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**Debate de los temas sustantivos relacionados con la
cooperación internacional en cuestiones de tributación:**

**Precios de transferencia, incluidos un manual y una
lista de verificación para los países en desarrollo**

Manual práctico sobre precios de transferencia para los países en desarrollo

Nota de la Secretaría*

Resumen

En la presente nota se resumen los avances de la preparación del Manual práctico de las Naciones Unidas sobre precios de transferencia para los países en desarrollo y los objetivos y principios rectores de esa labor. En el anexo figura un proyecto de esbozo del manual para su examen por el Comité (que se distribuye sin revisión editorial y únicamente en el idioma en que se presentó).

* La opiniones expresadas en el presente documento no representan necesariamente las opiniones de las Naciones Unidas o del Comité de Expertos sobre Cooperación Internacional en Cuestiones de Tributación.



I. Introducción

Proceso de elaboración de tratados fiscales y subgrupo

1. El propuesto Manual práctico de las Naciones Unidas sobre precios de transferencia para los países en desarrollo se señaló a la atención del Comité en su cuarto período de sesiones anual¹. La labor se derivó de las observaciones recibidas por la Secretaría sobre la falta de orientación clara y pertinente para los países en desarrollo respecto de las cuestiones de la política y los aspectos administrativos de la aplicación de análisis de precios de transferencias a algunas de las transacciones de las empresas multinacionales.

II. Reunión de Ámsterdam de 2008

2. La Oficina de Financiación para el Desarrollo del Departamento de Asuntos Económicos y Sociales de las Naciones Unidas organizó una reunión de un grupo de expertos sobre precios de transferencia para el examen de asuntos prácticos de interés para los países en desarrollo que se celebró los días 27 y 28 de agosto de 2008 en la sede la Oficina Internacional de Documentación Fiscal en Ámsterdam². Participaron en la reunión 22 expertos de países desarrollados y países en desarrollo, entre ellos funcionarios de gobierno, expertos dedicados a la actividad privada, académicos y representantes de organizaciones no gubernamentales.

3. Se observó en la reunión que el tratamiento apropiado de los precios de transferencia era un asunto de particular importancia respecto de las actividades de las empresas multinacionales, ya que las condiciones de la fijación de precios de mercado por lo general no eran aplicables a esas transacciones, pese a lo cual las administraciones fiscales habitualmente exigían que en esos negocios se utilizara una aproximación de los precios basados en el mercado (fijación de precios en condiciones de plena competencia). Con ello las administraciones procuran impedir que se usen precios de transferencia indebidos como medio de traspasar utilidades o pérdidas de una parte del grupo o empresa a otra, según resulte conveniente a los fines tributarios desde el punto de vista del contribuyente.

4. Por ejemplo, se puede hacer que las utilidades aparezcan como utilidades devengadas en jurisdicciones de baja tributación o exentas de tributación (lo que permite reducir las tasas tributarias aplicables a las utilidades/ingresos imponibles y las correspondientes obligaciones tributarias) y que las deducciones/pérdidas aparezcan en las jurisdicciones con tasas tributarias altas (lo que aumenta las deducciones permitidas a los fines tributarios) con el efecto neto de que se reducen los impuestos pagaderos por el grupo o entidad jurídica lo que afecta a los ingresos fiscales legítimos de distintas jurisdicciones tributarias.

5. Se observó en la reunión que:

a) Los precios de transferencia constituyen un asunto tributario importante para los países en desarrollo y los países desarrollados, pero en la mayor parte de los países en desarrollo hay problemas particulares debido a la insuficiente capacidad y

¹ Véase *Documentos Oficiales del Consejo Económico y Social, Suplemento núm. 25* (E/2008/45-E/C.18/2008/6), párr. 80.

² Véase <http://www.un.org/esa/ffd/tax/>.

a la carencia de información para determinar los precios de transferencia, incluida la falta de normas internas eficaces para tratar debidamente las cuestiones de los precios de transferencia, así como de profesionales calificados y de información suficiente para la aplicación práctica de esas normas;

b) Para muchos países en desarrollo, como para muchos países desarrollados, es difícil encontrar el equilibrio entre hacer valer sus derechos legítimos de recaudación tributaria y mantener un entorno abierto, transparente, atractivo y justo para los inversionistas. En muchos países en desarrollo la insuficiencia de personal calificado y de información exacerba esas dificultades;

c) Otra dificultad consiste en el carácter teórico, en lugar de práctico, de gran parte del análisis y del asesoramiento de que disponen las autoridades fiscales respecto de la forma de tratar los precios de transferencia. Se observó, por ejemplo, que aunque el método del precio comparable no controlado tiene una función muy destacada en la teoría sobre los precios de transferencia, en la práctica no se utiliza mucho, ya que el método utilizado predominantemente es el del margen neto de la transacción, aunque en la teoría éste se considera el método no preferido, situación que en la actualidad está evaluando la Organización de Cooperación y Desarrollo Económicos;

d) La “formula de reparto”³ método de “la división de utilidades” también tuvo partidarios en la reunión, especialmente para tratar asuntos como la transferencia de intangibles;

e) La falta de datos comparables para el cálculo de los costos o los precios de reventa de bienes y servicios es un problema grave en muchos países en desarrollo. Algunos países en desarrollo utilizan datos extraídos de las bases de datos de países desarrollados, por ejemplo fuentes de Europa y de los Estados Unidos, pero otros estiman que esto podría ser problemático, porque las condiciones de mercado, incluidos los factores geográfico o de localidad (“economías locacionales”)⁴ serían tan diferentes. Por lo general era posible obtener datos aduaneros a menor costo, pero se requeriría un análisis sofisticado para que sirvieran para efectuar las auditorías de los contribuyentes, y seguían siendo solo una parte de la solución;

f) El uso de distintos métodos para el análisis de los precios de transferencia, como el método del precio comparable no controlado, el del costo más margen, el del margen neto de la transacción y el del reparto de utilidades puede dar distintos resultados, a veces considerablemente distintos, y en la actualidad solo se dispone de orientación limitada, frecuentemente excesivamente teórica, sobre la cuestión de cuál es el método apropiado. Con frecuencia no se toman plenamente en cuenta las dificultades administrativas que entraña la aplicación de estos métodos, especialmente en los países en desarrollo;

³ Este método se puede usar cuando las empresas están tan integradas que no se pueda hacer una valoración por separado y las utilidades derivadas de la actividad se repartan. El reparto se basa en el nivel de la contribución de cada participante.

⁴ Cuando se producen economías debido a la localidad (como menores costos de producción o el menor costo de los servicios de tecnología de la información en algunos países en desarrollo en comparación con los países desarrollados) se plantea la cuestión de si las economías deben tratarse como beneficio no sólo para los que adquieren los bienes y servicios, sino también para los que los proporcionan.

g) El precio puede ser engañoso, ya que la comparación de precios no revela lo que podrían ser estructuras de precios distintas, como en las ventas o en la comercialización, y, en consecuencia, lo que constituirían márgenes en condiciones de plena competencia. Se sugirió que las Naciones Unidas podrían impartir orientación sobre márgenes aceptables para distintas categorías de productos.

6. Se observó en la reunión que una orientación selectiva pero no prescriptiva podría ayudar mucho a abordar esta situación y, a esos efectos, podría ser útil que las Naciones Unidas prepararan un manual práctico sobre precios de transferencia para los encargados de la formulación de política y los administradores de los países en desarrollo que incluyera una o varias listas de comprobación, y diagramas de flujo para facilitar la comprensión. Ese material ayudaría a comprender esos asuntos, priorizarlos, asignar las secuencias y abordarlos.

III. Enfoque adoptado en el Manual

7. El Manual incorporaría un enfoque paso a paso que aplicarían los encargados de la formulación y la administración de la política fiscal de los países en desarrollo para, entre otras cosas:

- Comprender los asuntos básicos que influyen en los precios de transferencia, incluida la norma de las condiciones de plena competencia utilizada habitualmente para analizar esos asuntos y los métodos para tratar las gamas de valores sobre la base de la plena competencia utilizados más frecuentemente en el caso de distintas industrias y situaciones
- Redactar legislación sobre precios de transferencia, incluidos aspectos del marco jurídico interno, como la definición de “partes relacionadas” y las obligaciones respecto de la retención y el suministro de información y las penas, reconociéndose que esa legislación debe ser adecuada y adaptada al medio local;
- Establecer dependencias de precios de transferencia, incluida la función de profesionales de las esferas jurídica, económica, contable o de otro tipo, la relación con los equipos de auditoría y los asesores jurídicos, asuntos de “cultura tributaria” y la relación entre las autoridades fiscales y los contribuyentes (aunque se reconoció que estos asuntos debían abordarse en un ámbito más general y no simplemente en el contexto de los precios de transferencia)
- Determinar y utilizar bases de datos pertinentes, incluidos asuntos relacionados con la extrapolación de material no local para extraer conclusiones relacionadas con el mercado local
- Elaborar estrategias simplificadas para determinar las transacciones en condiciones de plena competencia y las que no se efectúan en condiciones de plena competencia que sean compatibles con los aspectos fundamentales del principio de la plena competencia
- Elaborar estrategias para hacer cumplir las normas sobre precios de transferencia, incluso para empresas de distinto tamaño
- Determinar qué información adicional se necesita y cómo se puede obtener

- Determinar la información que se debe proporcionar a los contribuyentes para ayudarlos a cumplir las normas
- Determinar y examinar algunos asuntos problemáticos, como en el contexto de la fabricación por contrata y a maquila, la determinación, la verificación de la propiedad y la valoración de intangibles, la reestructuración de empresas y cuestiones de precios de transferencia en el contexto del suministro de servicios dentro de empresas y grupos
- La posible función de las economías locacionales en el análisis de los precios de transferencia
- La función de las opiniones de otros países respecto de los precios de transferencia (evitar la doble tributación) y el uso de mecanismos de arreglo de controversias
- La función, de haberla, del intercambio de información en las investigaciones sobre precios de transferencia, incluidas cuestiones prácticas como la demora que frecuentemente entraña ese proceso, cuestiones de idioma y posibles alternativas, como el intercambio de información como parte de procedimientos de acuerdo mutuo
- La relación con cuestiones de valoración aduanera, con sugerencias para la elaboración de un enfoque integrado
- La relación con cuestiones de infracapitalización
- El posible uso de refugios seguros⁵ y sistemas análogos para utilizar con mayor eficacia las limitadas capacidades de auditoría
- Un glosario de términos utilizados en la esfera de los precios de transferencia.

IV. Desde la reunión de **Ámsterdam**

8. Los interesados pertinentes, entre ellos representantes de gobiernos, de la sociedad civil y del mundo empresarial, han aceptado ampliamente que una labor clara, práctica y con buen fundamento técnico en esta esfera es provechosa para los interesados en el sistema.

9. La Secretaría ha venido celebrando consultas officiosas respecto de la estructura del Manual, ha examinado algunos manuales y libros sobre precios de transferencia y ha colaborado con expertos, que generosamente han cedido su tiempo y aportado sus conocimientos especializados en esta esfera. Estos procesos han sido necesariamente lentos, pero se les ha dedicado detenida atención.

10. Se ha pedido a muchos contactos en esta esfera, de gobiernos, instituciones académicas y del sector privado, que empiecen a colaborar con la redacción, y para el período de sesiones anual habrá algunos capítulos de muestra.

⁵ Definidos en el Glosario fiscal internacional de la Oficina Internacional de Documentación Fiscal como sigue: “Un refugio seguro puede definirse como una norma o medida objetiva, por ejemplo, una gama, porcentaje o suma absoluta, a la que puede recurrir el contribuyente como alternativa a una norma basada en factores más subjetivos o en apreciaciones, o en hechos y circunstancias inciertos. Normalmente el refugio seguro no se puede usar en perjuicio del contribuyente ...”

11. Se reconoce en particular la asistencia en esta labor que se ha recibido del Proyecto de intercambio de experiencias de países del sur sobre prácticas tributarias idóneas⁶, en particular en cuanto a la determinación de prácticas útiles de los países en desarrollo que pueden ayudar a otros países en desarrollo a abordar las cuestiones de los precios de transferencia.

V. Principios que guían la preparación del Manual

12. Hay varios principios que guían la preparación del Manual, como sigue:

- El texto debe ser lo más sencillo y claro posible
- Aunque es posible que el Manual se traduzca en el futuro, primero se redactará en inglés, en un estilo adaptado al hecho de que el inglés no es el primer idioma de la mayor parte de los usuarios y es solo uno de los seis idiomas oficiales de las Naciones Unidas. El objetivo es un estilo sencillo y claro
- El valor añadido del Manual debe ser su carácter práctico, es decir, abordar problemas verdaderos de los países en desarrollo, por lo que debe reflejar la realidad y puede destacar provechosamente la diferencia entre la realidad y la teoría respecto de los precios de transferencia
- El Manual debe adaptarse a las limitaciones inevitables de las administraciones de algunos países y a los déficits de información y capacidad de que adolecen muchos países en esta esfera. Las cuestiones de la capacidad, la orientación y la eficiencia cuando los recursos son limitados deben, en particular, influir en gran medida en el enfoque que se adopte en el Manual
- Los ejemplos prácticos de interés para los países en desarrollo serán particularmente útiles. Los conceptos de “posibles problemas candentes” y de diagramas de flujo examinados en la reunión de Ámsterdam encierran gran potencial en cuanto a utilidad práctica, aunque se reconoce que deben presentarse y explicarse cuidadosamente en su contexto (igual que todo el Manual), de manera que no induzcan en error
- Este proyecto está relacionado con la labor del Comité, con otros asociados, sobre el intercambio de experiencias de los países del sur sobre las prácticas tributarias idóneas y, en ese espíritu, hay gran interés en el aporte de los expertos de los países en desarrollo, con distinta experiencia en la esfera. El Comité seguirá investigando otras fuentes de países en desarrollo o aprovechando la colaboración de expertos de países desarrollados con conocimientos especiales de los problemas y prioridades de los países en desarrollo

⁶ Este es un proyecto de la Dependencia Especial para la Cooperación Sur-Sur del Programa de las Naciones Unidas para el Desarrollo (PNUD) en estrecha colaboración con la Oficina de Financiación para el Desarrollo del Departamento de Asuntos Económicos y Sociales de las Naciones Unidas y dos organizaciones no gubernamentales: la New Rules for Global Finance Coalition y la Tax Justice Network. El proyecto también tiene por objeto aumentar la cooperación entre los países en desarrollo respecto de cuestiones tributarias mediante el intercambio de experiencia y ayudar a determinar esferas en que se debe aumentar la cooperación entre esos países para que en la elaboración y aplicación de las normas tributarias internacionales se tengan en cuenta las perspectivas, la experiencia y la realidad de los países en desarrollo.

- Por último, esta labor se ha inspirado en un enfoque de ciclo de vida, es decir, que lo que es útil para un país que se encuentra al comienzo del recorrido en cuanto a precios de transferencia generalmente no será adecuado para ese país en una etapa futura y viceversa.

VI. Próximas medidas

13. Se adjunta como anexo de este documento el proyecto de esbozo del Manual. Si bien este esbozo se perfeccionará considerablemente a medida que avance la labor, constituye una base para la formulación de observaciones y para la redacción inicial del Manual.

14. Cuando se redactó la presente nota (agosto de 2009) se esperaba la presentación de los primeros borradores para someterlos a examen. Esos borradores se someterán al Comité como parte del proceso de consulta y perfeccionamiento. El Comité seguirá trabajando estrechamente con las redes gubernamentales, académicas, empresariales y de particulares para perfeccionar los capítulos del Manual y explorará modalidades de trabajar en colaboración para acelerar la labor y preparar una versión en línea con hiperenlaces.

Annex

Transfer Pricing Manual

for

Developing Countries

2009 Draft Concept⁷

Ver 2

⁷ This draft should not be taken as representing the views of the United Nations or its Secretariat or of the UN Committee of Experts on International Cooperation in Tax Matters. The document draws on various publicly available materials from tax authorities and others and from the input of the Ad Hoc Experts on Transfer Pricing organised by U.N. Department of Economic and Social Affairs Financing for Development Office, August 2008. [N.B. *authors and others assisting will, of course be acknowledged appropriately*]

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Introduction and Purpose

This Manual is intended to be used as a point of reference by tax administrations to address, in a fair and informed manner, the complex matters that may arise when dealing with transfer pricing issues. It is only a guide to some possible avenues of enquiry and approaches, and must be considered in the context of a specific country's legal requirements and business practices. This Manual is designed especially to respond to the needs of developing countries and draws on, in particular, transfer pricing experiences from these countries.

This Manual is premised upon the application of the arm's length standard which determines whether the prices between parts of a multinational enterprise (MNE) properly reflect the functions and assets of, and the risks incurred by, the local part of the MNE. It is acknowledged that there is an issue of whether the arm's length standard is always an appropriate one, especially for developing countries, and whether alternative approaches need to be considered. Whilst the importance of this issue is acknowledged and will be discussed later, it is not the central theme of this manual. It is intended to focus on the most effective, efficient and transparent ways of applying internationally accepted transfer pricing concepts and rules.

In view of the current widespread acceptance and usage of the "**arm's length standard**" (or "arm's length principle" ALP), included in the UN Model Tax Convention (UN MTC), and the benefit, in avoiding double taxation, of common approaches across countries, this Manual addresses currently accepted approaches of applying this standard in a developing country context. The larger issues of alternative approaches to addressing transfer pricing question is left for separate consideration as an important but parallel issue which is merely informed by the content of this manual.

The issues addressed and suggestions made in this Manual draw widely upon guidance made available by tax authorities and others experts, as well as relevant publications. It is envisioned that in a later version of this document there will be more hyperlinks to relevant public documents available on the internet, and more extensive direct citation. The Manual remains a practical document, however, not an academic treatise. This Manual acknowledges the importance of investment to the development plans of most countries, and the importance to most developing countries, therefore, of an attractive investment climate. It also recognises, however, that such a favourable investment climate is entirely consistent with a robust but fair defence of revenues properly due to a country, in accordance with its law. It also recognises the advantages to business interests of a thoughtful, targeted, transparent, service oriented and not unduly burdensome and costly approach by tax administrations to the taxation of activities of investors, including multinational enterprises (MNEs) in their jurisdiction.

At this stage the Manual does not deal with the special case of banking in any detail. The Manual also does not separately address issues of branches and permanent establishments, nor deals with the Mutual Agreement Procedure (MAP) in any great detail, although the MAP is frequently relied on in transfer pricing cases, it has a broader application. These subjects may either be addressed in a later version of the Manual, or may be the subject of special specific guidance.

Chapter 1: Basics of Transfer Pricing

What is Transfer Pricing

“Transfer pricing is the area of law, accounting and economics that is concerned with ensuring that prices charged between associated enterprises [such as companies in the same group] for the transfer of goods, services and intangible property are in accordance with the arm’s length principle. Transfer pricing principles may also be applied in the context of transactions – or dealings – between different parts of a single enterprise, e.g. between a head office and permanent establishment and between different permanent establishments of the same enterprise.”⁸

..... [More explanation plus examples]

[including addressing issue of whether the reference to “pricing” can be misleading]

Transfer Pricing and the UN and OECD Model Tax Conventions

- *History*
- *Relevance for Developing Countries*
- *transfer pricing and double taxation - the role of the UN and OECD Double Tax Conventions and treaties based upon them*
- *the role of the OECD Transfer Guidelines OECD Transfer Pricing Guidelines and their relevance to treaties based on the United Nations Model Tax Convention?*

Transfer Pricing as an area of Taxation Law

- *Relationship to other domestic and international issues*
- *The relationship to other tax laws*
- *Relationship to customs issues (brief outline of issue – differences)*

The Arm’s Length Standard

Transfer pricing is important because of its impact on the allocation of profits and losses (and therefore the corresponding tax bases) of different parts of a multinational group across different jurisdictions. If the pricing of transactions between parts of an MNE located in different jurisdictions is incorrect, a jurisdiction may be denied its legitimate tax revenues. However, if jurisdictions take different views on a transfer pricing matter, the MNE involved may be subject to unrelieved economic double taxation.

A common concern is that dealings between parts of an MNE might be manipulated to shift profits to low tax jurisdictions, with losses and attendant deductions, moved to or retained in high tax jurisdictions. Transfer pricing and the arm’s length standard seek to counter such practices, however the scope of transfer pricing is however broader than just anti-avoidance, and is as applicable to dealings without tax motivation.

The arm’s length standard is internationally widely accepted as the preferred basis for determining the transfer prices for transactions between related parties, and is found in the UN and OECD Model Tax Conventions. This

⁸ IBFD International Tax Glossary (words in parentheses added)

Manual seeks to assist developing countries by exploring what the application of this standard means in practical terms, and how it can be most effectively administered within applicable resource and other constraints. An important initial question for any country is: has the arm's length standard been accepted as the governing principle in that country? In most cases, the answer will be, "at least for the present, yes". In theory, the wide acceptance of the arm's length standard should minimise the possibility for economic double taxation, as other countries are more likely to accept an arm's length adjustment and give relief from double taxation by way of corresponding adjustment.

According to the arm's length standard, a transfer price is acceptable if a transaction between related parties takes place at an arm's length price. With an arm's length price quite simply defined as the price which would have prevailed if the transaction had taken place between independent enterprises acting under the same or similar circumstances.

In applying the arm's length standard there is a comparison of "conditions" made or imposed between related parties with those which would be made between independent enterprises. This comparison is undertaken in order to determine whether these conditions have affected the prices used, and hence whether that a transfer pricing adjustment needs to be made - recalculating the profits which would have accrued to the enterprise in the absence of such conditions, or adjusting the conditions themselves to replicate those which would be made between independent enterprises.

Under Article 9 of the UN and OECD Model Tax Conventions, two enterprises are related parties with respect to each other if (in general) one of them participates directly or indirectly in the management, control or capital of the other enterprise; or they are under common control. This includes the relationship of separate legal entities in a group, such as a subsidiary and its parent company, or two parts of a single legal entity, being a branch (permanent establishment) and head office. Domestic legislation will often contain a more prescriptive definition of related parties, for the purposes of application of domestic transfer pricing rules.

In some countries, even without specific transfer pricing rules, the administration is empowered to disregard certain transactions altering the incidence of tax, and make adjustments to counteract the effects of such transactions. These provisions often allow the application of arm's length methodologies and the computation of an arm's length price or range.

Introduction and Explanation of the Annexed Flowcharts

- *There are several possible flowcharts:*
 - *the transfer pricing process for price setting or evaluation by a multinational*
 - *Flowcharts for different industries might also be possible.*
 - *A flowchart of the tax administration process (starting with identification of taxpayers – related party transactions – risk assessment etc).*
 - *A flowchart on possible documentation requirements [at least in one sample developing country with successful practices, might also be useful]*

Chapter 2: Establishing Transfer Pricing Capability in a Tax Administration

The Relationship Between Policy and Administration Issues

- *include issues of coordinating cross-ministerial responsibilities*

Setting up Policy Capacity

-

Assessing Administrative Capability

- *Assessing the level of development/ capability of the Tax Administration:*
 - *level of education and expertise*
 - *legal environment,*
 - *tax treaties (exchange of info)*
 - *availability of information in country/tax administration*

Setting up a Transfer Pricing Unit

- *Types of structure:*
 - *Centralised*
Advantage: coordination, easy in start-up phase, fast building up of knowledge
Disadvantage: risk of being in ivory tower

- *Decentralised*
Advantage: short lines of communication with tax inspectors, easy spread of knowledge, combined industry and TP knowledge, more fit for later phase
Disadvantage: coordination problems
- *Elements of organisation*
- *The legal framework*
- *Administrative policy making*
- *Coordination*
- *Staffing*
 - *Economists*
 - *Lawyers*
 - *Accountants*
 - *Auditors*
 - *Database-experts*
 - *Project management skills*
- *Budget and Funding*
- *Also: management information, registration/recording of TP-cases and adjustments*

Chapter 3: Policy and Administration Considerations

Overview

- *Transfer Pricing Phases/Stages/Life Cycle of the tax administration [Setting the scene]*
- *Influence of stages of an organisation on the organisation, but also on topics to be targeted and knowledge to be developed. For example: in first stage start with small number of industries of key importance and tackle most common problems. Also relevant for legislation- for example: start with general legislation and not with trying to tackle very complex issues.*
- *Elements discuss in this chapter are processes in the organisation. They could be structured in separate units or could be combined. At least the interfaces and interrelations between the elements should be taken care of. Not in all phases all the processes should be equally important (e.g. in start-up no APA)*
- *Transfer Pricing for Small and Medium-sized Enterprises (SMEs) – special issues? Streamlined compliance and administration?*

- *Acceptance and understanding of arm's length principle in domestic law*
- *Domestic Definition of related parties (who is covered legally, and in practice)*
- *Documentation and tax filing requirements*
- *Approach to comparability (process etc)*
- *Determining ALP (methods etc)*
- *TP-database use*
- *Dispute resolution and avoidance (including APAs, MAP etc)*
- *Adjustments (types: primary, secondary, corresponding) and penalties (types/scope)*
- *Attribution of profits to a PE – related issue*
- *TP-intelligence (detection of cases, knowledge centre etc)*
- *TP education/instruction (refer to heading below)*
- *Links to stakeholders – business and others*
- *Specific Country practices – [would be best integrated into the topics above rather than as a free-standing list, with links to more detailed “local explanations” where appropriate].*

Compliance Strategies and Policies

- *More or less the caveat: think before you leap.*
 - *Specific Focus:*
 - *Decide whether to set up coordination or separate TP groups per industry*
 - *Analysis of the importance of industries in the country - develop knowledge on top% of industries.*
 - *Develop solutions (administrative, legislative etc) for typical problems (see for example Mexican example of dealing with maquiladores)*
 - *Internal process: role of TP-unit - Options (also depending on life cycle):*
 - *advice only*
 - *compulsory consultation*
 - *TP-unit will take over case handling*

- *Case selection process, some options:*
 - *risk rating system (refer to chapter on risk assessment)*
 - *random*
 - *based on internal information*
 - *building up knowledge of your most important clients (international structure, global stream of transactions, high level idea of functions performed, financial statement analysis)*
- *Additional issues and attitude-shifting:*
 - *retrospective: audit focused on adjustments with risk of lot of MAPs (especially with transactions with large number of countries)*
 - *prospective: adjustments limited to clear cut cases, in other situation strive for good future solution together with taxpayer. High level of transparency: TP is not exact science. Open attitude towards taxpayer may help a lot in reaching a solution. Look to APAs program in time.*
- *Developing transparency as a value– relationship of regulation and transparency.*
- *Contacts with TP-consultants - A strategy could be to have informal meetings periodically to discuss both process and substantive issues*
- *Voluntary Compliance – options for MNEs*
- *SME and Large Taxpayer Approach (distinguish – thresholds?)*
- *Simplified Approaches*
 - *Optional Safe Harbours? Pros and cons in policy and administration terms –including treaty issues and potential economic double taxation if not in accordance with ALS*
 - *Fixed Rates or Ranges of Return*
 - *General*
 - *Industry Specific*
 - *Transaction Specific*

Compliance Programs

- *Documentation requirements – a variable geometry (SMEs/ MNCs)?*
- *Filing requirements, Questionnaires and Risk Rating/Statistical Tools*
- *Enforcement powers*

- *Tax inspectors (general)*
- *TP-audit - Introducing the idea of an iterative process (e.g. risk analysis, high level functional analysis, initial interview, initial audit (high level), thorough audit etc):*
 - i. *Initial risk/documentation review*
 - *Criteria for Selection – (see compliance strategies and policies above)*
 - *Industry Approach*
 - i. *Selecting Cases to proceed to Audit*
 - *Criteria for Selection*
 - ii. *Undertaking an Audit*
 - *Timing, process etc*
 - iii. *Country specific practices*
 - *Benchmarking/Pre-determined Rates of Return (e.g. Brazil)*
 - iv. *Typical cases – examples*
 - v. *Specific industries - examples*

Transfer Pricing Adjustments and Penalties

- *Refer to specific chapter covering this topic, but provide summary of:*
- *Use/type of adjustments*
 - *Primary*
 - *Secondary*
 - *Corresponding*
- *Penalties*
 - *Base - shortfall (tax or taxable income)?*
 - *Documentation*
 - *Taxpayer size/category*

Dispute Resolution and Avoidance

- *Refer to specific chapter covering this topic, but provide summary of concepts/tools:*
 - *Settlement*

- *Litigation*
- *Procedure for MAP access – relationship to domestic law rights*
- *Competent authority - Some “best” practices to be found at OECD site (MEMAP) – relevance to developing countries explored.*
- *Advance Pricing Agreements (APAs)*

Education and Information Strategies

- *Internal:*
 - *Organisation of education (in-house or external - e.g. international organisations)*
 - *Diversification of education: experts, TP-network, general tax inspectors and industry experts. Focus different depending on moment in lifecycle (start with small group of experts etc)*
 - *Strategy: focus on practical education directly followed by practical application in practice to increase effect, instead of educating large groups that don't use the material in practice.*
 - *Education not only on theoretical framework but also on audit strategy, practical considers, industry specific etc*
- *External*
 - *working with stakeholders, tax culture issues and the relationship(s) between informational strategies and compliance*
- *Sources of Information*

Chapter 4: Legal Framework

Domestic Approaches

- *Definition of related parties*
 - *Article 9*
 - *Domestic law (with examples)*
- *Types of transfer pricing rules: Legislation, Regulations, Rulings, and other Guidance*
- *Discuss use of different types to achieve different objectives*

Tax Treaties

- *Limits Domestic Law*

- *Scope of treaty (i.e. can a TP adjust be made under treaty in absence of domestic legislation?)*

Legislative and Regulatory - Country Specific Examples

- *Relevant elements (and common points) of Country Transfer Pricing Legislation and Regulations [more to be added – this will have to be fairly basic to be manageable, especially with updates occurring – possibly more material in appendices]*

- *Argentina*

- *Australia*

Australia has specific transfer pricing legislation, found in Division 13 of the Income Tax Assessment Act 1936. Division 13 prescribes the application of the arm's length standard, but does not have automatic application as it is applicable at Commissioner's discretion. There are however significant penalties for taxpayers who do apply the arm's length standard voluntarily.

The application of Division 13 by the Commissioner merely requires; a supply or acquisition of property (defined to include services) under an international agreement (broadly defined) between two or more parties; that the Commissioner be satisfied that the parties to the transaction were not dealing at arm's length; and, that the Commissioner exercise his discretion to apply it. Notably, the application of Division 13 does *not* require the parties to be related (or associated), only that they have not dealt at arm's length.

- *Brazil*

- *China*

- *Egypt*

- *France*

- *Germany*

- *Hungary*

- *India*

- *Indonesia*

- *Italy*

- *Japan*

- *Kazakhstan*

- *Kenya*

- *Malaysia*

- *Mexico (new rules interesting to discuss)*

- *Netherlands*
- *New Zealand*
- *Nigeria*
- *Norway*
- *Pakistan*
- *Singapore*
- *South Africa*
- *Thailand*
- *United Kingdom*
- *United States of America*
 - > [US Code of Federal Regulations \(Transfer Pricing – refer to Reg. 1482\)](#)

Guidance and Rulings - Country Specific Examples

- *Relevant elements of Transfer Pricing Guidance/Rulings/ Examples of application of methods, country rulings etc*

Australia

Under its public ruling program, the Australian Taxation Office (ATO) has released numerous rulings on transfer pricing and related subjects. These rulings are binding on the Commissioner insofar as they are relied on by, and are applicable to, a taxpayer. The topics covered by these rulings include: Transfer Pricing Methodologies; Intra-Group Services; Cost Contribution Agreements; Loan Arrangements; and, a number of other practical and interpretive matters.

- > [Australian Taxation Office: Transfer Pricing Rulings and Determinations](#)

Notably, the ATO has issued public ruling TR98/11, which provides comprehensive practical guidance on the preparation of transfer pricing documentation, and the process for setting and reviewing international transfer prices, for Australian tax purposes.

- > [Australian Taxation Office: Taxation Ruling TR 98/11](#)

In addition to the rulings and determinations, the ATO has also issued a number of transfer pricing specific papers, covering issues ranging from a basic introduction to transfer pricing concepts and risk assessment through to more specific issues such as marketing intangibles. The ATO continues to be active in this area, recently releasing a draft paper on business restructures (May 2007) and a draft paper on intra-group finance guarantees and loans (June 2008).

- > [Australian Taxation Office: Transfer Pricing Papers](#)

Relevant Case Law

Non Transfer Pricing Considerations

- *Description of the issues and caveat to regard cases not only from one perspective, but also the other issues (for example intensive TP audit of a cases where all operational profit is eroded by interest is not very valuable):*
 - *Taxing Natural Resources*
 - *Thin Capitalisation*
 - *Anti-Earning Stripping Rules*
 - *Erosion of the Tax Base*
 - *CFC Rules*
 - *Permanent Establishment (existence)*
 - *General Anti-Avoidance Rules*

Chapter 5: Transfer Pricing Analysis in Practice

Introduction

Flowchart

Functional Analysis

- *Introduction (purpose and importance)*
- *Fact finding process*
- *Analysis of functions, assets and risks*
- *Industry analysis*
- *Entity classifications*

Comparability

- *Determination of comparable companies and performing comparability analysis (determines an arm's length return for the functions assets and risks attributed). Dealing with outlying companies – highly profitable/ loss-making*
- *The arm's length "range" – arithmetical mean vs. inter-quartile range or other statistical tools*
- *How comparable are proposed comparables? Possible differences on the basis of:*

- *Quantity differences*
- *Geographical differences*
- *End-use differences*
- *Quality / characteristic differences*
- *Difference in the lifecycle of the product*
- *Differences in terms of trade*
- *Different channels of distribution*
- *Other relevant economic differences*
- *Location savings – how does the concept operate – how are they valued and to whom do they belong [Refer to special issues chapter]*
- *Market Penetration strategies and transfer pricing (e.g. reduced prices, higher marketing costs etc) [Refer to special issues chapter]*

Corporate Level Issues and Understanding Corporate Compliance Strategies

- *Related Party Dealings*
- *Associate Enterprises/Related Parties – definition and identification*
- *MNEs Transfer Pricing Global Policies and Strategies*
- *Financial*
 - *Profit Level Indicators*
 - *Link to materials such as the IRS APA guide*
 - *Ranges*
 - *Link to materials such as the IRS APA guide*

Transaction Specific Issues

- *[Introduce/highlight issues, but elaborate in later chapter]*
- *Intra-Group Services*
- *Intra-Group Finance*
- *Intangibles*

- CCAs

Industry Specific Issues

- Oil & Gas
 - Resource Tax Regimes
- Mining
- High technology industries
- Services sector

Chapter 6: Transfer Pricing Methods

Introduction

- Use of Methods
- Selection of method(s) (how, why and use of more than one method)
- Is it any longer useful to think in terms of a hierarchy of methods?

Current Methods

- [Include examples for each method?]
- Comparable Uncontrolled Price (and its derivatives – CUT etc)
- Resale Price Method
- Cost-Plus Method
- Transactional net Margin Method
- Profit Split Methods
- Comparable Profits Method
- Other (i.e. modified resale price and use of any method, provided AL price)

Alternatives

- Global Formulary Apportionment – an introduction (alternative method for applying the ALS or alternative to the ALS?)

Case Studies

- [include a case study that highlights issues that may arise, i.e. Use of CPM v TNMM by two different countries]

Chapter 7: Transfer Pricing Analysis and Methods - Special Issues

Location Savings

- what are they and to whom do they belong (how to allocate)

Market Penetration Strategies

Business Restructuring

Tax Holidays and transfer pricing

Accounting and Corporate Governance developments

- E.g. Fin 48
-

Customs valuation issues

VAT/GST/Withholding Tax Issues

Foreign Investments

Treatment of Intangibles

- *Defining & Identifying Intangibles*
- *Ownership*
 - *Legal*
 - *Economic*
- *Transfer of Intangibles*
 - *Know How*
 - *“Mixed bundles”*
- *Valuation*
- *Functions, Assets and Risks*

- *Research & Development*
- *Other cost contribution*
- *Transfers and licensing*
- *Royalties Rates*
- ***Intra-Group Services and Commodities Trading***

- *Technical Services*
- *Administrative services*
- *[Practical application of methods]*
- *Administrative concessions (non-core, de minimis etc)*

Cost Contribution Arrangements (CCAs)

- *Research & Developments*
- *Other cases*

Intra-Group Finance

Chapter 8: Documentation

Introduction

- *What is it?*
- *[Developing country examples???*
- *Burden of proof/legal requirements*
- *SME v Large Business / other thresholds*
- *PATA*
- *EU Joint Transfer Pricing Forum*
- *Documentation related penalties*

Chapter 9: Risk Assessment (RESTRICTED ACCESS? - to be determined)

Selecting Cases for initial Risk/Documentation Review

- *Criteria for Selection – see strategies & policies above*
- *Industry Approach*

Selecting Cases for Audit

- *Existence/quality of TP documentation*
- *Commercial reality check*
- *Presence of Specific transactions*

Examples of Country Specific Practices

- *Benchmarking/Pre-determined Rates of Return (e.g. Brazil)*
- *.....*

Safe Harbours

- *Policy issues*
- *Tax Treaty, Corresponding Adjustment issues and Economic Double Taxation*

Administration

Chapter 10: Audit – Processes and Procedures (RESTRICTED ACCESS? - to be determined)

Strategy

Simultaneous Tax Audits

Country Specific Best Practices

Effective Use of Resources

Chapter 11: Adjustments, Disputes and Dispute Resolution and Avoidance

Introduction to dispute avoidance and resolution in a domestic and international context

Transfer Pricing adjustments, including corresponding adjustments

- *Primary*
- *Secondary*
- *Corresponding (who/when and Article 9(2))*

Penalties

The Mutual Agreement Procedure (MAP) under tax treaties

Settlements and alternative dispute resolution

The Role of Courts and Tribunals in Transfer Pricing Dispute Resolution

- *The role of courts and tribunal*
- *Dealings with taxpayers, administrators and possible impact on policy makers*
- *The domestic law setting*
- *The international context*
- *Dealing with skilling up and consistency issues*
- *Dealing with workloads*
- *Are there possibilities for greater cooperation or at least greater sharing of experiences internationally?*

Advance Pricing Agreements (APAs) – policy and administrative considerations

Developing an APA program – practical considerations

Chapter 12: Government to Government (RESTRICTED ACCESS? - to be determined)

- *Governance*
- *Enforcement Powers*

Chapter 13: Sources of Information

Relevant Bodies (with hyperlink where available):

- AATA – *Association of African Tax Administrators*
- ATAIC – *Association of Tax Authorities of Islamic Countries*
- CATA – *Commonwealth Association of Tax Administrations*
- CIAT – *The Inter-American Center of Tax Administrations/Centro Interamericano de Administraciones Tributarias*
- COTA – *Caribbean Organization of Tax Administrators*
- CREDAF – *Centre de Rencontres et d'Etudes des Dirigeants des Administrations Fiscales*
- EUJTPF – *EU Joint Transfer Pricing Forum*
- IBFD – *International Bureau of Fiscal Documentation*
- IOTA – *Inter-European Organisation of Tax Administrations*
- OECD – *Organisation for Economic Co-operation and Development*
- PATA – *Pacific Association of Tax Administrations*
- PITAA – *Pacific Islands Tax Administrators Association*
- SADC – *Southern African Development Community*
- SGATAR – *Study Group on Asian Tax Administration and Research*
- *[others]*

Research

-

Chapter 14: Training and Capacity Building Resources

South – South Experience

CATA, CIAT, CREDAF, IOTA, SGATAR, SADC

UN - Related

OECD

Organisation for Economic Co-operation and Development

IMF, World Bank etc

IBFD

- Open Courses
- In-house Courses
- On-line Courses

Funding

APPENDICES

Glossary of Terms

Frequently Asked Questions (FAQs)

Checklist [and possibly also a flowchart] for a transfer pricing set-up

Checklist of possible transfer pricing issues – General

- *Checklist for (non-financial) services industries*
- *Checklist for financial services industries*
- *Checklist for commodities trading*
- *Checklist for Pharmaceuticals industries*
- *Checklist[s] for Oil and Gas/ Mining industries*
- *Checklist for transactions involving intangible property*
- *Checklist for telecommunications Industry*
- *Checklist for the Media and entertainment*

Table of main differences and possible uses of different Methods

Flowchart of a typical transfer pricing scenario (with non-typical extensions)

Current Databases – a Survey

Checklist [and possibly also flowchart] on documentation

Bibliography