



Economic and Social Council

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Special meeting on international cooperation in tax matters

Provisional summary record of the 9th meeting

Held at Headquarters, New York, on Thursday, 15 March 2012, at 3 p.m.

President: Mr. Koterec..... (Slovakia)

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The meeting was called to order at 3.10 p.m.

International cooperation in tax matters (*continued*)
(E/2012/8)

Launch of the United Nations Model Double Taxation Convention between Developed and Developing Countries (2011 update)

1. **Mr. Yaffar** (Chair of the United Nations Committee of Experts on International Cooperation in Tax Matters) said that the update of the United Nations Model Double Taxation Convention, the first in 11 years, was the result of much effort. In 2005, the United Nations Committee of Experts on International Cooperation in Tax Matters had been established to replace the Ad Hoc Group of Experts on International Cooperation in Tax Matters. The Committee's primary task was to update the United Nations Model Double Taxation Convention, which was necessary on an ongoing basis. Establishing dialogue among national tax authorities and treaty negotiators was also essential. It was important not to impede the free flow of investment, as it was to have a programme to develop and offer technical assistance, capacity-building and sharing of experience among developed, transitional and developing economies. Ongoing assistance should be provided to developing economies so that they could implement the new guidelines created in the Committee.

2. The Committee had decided that rather than working on the basis of consensus, it would include a range of opinions in the Model. That approach had allowed the Committee to accelerate its work. The Committee permitted access and participation by officially designated observers of Governments. Participation by non-governmental organizations was strongly encouraged.

3. Technical subcommittees had been created, providing for specialized analysis. The Subcommittee on Exchange of Information allowed for adoption of very high standards of information exchange. The Economic and Social Council was urged to adopt the proposed code of conduct on that topic that was currently before it. The Subcommittee on Transfer Pricing had sought to demonstrate, on the basis of specific cases, how the principle of transfer pricing could be implemented. The objective was not to establish a new principle for the United Nations, but rather to show developing countries how to implement

transfer pricing without veering from established principles. The work of the Subcommittee on Revision of the Manual for Negotiation of Tax Treaties was important for training treaty negotiators. The scope of the Committee's working groups was more narrow than that of the subcommittees. The issue of Islamic financial instruments had been taken up at the suggestion of Arab colleagues.

4. The main features of the updated United Nations Model Convention included descriptions of voluntary or compulsory dispute arbitration options; information on how banking information should be exchanged, in view of secrecy requirements in various countries; and information on how a State should collect taxes on behalf of another country. The Model had been modernized and made more responsive to the needs of countries, especially developing countries. The Commentaries accompanying the changes to the Model were an integral part of the document.

5. There was broad international support for cooperation between countries on tax issues. To continue its work, the Committee needed additional resources, either in the form of voluntary contributions, or from the United Nations itself.

Presentation by Mr. Alexander Trepelkov, Director, Financing for Development Office, Department of Economic and Social Affairs

6. **Mr. Trepelkov** (Director, Financing for Development Office, Department of Economic and Social Affairs) said that double taxation treaties were bilateral agreements that allocated taxation rights in cases where taxes might otherwise be levied by both source and residence countries. Such treaties encouraged investment while allowing Governments to retain appropriate taxation rights. The Double Taxation Model Conventions produced by the United Nations and the Organization for Economic Cooperation and Development (OECD) were used by countries as a basis for negotiating bilateral tax treaties, and therefore had a profound influence on international tax treaty practice.

7. The United Nations Model Double Taxation Convention aimed to provide assistance to developing countries in negotiating bilateral tax treaties with the aim of striking the balance they sought between obtaining more tax revenue from foreign investments and maintaining an investment-friendly climate. While

the OECD Model Convention allocated taxation rights on royalties to the country of residence of the recipient only, the United Nations Model provided that royalties could also be taxed in the country of origin. They could be taxed by the country of residence as well, but the amount already paid in the country of origin must be deducted.

8. In some model conventions, the country of origin might have greater taxing rights, but that could discourage the transfer of technology to that country. The prevention or elimination of international double taxation was important in encouraging investment.

9. Tax treaties had other aims, including the provision of a framework of legal and fiscal certainty for international business operations and improved cooperation between national tax authorities in carrying out their functions, including information exchange to combat tax evasion and mutual tax collection assistance.

10. In recent years, the link between international tax cooperation and the mobilization of financial resources for development had featured prominently in the outcome documents of major United Nations conferences and summits, including the 2002 Monterrey Consensus of the International Conference on Financing for Development; the 2008 Doha Declaration on Financing for Development; the 2009 Conference on the World Financial and Economic Crisis and Its Impact on Development; and the 2010 Millennium Development Goals Summit. International cooperation in tax matters remained high on the international agenda. There had been calls to strengthen international tax cooperation further as the United Nations development agenda beyond 2015 began to take form.

11. The United Nations and OECD Double Taxation Model Conventions had much in common. Their differences had to do mainly with the extent to which a country should forgo taxation rights otherwise available to it under domestic law. Generally speaking, the United Nations Model preserved more taxation rights for the country where the investment or other activity took place, known as the source country, thereby allowing developing countries broader rights to tax income generated by foreign investments, while the OECD Model favoured retention of a greater share of taxing rights by the home country of the investor or trader.

Presentation by Mr. Michael Lennard, Chief, International Tax Cooperation Unit, Financing for Development Office, Department of Economic and Social Affairs

12. **Mr. Lennard** (Chief, International Tax Cooperation Unit, Financing for Development Office, Department of Economic and Social Affairs) said that the way in which double taxation issues were resolved between source and residence countries had implications for domestic resource mobilization. Developing countries, which were frequently net capital importers, were often dependent on source taxation rights.

13. The concept of permanent establishment, whereby a certain connection between an entity and a country existed over time, allowed the country to retain source taxation rights under a treaty. The article of the United Nations Model Convention on permanent establishment had been completely rewritten. It had been a challenge to modernize that section while continuing to take the needs of developing countries into account. The threshold in the United Nations Model Convention for determining the appropriate level and length of economic engagement at which a source country should begin to tax an entity was lower than in some other model conventions, reflecting the United Nations orientation toward developing countries.

14. The question of apportioning taxation rights in respect of services would become more important in the future. The United Nations and OECD Model Conventions resolved that question differently, although the OECD Model Convention had been influenced by the United Nations approach. Future dialogue between the two organizations on that matter was expected. The United Nations Model Convention made a distinction between services and goods. Services were deemed taxable by the source country based on the length of time that they had been provided there, without regard to office location. Office location was taken into account in taxation of goods but not services.

15. Taxation depended not only on permanent establishment, but also on profit. That was covered in article 7, on business profits. Under the OECD approach, the permanent establishment was treated as a separate legal entity from the rest of the enterprise, which was not the case in the United Nations Model.

Under the United Nations Model Convention, payments within a single legal enterprise were not treated as payments between different enterprises. The OECD Model treated certain notional intra-enterprise payments as deductible, but not taxable. That was a very complex provision. However, complexity bore a cost. Complex solutions to perceived injustices had their own unfairnesses, in that developing countries were often least equipped to address such complexities.

16. The United Nations had taken the initiative in addressing Islamic financing instruments, which did not involve the charging of interest. The approach had been to treat returns as interest without referring to them as such. That was a good resolution, given the current importance of Islamic financing instruments.

17. The OECD Model included binding arbitration for the parties to a dispute if they were unable to resolve a problem within two years. The United Nations Model, recognizing that some developing countries were resistant to arbitration, provided two approaches, one that involved arbitration and one that did not. While arbitration could involve costs that must be borne by the countries, and some developing countries might fear that arbitrators would instinctively identify with their more regular clients, namely, large countries, mandatory binding arbitration provided greater certainty to taxpayers and might be the only or the best solution if domestic remedies proved ineffective. Mandatory binding arbitration could encourage settlement of a dispute within two years through the mutual agreement procedure.

18. Because double taxation treaties also addressed tax avoidance and evasion, the United Nations Model Convention contained provisions on information exchange that were very similar to those in the OECD Model. A new rule in the United Nations Model Convention allowed countries to provide mutual assistance in revenue enforcement and to enforce tax debts of other countries as if they were enforcing their own debt. That was potentially useful for developing countries.

General discussion

19. **Mr. Sollund** (Committee of Experts on International Cooperation in Tax Matters) said that both model conventions had a common heritage dating back to the League of Nations. The value of the United Nations Model Convention lay in the similarity of its

format and terminology to those of the OECD Model Convention. The United Nations Model Convention served as a tool for countries negotiating bilateral treaties. Because OECD member States endeavoured to negotiate agreements that were as close as possible to the OECD Model Convention, while non-OECD countries sought results that were radically different from it, the outcome was usually a compromise. Because the United Nations Model Convention had been drafted taking into account many points of view, approaches and compromises, it resembled the potential outcome of country negotiations on bilateral treaties more closely than did the OECD Model Convention.

20. **Mr. Louie** (Committee of Experts on International Cooperation in Tax Matters) welcomed the revision of the United Nations Model Convention as a major accomplishment, with many recent changes in international tax treaty policy reflected therein.

21. **Ms. Kapur** (Committee of Experts on International Cooperation in Tax Matters) said that given the skill sets available in developing countries, it was sometimes difficult for those countries' views to be properly presented and analysed. As a result, apparent consensus might in fact conceal divergent views. Additional resources were therefore needed to support the effective expression of developing countries' views and to make sure that those views were heard. The intent of the United Nations Model Convention was to assist developing countries, while the OECD Model Convention had been designed to assist developed countries. The United Nations Committee had far fewer resources than did OECD.

22. **Mr. Lasars** (Committee of Experts on International Cooperation in Tax Matters) said that the Committee had focused on the practical needs of tax officials in developing countries rather than on overarching taxation concerns or theoretical questions. Frequently referred to during negotiations, the United Nations Model Convention had a great impact. The Committee had provided genuine assistance to developing countries.

23. **Mr. Valadão** (Committee of Experts on International Cooperation in Tax Matters) said that further updates would be needed because international taxation matters were constantly changing. Additional research was needed to improve and continue the work of the Committee.

24. **Mr. Hassan** (Committee of Experts on International Cooperation in Tax Matters) said that with the launch of the new United Nations Model Convention and the release of a new OECD Model Convention in 2010, both Conventions were now up to date. Developing countries would have material to rely upon when they wanted to deviate from the OECD Model Convention. They no longer had to come up with their own proposed treaty language and conditions.

25. **Mr. Manjeev Puri** (India) said that Member State endorsement was key to the work of the major United Nations bodies. No matter how good a panel was, Member State support for its work was the most important element. Unfortunately, there was an erroneous impression that model laws bearing the words “United Nations” had been agreed in an intergovernmental process, when that was not in fact the case. Such situations were damaging to the prestige of the United Nations. OECD member States had no doubt agreed on the OECD Model Convention before its release.

26. Developing nations formed the vast majority of the States Members of the United Nations. However, in many ways, the United Nations Model Convention adopted or aligned itself with OECD positions. In the next phase, there should be an intergovernmental process. That would make the work inclusive and acceptable. Ideally, committees such as the Committee of Experts on International Cooperation in Tax Matters should be intergovernmental, or, at least, their work should be subject to intergovernmental processes.

27. The allocation of greater taxation rights to the source country in the updated United Nations Model Convention was a positive step. However, the OECD transfer pricing guidelines for multinational enterprises and tax administrations were applied to all developing countries in the United Nations Model Convention. That was a matter of great concern, especially paragraph 3 of article 9, which legitimized assertions of the earlier Ad Hoc Group of Experts, made in a time before developing countries were major players in the global economy, that all countries must follow the OECD transfer pricing guidelines and that they represented internationally agreed principles. The Committee of Experts did not have the mandate to decide whether the OECD transfer pricing guidelines should be followed by developing countries, nor had

the earlier Ad Hoc Group of Experts had that particular remit.

28. Intergovernmental acceptance was very important. Only if the Convention was agreed upon by all, including a negotiator’s own country, in accordance with the Charter of the United Nations, would the Convention genuinely be a Model Convention.

29. **The President** said that the Council would no doubt follow up on the suggestions made by the representatives of India and expressed his expectation that the United Nations Model Convention would be widely used by Member States.

The meeting rose at 4.35 p.m.