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**Committee of Experts on International
Cooperation in Tax Matters
Twenty-fourth session**

4-7 April and 11-12 April 2022

Item 3 (c) of the provisional agenda

**Update of the UN Model Double Taxation Convention between Developed and
Developing Countries**

Co-Coordinator's Report on the Work Program of the Subcommittee

Summary

At its 23rd Session, the Committee of Experts established the Subcommittee on the Update of the United Nations Model Double Taxation Convention between Developed and Developing Countries and agreed on certain priorities for the Subcommittee's work during this Membership of the Committee of Experts. This Coordinators' Report describes the Subcommittee's proposed plan on how to take forward work on those priorities, as well as several other issues raised by participants in the Subcommittee.

The Committee is invited to ***approve*** the Subcommittee's proposal for its work program as set out in this Report.

Background and Subcommittee Mandate

1. At its 23rd Session, the Committee of Experts on International Cooperation in Tax Matters considered note [E/C.18/2021/CRP.22](#), on the work relating to the [United Nations Model Double Taxation Convention between Developed and Developing Countries](#) (the UN Model). That note described the work on a proposal to include payments for computer software within the definition of royalties in Article 12 of the UN Model, as well as a number of additional issues that had been identified by the last Membership of the Committee but which that membership had not had a chance to address.

2. The additional issues listed in the note were:

- (a) Article 5 (6) of the United Nations Model Double Taxation Convention between Developed and Developing Countries, Permanent establishment with respect to insurance activities, including the treatment of reinsurance;
- (b) Article 3, reference to the mutual agreement procedure for interpretation of undefined terms;
- (c) Commentary on articles 7, 9 and 25, self-initiated adjustments;
- (d) Time limits for profit adjustments under articles 7 and 9;
- (e) Changes to article 25 (Mutual agreement procedure);
- (f) Amendments to the commentary on article 15 related to payments made upon termination of employment;
- (g) Clarifications on the application of article 17 (Artistes and sportspersons);
- (h) Tax treaty issues relating to emissions permits/credits;
- (i) Possible issues related to article 1 (2) dealing with transparent entities;
- (j) Application of the Model Convention to sovereign wealth funds;
- (k) Treatment of accrued interest in the commentary on article 11;
- (l) Tax treaty provisions related to the exploration and extraction of natural resources;
- (m) To what extent a tax treaty can result in increased taxation;
- (n) Whether the mutual agreement procedure should deal with issues that had already been decided by the courts of one of the States (i.e., it is noted in note [E/C.18/2020/CRP.37](#) that, while the commentary on article 25 already indicates that the competent authorities of a contracting State may be constrained by a court decision rendered in that State, it suggests that access to the mutual agreement procedure cannot in that case be denied without the situation of the other competent authority being directly addressed. It has been suggested that this question should be examined);
- (o) Whether article 8 should be fundamentally revised, including as to the treatment of shipping income from international traffic;
- (p) Interaction between article 21 (3) and the source rule of article 18, alternative B.

Four other issues identified by current or former Committee Members as possible work areas are: a technical issue relating to a re-draft of Article 13(6); determining profits of a permanent establishment under Article 7; introduction of a subject-to-tax-rule; and modification of the distributive rules of Articles 6 and 13(1) for income and gains from immovable property.

3. The Committee established a Subcommittee on the Update of the United Nations Model Double Taxation Convention between Developed and Developing Countries with the following mandate:

The Subcommittee is mandated to consider, make recommendations and provide proposed drafting for the next update of the United Nations Model Double Taxation Tax Convention (the Update) focusing on issues of the most relevance to developing countries.

The Subcommittee will report on its work to the Committee at its twenty-fourth session in 2022, and at each session thereafter, with a view to making a recommendation as to the timing and content of the Update no later than the Twenty-ninth Session in 2024.

In undertaking its work, the Subcommittee may wish to consult with relevant stakeholders.

Additionally, the report of the 23rd Session notes the following areas of agreement regarding the Subcommittee's work program:

29. On priorities, there was general agreement that the Committee should focus on issues with the most impact for developing countries as well as technical issues arising from specific UN Model provisions. Low or no priority should be given to changes to align with the OECD Model unless they represent an issue of practical importance for developing countries.

30. The issues that were identified as initial Subcommittee priorities are:

- Carrying forward the work on computer software;
- Tax treaty provisions related to exploration and extraction of natural resources;
- Whether article 8 should be fundamentally revised, particularly with respect to income from shipping activities;
- Provision of services, particularly the physical presence tests of articles 5(3)(b), 14 and 15, and guidance regarding the interaction of those provisions with articles 7, 12, 12A and 12B;
- Possible introduction of a subject-to-tax rule;
- International insurance activities; and
- A technical issue on interaction of article 21(3) and the source rule of article 18, alternative B.

Overview of Subcommittee's Proposed Work Plan

4. The first meeting of the Subcommittee on the United Nations Model Double Taxation Convention between Developed and Developing Countries (the Subcommittee) was held 10-12 January 2022. The agenda for that meeting reflected the priorities set out in paragraph 30 of the report on the 23rd Session. The Subcommittee also discussed several additional issues raised by participants and discussed in paragraph 13 below. The general approach proposed to be taken to each subject is set out below, in roughly the order in which they are likely to be presented to the Committee for consideration.

Inclusion of Payments for Computer Software in the Definition of Royalties

5. The Committee decided that this issue, which had not been completed by the last membership of the Committee, should be continued in this membership. The Subcommittee plans to proceed by examining a Secretariat paper presenting practical cases in order to develop general principles regarding how to determine what would and would not be included within a revised definition. The Subcommittee

then plans to draft a proposed Commentary providing guidance on the principles and what falls within the expanded definition of royalties when payments for computer software are included. This work will assist the Committee in deciding whether to modify the Article 12 definition of royalties to include a specific reference to computer software in the Model or to keep it as an alternative in the Commentary but with additional guidance.

Introduction of a Subject-to-Tax Rule in the UN Model

6. Participants in the Subcommittee noted that, from a policy perspective, adding a subject-to-tax rule to the UN Model would be consistent with changes made in the 2017 UN Model in response to concerns about base erosion and profit shifting (BEPS). Some participants noted that some cases of double non-taxation of income (as a result of participation exemptions) or entities (such as pension funds) have been viewed as acceptable in the past and argued that they should continue to be accommodated by any subject-to-tax rule. A number of participants suggested that the rule should be simple for developing countries to administer. Before deciding on the scope and drafting options relating to a proposal to be made to the Committee, the Subcommittee will review a variety of provisions that address various aspects of the problem, including: the special tax regime rule found in the Commentaries on Article 1 of both the UN and OECD Models; the simpler subject-to-tax rule that was deleted from those Commentaries when they were substantially re-written in 2017; the remittance-basis taxation rule found in many treaties; and the fiscally transparent entities rule added as paragraph 2 of Article 1 of the UN and OECD Models. Participants in the Subcommittee have also been asked to inform the Secretariat of any similar provisions found in their own bilateral tax treaties.

Extractives and Other Natural Resources

7. The Subcommittee had a very short discussion of this issue. Participants emphasized the importance of this work for developing countries. The Subcommittee noted the important work that has already been done and is continuing in the Subcommittee on Extractives Industries and stressed the importance of coordination with that subcommittee. The Subcommittee also noted the recent report by the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, *Protecting the Right to Tax Mining Income: Tax Treaty Practice in Mining Countries*, which recommends that developing countries adopt in their bilateral tax treaties many of the provisions already found in the UN Model. The Subcommittee proposes that its next steps are to identify any additional provisions relating to extractives and, perhaps, other natural resources, that might be included in the UN Model that would be helpful to developing countries with significant natural resources.

The Treatment of Services, Including Issues of Overlap

8. The UN Model includes a number of provisions that are intended to ensure that a source or host State is able to tax payments for services rendered to its residents. These include various provisions in Articles 5, 12, 12A, 12B and 14. During the discussion of computer software during the last membership of the Committee, it became clear that it would be useful for the Committee to provide additional guidance regarding the scope of each of those provisions in order to avoid disputes. The need for additional guidance in this area, particularly with respect to the scope of Article 12A, was stressed by several participants in the Subcommittee meeting. The Subcommittee plans to consider a technical paper that includes practical examples at its next meeting. Subcommittee members have been invited to share with the Secretariat any cases that they have encountered in order to facilitate the drafting of that technical paper.

9. Several participants in the Subcommittee noted that the issue of remote services is becoming more important as a result of changes in the way work is performed during the COVID-19 pandemic, facilitated by improvements in technology. The physical presence tests currently found in several articles of the UN Model therefore are less relevant to decisions regarding taxing jurisdiction. The Subcommittee noted that this topic is being addressed through a Secretariat paper in the context of the coronavirus disease (and encouraged coordination with this Subcommittee on tax treaty issues), but also that the issue will remain after the pandemic is over. The Subcommittee plans to examine this issue after the Secretariat paper is discussed in the 24th Session. *International Shipping Activities*

10. The Subcommittee noted that, while a number of countries have negotiated bilateral tax treaties that allow for source State taxation of income from international shipping activities, very few (if any) of those treaties follow the form of Article 8 (Alternative B) of the UN Model. The Subcommittee plans to consider whether a different provision, more consistent with actual treaty practice, should be included in the UN Model. The Subcommittee's consideration of this question will begin with fact-finding, asking those countries that have included such alternative provisions to share their experiences, including with respect to implementation, with the Subcommittee.

Income derived from Cross-Border Insurance Activities

11. The Subcommittee reviewed the past work on this issue, including during the consideration of BEPS issues during the membership of the Committee that ended in 2017 and in connection with the G20/OECD BEPS project. The Subcommittee discussed the difficulties in determining the profits of a permanent establishment of an insurance company, which may reduce the benefit to a developing country of including paragraph 6 of Article 5. The Subcommittee noted with interest the public submissions on the BEPS project that noted the importance of insurance premium taxes; some participants suggested that countries should consider whether their tax treaties would prevent the imposition of such taxes. In particular, some participants noted that the differing forms such premium taxes take in different countries may result in asymmetrical treatment. The Subcommittee also noted that the tax treaty practice of some countries provides for limited source taxation regardless of the existence of a permanent establishment. The Subcommittee plans to discuss these issues further in future meetings.

Other Issues

12. The Subcommittee noted but did not discuss the last item identified as a priority by the Committee, the technical issue on the interaction of article 21(3) and the source rule of article 18. This issue will be addressed in future meetings on the basis of a technical paper by the Secretariat describing the possibilities for double or multiple taxation because of the lack of consistent rules across jurisdictions.

13. The Subcommittee also discussed other issues that might be included in the work program. One possibility is the determination of the profits of a permanent establishment; if taken up, that work would need to be coordinated with the Subcommittee on Transfer Pricing. Several participants raised concerns with respect to Article 6. One is a technical issue regarding the definition of immovable property. The current approach of the article allows the situs country to define the scope of the provision unilaterally through changes to domestic law. Disputes may arise when the scope covers properties which are commonly regarded as movable assets. The Subcommittee has been urged to consider language that would limit that unilateral power and enhance certainty. Another participant raised the issue of capital flight from developing countries to investment in immovable property in developed countries. The

Subcommittee was not able to discuss this issue at its January meeting but plans to have a first discussion at a future meeting.

Future Meetings of the Subcommittee

14. The Subcommittee is aware that this is an ambitious program of work. It plans to submit items for consideration by the Committee as they are ready and anticipates that the Committee may have a first substantive discussion of the computer software issue and subject-to-tax rule at the 25th Session of the Committee in October 2022. To achieve that goal, the Subcommittee expects to have two virtual meetings between the 24th and 25th Sessions of the Committee.

Participation in the Subcommittee

15. At its pre-meeting, held on 6 December 2021, the Subcommittee agreed that country observers that have relevant experience could be invited to be participants in the Subcommittee. However, only Committee Members participated in the first meeting of the Subcommittee.

Proposed Work Plan and the Sustainable Development Goals

16. At its 23rd Session, the Committee agreed to discuss taxation and the Sustainable Development Goals regularly during its sessions, and to have subcommittees reflect on the links between their work and the SDGs. The Subcommittee on the Update of the UN Model recognizes that by promoting fair and effective tax systems, which support both revenue and trade and investment for sustainable development, through guidance products and through advising UN DESA on capacity building activities, the Committee's work contributes to achieving the interlinked SDGs as a totality. In this regard, the work of the Subcommittee, in supporting effective guidance efforts in the areas described, will promote the balance of revenue needs and the development focused investment climate which many countries seek, by promoting whole of government, informed and practical real-world approaches to interlinked tax, trade and investment policy objectives. This builds greater certainty for all stakeholders in tax systems.