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

Online meeting of 18 to 29 October 2021

Item 5(d) of the provisional agenda

**Review and possible update of the Manual for the Negotiation of Bilateral Tax Treaties
between Developed and Developing Countries**

**Options for Updating the Manual for the Negotiation of Bilateral Tax
Treaties between Developed and Developing Countries**

Summary

The Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries (the Manual) is one of two documents specifically referenced in the mandate of the Committee of Experts, with the other being the United Nations Model Double Taxation Convention between Developed and Developing Countries (the UN Model). The Committee is charged by the Economic and Social Council to “keep under review and update as necessary” the two documents. The UN Model having been updated by the last Membership of the Committee of Experts, there is now a need to update the Manual, which was last updated in 2019 to reflect changes made to the UN Model in 2017.

This note asks the Committee of Experts to decide how to fulfil its mandate as to the update of the Manual. In particular, it recommends that the Committee decide to publish during its term an updated Manual to reflect changes made to the UN Model in 2021 and to agree on the timing for such an update. The Committee is also asked to consider the scope of such an update and, depending on its conclusions with respect to that question, to decide whether to establish a subcommittee to work on an update to the Manual.

Introduction

The *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries* (the Manual) “aims at strengthening the technical expertise of developing countries’ tax officials as regards the negotiation of tax treaties...[It] provides an introductory guide to tax treaty negotiations and, as such, provides general explanations on the way treaty negotiations are conducted and on the issues that are typically addressed during these negotiations.”¹ Because the Manual features prominently in the Secretariat’s tax capacity development programme, the Economic and Social Committee’s resolution 2004/69 of 11 November 2004 mandated the Committee of Experts “to keep under review and update as necessary” the Manual as well as the UN Model.

2. The Manual was initially published in 1978 and first revised in 2003. A second revision was adopted by the Committee in 2015. The last membership of the Committee agreed at its 15th meeting that the Manual should be updated again to reflect the changes made to the *United Nations Model Double Taxation Convention between Developed and Developing Countries* (the UN Model) in 2017. That version of the Manual was published in 2019.

3. In accordance with the Committee’s mandate, the update of the Manual was included on the provisional agenda developed during the last (the 22nd) session of the UN Committee of Experts on International Cooperation in Tax Matters as an item that the next Committee Membership (this current Membership) might carry forward. This note is intended to provide background information to help the Committee determine whether (a) it is necessary to update the Manual during this Membership of the Committee, (b) if so, what the scope of that update should be and (c) the best way to organize that work.

Background

4. The history of the Manual’s development over time is described in the Introduction to the 2019 version of the Manual (accessible at: <https://www.un-ilibrary.org/content/books/9789210042734/read>.) From 2005 to 2011, the work was undertaken by the first Subcommittee on a Manual for the Negotiation of Tax Treaties. In 2013, the Committee established the Subcommittee on Negotiation of Tax Treaties – Practical Issues. Its 2015 revision of the Manual, approved at the 10th session of the Committee, was based on the following principles:

- That it be a compact practical training tool for beginners or tax officials with limited experience and reflect the realities for developing countries at their relevant stages of capacity development;
- That it reflect the current version of the UN Model and the relevant Commentaries thereon, as well as ongoing decisions of the Committee leading to changes therein; and
- That it draw upon the previous work done by the Committee and any other relevant inputs, as well as work being done in other fora.

This version of the Manual was prepared with the assistance of former tax treaty negotiators.

5. At its 15th session, the Committee decided that an additional revision was necessary in order to reflect the substantial changes adopted in the UN Model approved at the 14th session of the Committee and published in 2017. The Subcommittee on Tax Treaty Negotiation was given the following mandate:

The Subcommittee is mandated to propose updates to the United Nations Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries, based on the following principles:

- That it reflects the current version of the UN Model Double Taxation Convention between Developed and Developing Countries and the relevant

¹ Preface to the 2019 version of the Manual.

UN Commentaries as well as ongoing decisions of the Committee leading to changes in them;

- That it pays special attention to the experience of developing countries and reflects their realities and needs at their relevant stages of capacity development;
- That it draws upon and feeds into, as appropriate, the relevant work done in other fora, especially the work on the toolkit on tax treaty negotiation by the Platform for Collaboration on Tax.

The aim of the Subcommittee shall be to present to the Committee an update of the Manual for consideration with a view to adoption in 2019. Updates on the progress of the work shall be provided to the Committee at each preceding session. The Subcommittee may request the secretariat to develop necessary inputs and provide necessary support within its resources.

The work was completed according to schedule and an update of the Manual reflecting the 2017 UN Model was published in 2019. The 2019 version of the Manual serves as the basis for the Toolkit on Tax Treaty Negotiations produced by the Platform for Collaboration on Tax, a joint project of the International Monetary Fund, the Organisation for Economic Co-operation and Development, the United Nations and the World Bank Group, which was published in 2021.

6. From 2017 to 2021, the Committee approved a number of important changes to the UN Model. These included the introduction of a new article – Article 12B (Income from automated digital services) – the addition of which alone suggests the need for an update of the Manual. Other important changes to the treaty text and commentaries deal with collective investment vehicles, pension funds and real estate investment trusts, offshore indirect transfers, permanent establishments and a number of technical issues that were approved in connection with consideration of note [E/C.18/2020/CRP.37](#) at the twenty-first session of the Committee.

Options for the Update

7. This section describes two different approaches toward updating the Manual – one limited and one more expansive. Which approach the Committee chooses will influence, at least to some extent, the process for updating the Manual.

8. The first approach would be an update that would be limited to modifications necessary to reflect the changes to the UN Model that have been adopted since the 2019 publication of the last version of the Manual. This work would be relatively straightforward as many of the issues addressed by changes in the 2021 UN Model were already referenced in the 2019 version of the Manual. It is possible that such a limited update could be completed without the formation of a subcommittee. An initial draft could be produced by the Secretariat and approved directly by the Committee or assigned to whichever body will be working on tax treaty issues more generally. Alternatively, the Committee might find it desirable to form a subcommittee to oversee even this more limited work. The latter approach might be considered more appropriate because the Manual deals with practical aspects of treaty negotiations while the subcommittee working on the update to the UN Model is more concerned with tax treaty policy and technical drafting issues.

9. A more extensive update could start by addressing certain issues that were raised in connection with the drafting of the PCT Toolkit on Tax Treaty Negotiations and the launch webinar related to it that took place in March 2021. (Comments on the Toolkit are relevant because the Toolkit follows closely the guidance in the Manual.) For example, the public discussion draft of the Toolkit had been dismissive of conducting negotiations through videoconferencing. Comments requested that the relevant section be revised to be more positive and to provide guidance regarding such virtual negotiations. This section was added to the toolkit in response to that request:

In the past, the normal rhythm of tax treaty negotiations was to travel and meet in-person for a week at one country's capital, followed by another week at the other country's capital some months later, and so on until negotiations were completed. Occasionally, meetings, either of the entire team or just the principals, would take place on the side-lines of other international meetings attended by team members. With the important changes in working methods resulting from advances in communications technologies and various restrictions on travels, assumptions about the best way to proceed should be re-examined.

Countries have found that it is possible to make substantial progress through videoconferencing. Even when meetings in-person are possible, videoconferencing may be preferred because of the substantial savings in travel time and costs that it allows. Such an approach may be helpful, for example, to make progress on specific issues between in-person meetings. Videoconferencing may also be helpful in connection with the discussion of specialized issues, such as the treatment of pensions or financial products, where it would not be cost-effective to bring a subject-matter expert to an in-person meeting. It could also be used for exploratory discussions aimed at determining whether it is likely that the parties could agree on the terms of a treaty, in order to avoid spending scarce resources on a treaty that is unlikely to materialize.

Some countries that have used videoconferencing effectively note that it is good practice for the members of the negotiating team to be in the same room if possible. This facilitates communications within the team during the negotiations. If it is not possible, then the team should consider other ways to facilitate such internal communication.

The Manual does not include a discussion of these issues; a more extensive update therefore could include a new section that reflects the experience of the Members of the Committee and others who have been involved in tax treaty negotiations by videoconferencing. Another comment on the draft Toolkit suggested that there should be guidance recommending "bulk" negotiations, either with a single developing country negotiating with multiple developed countries at the same time, or multiple developing countries negotiating with a single developed country. A review of the comments on the draft Toolkit, and issues raised during the launch webinar, might suggest other areas for which additional guidance would be helpful.

10. Other practical issues regarding the conduct of treaty negotiations could be addressed as well. The above excerpt from the Toolkit references exploratory talks, as does Section II of the Manual, but neither provides any guidance regarding the scope of such discussions or the potential pitfalls for developing countries. Recent court cases regarding most-favored-nation clauses suggest that further discussion of how to draft such clauses (when desired) might be helpful. The Committee might also consider adding tools to the Manual, such as a timeline or decision tree as a visual guide to the process for new negotiators.

11. If a more extensive revision of the Manual is desired, the work probably should be conducted through a subcommittee of the full Committee. As noted above, the work could be assigned to whatever body will be considering tax treaty issues more generally or, as in the past, be the subject of its own subcommittee because this work is more concerned with the practical aspects of tax treaty negotiations that are important for developing countries.

12. Whether the Committee decides to pursue a limited or more extensive revision, it should be possible to complete the work in 2023 if the Committee decides to do so.

Conclusion

13. The Committee is asked to agree to publish an update of the Manual during the term of this Membership and, if it does so, on the timing of such an update. In that case, then it is asked to decide whether it supports a limited update of the Manual, as described in paragraph 8, or a more extensive revision. If the Committee decides to pursue a more extensive update of the Manual, it is asked to determine which areas, in addition to those set out in paragraph 8, should be addressed in that update.

14. Once the Committee decides on the general scope of the work, it will need to decide how the work should be organized. The Committee therefore is asked to decide whether to take up the work directly (which is likely to be efficient only if the Committee decides on a limited update) or to assign the work to a subcommittee. If the Committee decides to assign the work to a subcommittee, the Committee is further asked to decide whether this work should be combined with the general work on tax treaties or should be conducted by a stand-alone subcommittee.

15. Finally, if the Committee decides to establish a stand-alone subcommittee to pursue this work, it is asked to consider the following draft mandate for a Subcommittee on the Update of the Manual, which is based on the mandate of the Subcommittee on Tax Treaty Negotiation established during the last Membership of the Committee:

The Subcommittee is mandated to propose updates to the United Nations Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries, based on the following principles:

- That it reflects the current version of the UN Model Double Taxation Convention between Developed and Developing Countries and the relevant UN Commentaries as well as ongoing decisions of the Committee leading to changes in them;
- That it pays special attention to the experience of developing countries and reflects their realities and needs at their relevant stages of capacity development;
- That it draws upon and feeds into, as appropriate, the relevant work done in other fora, especially the work on the toolkit on tax treaty negotiation by the Platform for Collaboration on Tax.

In undertaking its work, the Subcommittee shall engage with academia and international organizations working in the field, particularly the regional tax organizations. The aim of the Subcommittee shall be to present to the Committee an update of the Manual for consideration with a view to adoption in 2023. Updates on the progress of the work shall be provided to the Committee at its 24th session and each succeeding session. The Subcommittee may request the secretariat to develop necessary inputs and provide necessary support within its resources.