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REPORT OF PROCEEDINGS 15 DECEMBER 2003

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1. The proceedings were opened by Mr. Abdel Hamid Bouab, Secretary of the Group of Experts on International Cooperation in Tax Matters, who welcomed the members of the group, observers and other interested parties to this 11th meeting. Mr. Bouab, in his welcoming remarks, reviewed the work and accomplishments of the Group of Experts, noting particularly the publication of the United Nations Model Taxation Convention between Developed and Developing Countries and the Manual for the Negotiation of Bilateral Treaties between Developed and Developing Countries. He observed that the Group of Experts has conducted training tax workshops in Amsterdam, Netherlands, and Beijing, China. He also noted that the group's membership has expanded over the years and now has 25 members, one third of which are from capital exporting countries and two thirds from developing countries and countries with transitional economies. Mr. Bouab then presented for approval the Agenda items and introduced the new members of the Ad Hoc Group of Experts.

2. In his opening remarks, Mr. Antonio Hugo Figueroa, the Chairman of the Group of Experts, observed that model tax conventions reflect concepts developed many years ago. He noted the difficulty of working with these models in the current economic conditions and stressed the need to keep tax regimes updated. The goal in this forum (the meeting of the Group of Experts), he suggested, is to have fruitful discussions that would lead to improvements in the UN model tax conventions and its related materials.

Mutual Assistance in Collection of Tax Debts and Protocol for Mutual Assistance Procedure

3. A paper (*ST/SG/AC.8/2003/L.2)* titled "Mutual assistance in collection of tax debts and protocol for the mutual assistance procedure" was presented to the group. The presenter reviewed the existing UN, OECD and EU agreements and mechanisms for mutual assistance in tax matters. Another paper (ST/SG/AC.8/2003/CRP.2) titled "L'assistance internationale au recouvrement des créances fiscales", was also presented.

4. The central question raised was whether a provision similar to Article 27 of the OECD Model Convention should be adopted by the Group. Additionally proposed was an article dealing with the Service of Documents. Another issue presented was whether developed countries should offer incentives to developing countries in order to help defray the costs to developing countries of entering into mutual assistance agreements.

5. Traditionally, mutual assistance in tax matters has been provided for in the exchange of information article in income tax treaties. These provisions exist within both the UN and the OECD Model Tax Treaties. Ascertaining the state of the art in mutual assistance in tax matters requires a consideration of (1) Article 26 of the United Nations Model Double Taxation Convention and methods of exchange of information and/or assistance; (2) Articles 26 and 27 of the OECD Model Double Tax Convention; (3) the Convention on Mutual Administrative Assistance in Tax Matters; (4) the OECD Agreement on Exchange of Information on Tax Matters; (5) the EU Directive on Exchange Information; (6) the EU Savings Tax Directive; (7) the EU Directive on Mutual Assistance for the Recovery of Claims; (8) the OECD Model Convention for Mutual Administrative Assistance in the Recovery of Tax claims; and (9) the findings of the report on improving access to bank information for tax purposes.

6. In his comments, the discussant remarked that the recent trend internationally is to provide cooperation on collection between taxing authorities. He observed that Morocco has 12 treaties which contain an assistance-in-tax-collection provision, and such a provision can be found in other treaties of the region.

7. A developing country member pointed out that the fundamental issue in any tax system is the collection of taxes. It is natural, therefore, to consider cooperation on collection. Historically, the 1928 League of Nations Fiscal Committee worked on the issue of tax collection. The initial direction, however, was not followed in later models.

8. A question arises as to whether mutual assistance should be limited only to taxes covered by the convention or should extend to all taxes of the contracting states, including local taxes and social security. One member suggested that requests for collection assistance should wait until all internal remedies have been exhausted. In any event, requests for collection must be accompanied by the proper paper work. It was suggested that precautionary measures, such as seizures, must not interfere with normal business conduct. One observer noted that it would be desirable to allow assistance in collection on a voluntary basis before a full exhaustion of remedies, when the administration costs of assistance are small and the cost of exhausting remedies are large**.**

9. A developing country member asserted that there must be similar mutual assistance and exchange of information provisions between developed and developing countries. However, many developing countries find it difficult to meet the paperwork requirements for making requests and do not have the capacity to respond properly to requests for assistance from a treaty partner. A suggestion was made that perhaps developing countries could receive a subsidy to allow them to comply with requests for assistance. A question is whether such a clause could be enforced in a reasonable way. It is also possible that the United Nations could provide technical assistance to developing countries on tax collections.

10. A number of members from developing and developed countries were of the view that the collection of taxes should not be limited solely to taxes covered by a tax convention. It was noted that practically mutual assistance might be limited to taxes covered by tax conventions due to the lack of capacity by tax administrators to administer state and local taxes. Clauses can be placed in tax conventions which limit mutual assistance due to lack of capacity. The suggestion was made that the language of a model convention might allow for flexibility, depending on the circumstances of the contracting states.

11. With regard to model treaties, a variation exists concerning mandatory versus voluntary mutual assistance provisions. Moreover, the OECD Model provides a number of exemptions regarding mutual assistance including: transfers of trade secrets, precluding mutual assistance where another convention would prohibit such assistance, and prohibiting mutual assistance if the result would be to discriminate against the residents of the two Contracting States.

12. A member from a developed country pointed out that collection assistance is a much bigger commitment than information exchange. Many developing countries appear reluctant to agree to information exchange provisions which override bank secrecy. One member noted that

the United States now insists on an exchange of information provision that overrides bank secrecy in all of its new tax conventions.

13. A question was raised as to the impact of capacity on exchange of information agreements. It was pointed out that the capacity of developing countries to initiate or react to exchange-of-information requests is often quite limited. The suggestion was that capacity building is an important task that needs to be given great attention. One observer noted that the OECD and various regional associations of tax administrators could be helpful in capacity building. Others suggested that the regional tax organizations provide a useful clearing house for ideas but were not engaged in effective administrative training. It was noted that the United Nations was prepared to work closely with any groups offering to assist developing countries in capacity building.

14. While discussing the capacity problems faced by developing countries, it was noted that some countries may be reluctant to sign exchange of information agreements because they fear it would cause deposits in their banks to vanish. According to several commentators, exchange-of-information agreements generally have not worked well for developing countries. Mutual assistance should begin with support so that developing countries can improve their tax administration. In developing countries, internal tax evasion is such a large problem that exchange of information and tax collection agreements may not work.

15. A member from a developed country suggested that international organizations need to mobilize resources to promote the development of efficient tax administration in developing countries. Governments in developing countries should be made aware of the importance of international taxation and build the capacity of their government in that regard. The United Nations is dedicated to consult and interact with every organization which is involved in enhancing the capacity of tax administrators.

16. A member from a developing country asserted that developing countries may have serious constitutional problems in collecting foreign tax debts. Therefore, the UN Model must clearly establish what sorts of debts can be collected. In many cases, domestic laws must be changed to permit the collection of foreign tax debts.

17. A member from a developing country stated: (1) Reciprocity is very important in exchange of information agreements; (2) Relative administrative capacity is very important to the success of such agreements, and (3) The effects of differing legal systems (common law versus civil law) must be given careful attention.

18. A member from a developing country stated that there is a need for reciprocity in exchange of information agreements. In addition, the existence of a collection agreement can act as a deterrent to tax evasion. Assistance in collection is secondary, one observer stated, to information exchange, and especially to the removal of banking secrecy.

19. An observer from a developed country noted that even if the UN adopts a provision similar to Article 27 of the OECD Model treaty, various problems remain. One problem is that most countries will not allow their tax department to collect a tax debt without providing due process to the taxpayer. Thus automatic collection may be difficult. In response, it was

suggested that all matters relating to defences to a tax claim should be settled before the foreign country is asked to collect a debt. In that event, the only due process requirement might be that the taxpayer should have the opportunity to contest the finality of the judgment in the other state. It was generally agreed that the courts of a treaty partner should not be looking into the validity of the underlying tax claim, since they have no expertise on that matter.

20. A number of speakers expressed concern about the requirement of due process under the constitutions of their country. Some members pointed out that various limitations in a country's constitution could prevent the implementation of a proposed Article 27. Other members suggested that constitutional issues generally are covered during the treaty negotiations. It was suggested that this matter might require further study.

Abuse of treaties and treaty shopping

21. A paper (ST/SG/AC.8/2003/L.3), titled "Abuse of tax treaties and treaty shopping", was presented. The Group stressed the importance of the issue, taking into account the many international developments that had occurred since the topic was addressed during the 4th Meeting of the Group in 1987. In particular, the number of treaties in force has increased dramatically, with the result that treaty networks have to some extent superseded the original bilateral agreement. In addition, the OECD had done important work in this area, as reflected in the 2003 update made to their Commentaries on article 1 of the OECD Model Convention.

22. Three main questions were addressed. First, what is considered a treaty abuse? In that connection, it is necessary to decide who is to determine the existence of an abuse. Second, how are the standards for dealing with treaty abuse being established? In that connection, it was noted that those standards might be included in the treaty itself. Third, is it acceptable to deal with treaty abuse with domestic anti-abuse mechanisms? In this connection, it was suggested that it was necessary to take account of the legal nature of treaties and the obligations derived from the Public International Law of Treaties, mainly *pacta sunt servanda* (article 26 VCLT) and the impossibility to invoke domestic law as a justification for unilateral treaty override of the obligations of the treaty (article 27 VCLT). It was also noted that treaties are to be interpreted to advance the intent of the signatories.

23. As regards what should be considered treaty abuse, it was noted that it is not possible to come up with a common general understanding of a definition of a treaty abuse, Nevertheless, there is a broad recognition that treaty abuses exist and must be dealt with properly. The impossibility to reach a common definition of a treaty abuse was partly due to the mechanisms for dealing with tax treaty abuse. Persons covered by a tax treaty are its ultimate beneficiaries, despite the fact that a treaty is signed by Contracting States and is intended to advance the interests of the Contracting States.

24. Certain common aspects of treaty abuses were stressed, notwithstanding the different legal traditions for dealing with abuses. The existence of an abuse implies an indirect violation of the law, being contrary to its goal and objectives. Such a violation can only be determined after taking into account the specific circumstances of the case. It was asserted that a treaty abuse generally is determined by national authorities under domestic law patterns, according to the respective legal tradition of each country. For this reason, the concept is likely to vary from State

to State. It was also explained that the question of treaty abuse was mainly a question of treaty interpretation, mainly of who are the *bona fide* beneficiaries of the treaty. It was noted that the provision of a general and common understanding of the meaning of the term in the Commentaries of the Model Convention would be very useful.

25. Some discussion followed about the identity of the person committing the abuse. Normally, the term “treaty abuse” is used to refer to situations in which the taxpayer is seeking to circumvent the law. But consideration should be taken to cases in which one of the Contracting States takes advantage of the good faith of the other Contracting State of the Treaty, by making a future amendment of the law or by administrative practices that lead to significant losses of resources of the other Contracting State. The two situations --- abuse by the taxpayer and abuse by the Contracting State --- should be distinguished in framing the rules used to determine the existence of the abuse, in identifying the bodies that would declare the existence of an abuse, and in establishing the legal consequences of a finding of an abuse.

26. There was a debate whether or not treaty shopping was compatible with the goals of tax treaties. It was reiterated that treaty abuse and treaty shopping should not be confused. Treaty shopping relates to situations where the person gets the benefit of the Treaty without being the legitimate beneficiary of it. Treaty abuse, on the contrary, refers to situations where the result of a certain operation is in contradiction with the treaty. Some representatives from developing countries stressed that treaty shopping was not compatible with the goals of the treaty. Other Members of the Group stressed, however, that treaty shopping was a more complex issue. Some participants mentioned that whenever the treaty shopping issue is considered important, it should be specifically mentioned in the treaty, including countervailing measures to combat it. It was insisted, nevertheless, that in certain treaty shopping situations, general measures countervailing abuse could still be used even in the absence of a specific provision in the treaty.

27. In order to address treaty abuses, some participants contended that there was no need to establish specific rules in a treaty, and there was general consensus that some domestic anti-abuse measures could be used, as occurs in practice in many cases. Other participants expressed a concern, nevertheless, for the dangers and uncertainties that this straightforward solution could produce if the limitations derived from the Vienna Convention on the Law of Treaties were not taken into account.

28. Some members from developing countries mentioned that the real concern was to avoid double non-taxation situations, which are not dealt with explicitly in tax treaties. Some members were of the opinion that double non-taxation situations are inconsistent with the goal of a tax treaty; they argued that such situations should be considered treaty abuse cases. Other members expressed some reservations to that view. One participant remarked that the original goal of the work done by the League of Nations was not only to avoid double taxation but to assure taxation once. As one participant remarked, even if it is agreed that double non-taxation should be avoided, the issue remains as to which of the Contracting States should get the tax revenues from eliminating the non-taxation.

29. One commentator stressed that cases of treaty abuse by the Contracting States need special attention because the Vienna Convention on the Law of Treaties does not foresee any

consequence for indirect abusive breaches of a treaty by the Contracting parties but only for cases of serious violation (article 60 of the VCLT). One participant suggested that there was a real need for new tools in order to deal with treaty shopping, taking into consideration the willingness of some States to promote it. In that respect, countries were advised to look carefully into the practices of some States before entering into a treaty with them. A participant from a developing country indicated that developing countries attempting to expand their treaty network had a need for technical assistance and advice in structure used by taxpayers to abuse a treaty.
