



UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

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Financing for Development Office
U.N. Dept. of Economic and Social Affairs
2 U.N. Plaza, Room DC2-2172
United Nations
New York, N.Y. 10017

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Dear Mr. Lennard,

I am writing concerning the proposal to modify the commentary on article 9 of the UN Model Convention. USCIB¹ is quite concerned with the proposed changes, partly because of the potential effect of those changes and partly because of the lack of process surrounding the development of both those changes and the UN Transfer Pricing Manual. This is relevant because the proposed changes would potentially affect the status of the Manual.

In our view, the proposed commentary signals a significant move away from the OECD's Transfer Pricing Guidelines, at least as a matter of policy. The draft commentary would recognize that the OECD Transfer Pricing Guidelines contain "valuable guidance" and that it is "highly important for avoiding international double taxation of corporate profits that a common understanding prevails on how the arm's length principle should be applied." Nevertheless, the proposal treats the UN's Transfer Pricing Manual as another source of "authoritative assistance" in the field of transfer pricing. The commentary mentions that the Manual "seeks broad consistency" with the OECD Transfer Pricing Guidelines. However, if true consistency were the goal, there would be no need for the proposed changes. "Broad consistency" is not necessarily consistent at all. A broad consistency that permits countries to argue that their rules comply with the arm's length principle, but that permits multiple, inconsistent applications of that principle, will lead to multiplied disputes, increased double taxation, and ultimately to serious damage to the cross-border trade and investment that fuels economic growth and development.

The UN Transfer Pricing Manual was clearly intended to be consistent with the OECD Transfer Pricing Guidelines. This was confirmed, for example, in the report of the sixth session of the

¹ USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

committee of tax experts (paragraph 48, page 10) which provides that: "as clearly referenced in the mandate of the Subcommittee the manual would be based on the arm's length principle embodied in Article 9 of the Model, which also would require consistency with the OECD Transfer Pricing Guidelines, to which the United Nations commentaries make a reference." Indeed, the UN Manual itself notes, in its Foreword, that "[c]onsistency with the OECD Transfer Pricing Guidelines has been sought, as provided for in the Subcommittee's mandate and in accordance with the widespread reliance on those Guidelines by developing as well as developed countries."

The rationale that the Manual was only intended to provide practical guidance and not a second source of authoritative guidance was the principal reason given that it was not necessary to have an inclusive process in developing the Manual. (See the report of the eighth session of the committee of tax experts, paragraph 17, page 6,) The recognition of the Manual as a source of authoritative guidance rather than a practical manual is an attempt to retroactively change the status of the Manual, but a Manual intended to be used as a source of authoritative guidance should have required a more inclusive process than actually took place. This lack of transparency has been perpetuated by the fact that the proposed changes were developed and put forward for approval without any opportunity for input by stakeholders, including the many governments without a seat at the table. Business input on these proposals was barred entirely by the Committee's decision that they would be developed by a subcommittee comprised only of select members of the Committee, thus lacking even the limited business participation allowed in the Subcommittee developing the Manual. This kind of reversal of position calls into question the integrity of the Committee's process and the standing of the UN work on taxation.

A principal rationale for proposing to delete the reference to the OECD Transfer Pricing Guidelines as representing internationally agreed principles was the concern expressed by some members of the former Committee that countries ought not to be bound by guidelines that they did not help develop. While it is true that not all UN countries are directly involved in the discussion of the Transfer Pricing Guidelines at the OECD, the expansion of the OECD process to include on an equal footing all G20 countries as well as all the OECD countries and countries seeking accession to, or with associate status at, the OECD makes that process a very inclusive one taking into account a full spectrum of views. The OECD also is in the process of establishing additional formalized processes for soliciting developing country views more broadly. Thus, this argument that the OECD Transfer Pricing Guidelines are being developed without input from a broad spectrum of countries does not now carry any real weight, if it ever did. Non-OECD countries have had much more privileged access to the discussions leading to developments in the OECD Transfer Pricing Guidelines than have taxpayers, and yet no one seems to question that the Guidelines should be fully binding on multinational enterprises.

Further, understanding that the experts are participating in their personal capacity and do not represent the countries from which they come, should those views have equal weight with official positions of the affected countries? If those positions should have equal weight, should those countries that are participating in both processes coordinate those positions so they are consistent? If the positions are inconsistent, should the official position of the country (the

position reflected in the OECD Transfer Pricing Guidelines), whether developing or developed, be given more weight? It seems inconsistent for G20 countries and other non-OECD countries that are now advocating for their views to be reflected in the OECD Transfer Pricing Guidelines to accept concessions from others participating in the development of those Guidelines and then undercut the very outcome of those negotiations by arguing elsewhere for positions that were rejected in that forum. If any notion of “fairness” has relevance in international tax, surely it should include the concept that acceptance of an invitation to bargain on an equal footing over a set of rules carries with it the good faith obligation to live by those same rules.

USCIB appreciates the opportunity to make these comments.

Sincerely,



William J. Sample
Chair, Taxation Committee
United States Council for International Business (USCIB)

cc:

Armando Lara Yaffar, Chair, UN Committee of Experts on International Cooperation in Tax Matters
Stig Sollund, Chair, UN Subcommittee on Transfer Pricing Issues
Robert Stack, Deputy Assistant Secretary for International Tax Affairs, Office of Tax Policy, US Treasury
Henry Louie, Deputy to the International Tax Counsel (Tax Affairs), Office of Tax Policy, US Treasury
Michael McDonald, Financial Economist, Office of Tax Analysis, US Treasury