Group Meetings on "Capacity Building on Tax Treaty Negotiation and Administration"

Rome, Italy, 28–29 January 2013

REPORT

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This report is posted on the website of the Financing for Development Office, Department of Economic and Social Affairs, United Nations at: http://www.un.org/esa/ffd/tax/2013CBTTNA/index.htm

For more information contact: Ms. Dominika Halka (halka@un.org) or Mr. Harry Tonino (tonino@un.org).

2 U. N. Plaza (DC2-2170), New York 10017
Telephone: 212-963-7633 — Fax: 212-963-0443
E-mail: ffdoffice@un.org
Website: www.un.org/esa/ffd

Introduction

The desirability of promoting greater inflows of foreign investment to developing countries on conditions which are politically acceptable and economically beneficial has been frequently affirmed by the General Assembly and the Economic and Social Council (ECOSOC). Over the past decade, the relationship between the mobilization of financial resources for development and international tax cooperation featured prominently in the outcome documents of major UN conferences and summits on economic and social matters, including the 2002 Monterrey Consensus, the 2008 Doha Declaration on Financing for Development, the outcomes of the 2009 Financial Crisis Conference and the 2010 MDG Summit.

The growth of investment flows between countries depends to a large extent on the prevailing investment climate. The prevention or elimination of international double taxation is a significant aspect of such a climate. International law places very few limits on the tax sovereignty of countries. As a result, income from cross-border investment and activities may generally be taxable both in the source country, which is the country where investment or other activity takes place, and in the residence country, which is the country of the investor or trader, according to their respective domestic tax laws. Double tax treaties are bilateral agreements between two countries, which allocate taxing rights over such income between these countries and thus aim at preventing double taxation of this income.

Many developing countries, and especially least developed ones, generally still lack adequate skills and experience to efficiently negotiate, interpret and administer tax treaties. This knowledge gap may lead to difficult, time-consuming and, in the worst case scenario, unsuccessful negotiation and/or application of tax treaties. Moreover, existing skills gaps may jeopardize developing countries' capacity to be effective treaty partners, especially as it relates to cooperation in combating international tax evasion. Capacity building initiatives targeted to strengthen skills of developing countries in the above area would contribute to further developing the role of these countries in supporting global efforts aimed at improving the investment climate and effectively curbing international tax evasion.

In its resolution 2012/33, ECOSOC recognized the work of the Financing for Development Office (FfDO) of the United Nations Department of Economic and Social Affairs (UN-DESA) in developing, within its mandate, a capacity development programme in international tax cooperation aimed at strengthening the capacity of the Ministries of Finance (MoFs) and National Tax Authorities (NTAs) in developing countries to develop more effective and efficient tax systems, which support the desired levels of public and private investment, and to combat tax evasion, and requested the Office, in partnership with other stakeholders, to continue its work in this area.

Joint Project of FfDO/UN-DESA and ITC

FfDO and the International Tax Compact (ITC) are working on a joint project aimed at strengthening the capacity of MoFs, NTAs, and/or other competent authorities in developing countries to effectively identify and assess their needs in the area of tax treaty negotiation and administration. The financial contribution for the project is provided by the German Federal Ministry for Economic Development and Cooperation (BMZ) and implemented by ITC.

The ultimate goal of this project is to support the development of a comprehensive set of capacity building tools on tax treaty negotiation and administration to be used in developing countries, which are demand

driven, reflect adequately needs and level of development of these countries, and are not a duplication of any existing and available tools, but rather a useful complement to them. In particular, very little written material and capacity building tools are available in the area of the practical application of tax treaties and the related administrative aspects particularly relevant to the situation of developing countries. Accordingly, the main focus of this project is on these issues.

In this context, two parallel meetings on "Capacity Building on Tax Treaty Negotiation and Administration" were held on 28-29 January 2013 at the Headquarters of the International Fund for Agricultural Development (IFAD) in Rome, Italy, with a view to launching and advancing the relevant work programme for the purposes of the project. The meetings contributed to: (1) identifying the needs of developing countries in the area of tax treaty negotiation and administration; (2) taking stock of the available capacity development tools at the disposal of developing countries; and (3) determining the actual skills gaps and challenges faced by developing countries in negotiating and administering their tax treaties.

In follow-up to the Rome meetings, a number of papers addressing the major issues identified during the Rome meetings, focusing mainly on the area of administration of tax treaties, will be contracted from selected experts. The draft papers will then be presented by the authors during a 2-day meeting, to be held in New York on 30-31 May 2013, with participation of representatives of the NTAs and MoFs from developing countries, with a view to further refining them to serve as useful capacity development tools for developing countries.

Following the meeting in New York, the authors will revise their papers taking into account feedback obtained from representatives of NTAs and MoFs. The papers on administration of tax treaties will then be edited and finalized, and will comprise the *UN Manual on Selected Issues in the Administration of Tax Treaties for Developing Countries*.

Organization of the Meetings

Twenty-five representatives from NTAs, MoFs, and/or other competent authorities of developing countries participated in the meetings, namely: Mr. Syed Mohammad Abu Daud (Bangladesh), Ms. Sabina Theresa Walcott-Denny (Barbados), Ms. Pen Sopakphea (Cambodia), Ms. Evelyn Maria Molina (Costa Rica), Mr. Edgar Octavio Morales (Dominican Republic), Mr. Galo Antonio Maldonado (Ecuador), Ms. Marine Khurtsidze (Georgia), Mr. Samuel McLord Chekpeche (Ghana), Mr. Eric NII Yarboi Mensah (Ghana), Ms. Nurgul Akshabayeva (Kazakhstan), Mr. Saythong Ouiphilavong (Lao People's Democratic Republic), Mr. Pusetso Seth Macheli (Lesotho), Mr. Setsoto Ranthocha (Lesotho), Mr. Crispin Clemence Kulemeka (Malawi), Ms. Laïla Benchekroun (Morocco), Ms. Mya Mya Oo (Myanmar), Ms. Naydine Sharida du Preez (Namibia), Ms. Laura Cristina Barrios Altafulla (Panama), Ms. Irving Ojeda Alvarez (Peru), Ms. Anastasia Certan (Republic of Moldova), Mr. Baye Moussa Ndoye (Senegal), Ms. Phensuk Sangasubana (Thailand), Ms. Mwantumu Mshirazi Salim (United Republic of Tanzania), Mr. Alvaro Romano (Uruguay) and Mr. Max Mugari (Zimbabwe).

The meetings were also attended by several members of the United Nations Committee of Experts on International Cooperation in Tax Matters (UN Committee), namely: Ms. Lise-Lott Kana (Chile), Mr. Wolfgang Lasars (Germany), Mr. Mansor Hassan (Malaysia), Mr. Armando Lara Yaffar (Mexico), and Mr. Ronald van der Merwe (South Afrcia).

Representatives of international and regional organizations were also present, namely: Ms. Elizabeth Storbeck, African Tax Administration Forum (ATAF), Mr. Miguel Pecho, Inter-American Center of Tax Administrations (CIAT), and Mr. David Partington, Organization for Economic Co-operation and Development (OECD).

The following experts also participated in the meetings: Prof. Hugh Ault, Boston College of Law School, Prof. Jan de Goede, International Bureau of Fiscal Documentation (IBFD), Mr. Odd Hengsle, Former Director General, Tax Treaties and International Tax Affairs, Norway, Mr. Klaus Klotz, International Tax Section, Federal Ministry of Finance, Germany, Prof. Jinyan Li, Osgoode Hall Law School, York University, Canada, Ms. Ariane Pickering, Former Chief Tax Treaty Negotiator, Department of the Treasury, Australia, and Ms. Joanna Wheeler, IBFD.

ITC was represented at the meetings by Mr. Roland von Frankenhorst, Head of Sector Project, and Ms. Yanina Oleksiyenko, Advisor. The following FfDO staff also participated in the meetings: Mr. Alexander Trepelkov, Director, Mr. Michael Lennard, Chief, International Tax Cooperation Section, Ms. Dominika Halka, Economic Affairs Officer, Mr. Harry Tonino, Economic Affairs Officer, and Ms. Victoria Panghulan, Administrative Assistant.

On the first day of meetings, a joint opening session was held, comprising welcoming remarks by Mr. Alexander Trepelkov, Director, FfDO, UN-DESA, Mr. Roland von Frankenhorst, Head of Sector Project, ITC, and Mr. Wolfgang Lasars, Director, International Tax Section, Federal Ministry of Finance, Germany, followed by a presentation on the UN Capacity Development Programme in International Tax Cooperation and the joint UN-ITC project, which was delivered by FfDO staff, Ms. Dominika Halka and Mr. Harry Tonino. Subsequently, the discussion was held in parallel sessions dealing respectively with tax treaty negotiation and tax treaty administration.

The group discussion on tax treaty negotiation issues started with a session on "Why Negotiate Tax Treaties", followed by sessions on "Designing a Developing Country Treaty Model" and "Preparing for Treaty Negotiation". In parallel, the group discussion on tax treaty administration issues started with an "Overview of Major Issues", followed by sessions on "Taxation of Non-residents", "Persons Qualifying for

the Benefits of Tax Treaties", and "Taxation of Residents on Foreign Source Income". At the end of the first day, participants reconvened in a joint session for a group discussion on "Sharing Regional Experiences and Perspectives".

On the second day, discussions continued in parallel sessions. The group discussion on tax treaty negotiation issues was organized in three sessions on "How to Conduct Tax Treaty Negotiation", "Post-Negotiation Activities" and "Analysis of Existing Background/Training Resources". In parallel, the group discussion on tax treaty administration issues covered "Taxation of Non-residents on Business Profits", "Taxation of Non-residents Service Providers", and "Investment Income and Capital Gains". Subsequently, the participants reconvened together for two joint sessions on sharing experiences on "The Relationship between Domestic Tax Legislation and Tax Treaties" and "The Improper Use of Tax Treaties, Tax Avoidance and Tax Evasion". The meeting concluded with brief closing remarks by Mr. Alexander Trepelkov, Director, FfDO, UN-DESA.

All presentations and other relevant materials are available at FfDO website at: http://www.un.org/esa/ffd/tax/2013CBTTNA/presentations.htm.

Summary of Discussion and Conclusions

Parallel Sessions on Tax Treaty Negotiation

Session on "Why Negotiate Tax Treaties"

Mr. Armando Lara Yaffar, Chairperson of the UN Committee chaired the session on "Why Negotiate Tax Treaties". Ms. Ariane Pickering, Former Chief Tax Treaty Negotiator, Australian Department of the Treasury was the lead discussant.

Ms. Pickering began by pointing out that governments enter into tax treaties for a variety of reasons, mostly related to economic considerations. The main economic reasons are usually to facilitate inbound and outbound trade and investment and to prevent tax avoidance and fiscal evasion. Double tax treaties facilitate inbound and outbound trade and investment by: (1) removing or reducing double taxation; (2) removing tax discrimination; (3) reducing excessive taxation; (4) providing certainty with respect to taxation; (5) simplifying tax compliance and administration, often by exempting certain income from taxation; and (6) providing for tax sparing. Treaties help prevent tax avoidance and fiscal evasion by providing for better exchange of tax information and assistance in collection of taxes, as well as minimizing tax arbitrage.

Governments often also have non-economic reasons to enter into tax treaties. These include fulfilling international obligations and expectations. For instance, countries, which take part in regional economic agreements such as European Union (EU) and Association of Southeast Asian Nations (ASEAN) or are members of international organizations such as the OECD are expected to have treaties with each other. Countries also respond to political pressures. They enter into treaties in order to show willingness to conform to international tax standards and/or to foster diplomatic relations with another country. Developing countries often enter into treaties in response to political pressure from another country.

From the perspective of developing countries, facilitating outbound investment through double tax treaties is not a high priority. The main focus for these countries is on attracting inbound investment, especially foreign direct investment (FDI), as well as inbound supply of skills and technology. Key factors in attracting inbound investment include relief from double taxation. Even though most countries unilaterally relieve source/residence double taxation, treaties are still useful for confirming such relief. They do so by providing rules for resolving residence/residence double taxation and source/source double taxation, as well as by providing arm's length standard for profit allocation in intra-entity and related party dealings. Treaties also include non-discrimination rules, remove excessive taxation, provide certainty, including through Mutual Agreement Procedure (MAP) and simplify tax compliance.

However, tax treaties alone are not sufficient to attract foreign investment. Countries must also have good infrastructure for investment, e.g. political and economic stability, robust regulatory framework, suitable workforce, and reliable and effective administration. Developing countries are often pressured into having tax treaties by countries that want them to reduce source taxation and to improve exchange of tax information. Developing countries should keep in mind that treaties can have significant costs for revenue and for tax administration, however they can also have long-term benefits.

During the round-table discussion, several points were raised. A view was expressed that there was not enough thinking among developing countries on why enter into tax treaties. In some cases the decision to enter into tax treaties might have been made prematurely. Developing countries were often advised by development economists that theoretically they would attract investment if they entered into treaties. However, these countries were sometimes not in the right position to benefit from treaties and should not have entered into them.

The reasons for developing countries to enter into tax treaties with developed countries are different from reasons to enter into treaties with other developing countries. Developing countries should enter into treaties with developed countries if they want to attract investment, and with neighbouring developing

countries if they want good regional relations. A country needs to be clear on what problem a given treaty is going to resolve and based on this consideration prioritize its treaty partners. Developing countries may be naturally more inclined to negotiate with each other since they have the same system, the same fears, etc. They should overcome that and make their decisions based on their policy priorities. Regional considerations were also raised. Regional economic communities would want a full set of treaties between its members in order to ensure free flow of investment. Southern African Development Community (SADC) is an example.

There is no effective methodology for accurately assessing the cost and benefit of double tax treaties. When trying to perform a cost-benefit analysis for a particular treaty, it is important to look not only at the history but also into the future and assess potential for long-term benefit. There are also risks to consider. Sometimes a treaty may "go wrong" and not bring the expected inbound investment, for instance in cases when other components needed to attract the investment, as mentioned above, are not in place.

Country experts shared their experiences on how it was decided in their countries whether to negotiate tax treaty with a particular partner. Several countries emphasized economic reasons, namely attracting FDI. One country would try to assess what tax problems that treaty would overcome and how, what would be the fiscal cost of the treaty and its risks to the tax base and what would be the long-term benefit of the tax treaty. Another country would decide on tax treaties with the view of supporting trade liberalization in the region. It would prioritize trade relationship and use tax treaties to support it. One country's objective, in addition to attracting inbound FDI, was to attract technical skills and to attack tax evasion and avoidance by non-residents. Other factors in deciding whether or not to have treaties, mentioned by countries were: short-term considerations by politicians, who were not keen on losing revenue, political pressures from other countries, regional pressures and considerations, diplomatic reasons, and pressures from private sector.

The relation between advanced tax rulings and tax treaties was also raised. Advance tax rulings are useful because they provide certainty to investors. However, in order to enter into advance tax ruling, a developing country would need domestic legislation to support it and capacity within its tax administration. Most countries would see advance tax rulings as part of the Mutual Agreement Procedure (MAP).

Session on "Designing a Developing Country Treaty Model"

Mr. Wolfgang Lasars, Director, International Tax Section, Federal Ministry of Finance, Germany and Member of the UN Committee chaired the session on "Designing a Developing Country Treaty Model". Ms. Lise-Lott Kana, Member of the UN Committee was the lead discussant.

Ms. Kana began by stating that once a country decided to negotiate treaties and set its objectives, next step was for it to decide on its model. Treaty negotiations usually start with an exchange of country models, which allows negotiators to know priorities of the other country.

When designing their model, developing countries would look at the United Nations Model Double Taxation Convention between Developed and Developing Countries (UN Model), OECD Model Tax Convention on Income and on Capital (OECD Model), regional models and existing treaties within their region. Usually, the main objective should be to strike a balance between protecting revenue and encouraging inbound investment. There is no empirical study on how to perform an accurate cost-benefit

analysis of treaties. When trying to estimate the revenue costs and potential FDI, it is advisable to keep in mind domestic economic factors, such as main sources of revenue, areas of anticipated future growth, etc. In practical terms, country statistics on how much and what kind of income was withheld from investors from foreign countries should be examined. It is also important to keep in mind domestic tax policy and law with the view that in case of inconsistency with treaties, generally treaties prevail.

A critical factor, when designing a treaty model is ability of tax administration to administer treaty provisions. Simple withholding tax might be the most appropriate anti-avoidance strategy for a developing country. Withholding taxes are easier to apply and collect than taxes that rely on information provided by the taxpayer, through filing of tax returns, and require determination of allowable deductions, etc. The model should also allow switching from simple anti-avoidance measures into more sophisticated ones when the administration is ready to handle those.

When designing their model, developing country needs to be clear on what its "bottom line" is. It is not possible to hide it since the other party would have normally studied all tax treaties of the partner when preparing for negotiation. If developing country has 10% withholding on interest in its previous treaties, it will be very difficult to include a rate higher than that in its future treaties. Each partner would try to negotiate a lower rate.

Language, in which treaty is negotiated is also important. English is the technical language of treaties, and treaties are usually negotiated in English but most non-English speaking countries will want an official version in their own language. It is usually not practical to have an interpreter at the negotiation due to their failure to impart full descriptions of arguments and sometimes their lack of technical expertise.

During the round-table discussion several points were raised. It was clarified that even developed countries didn't just follow the OECD Model. Both UN and OECD Models have provisions to choose from. In case of both Models, alternative provisions are included in the commentaries. Countries chose provisions from both models which best match their policy.

Importance of regional models was also emphasized. For instance, Southern Africa has its regional model. It was created by member states through discussion of their country models. In the course of this discussion, it was discovered that many provisions in national models were not really reflecting what these countries wanted but were rather leftovers from treaty partners' positions in prior negotiations. The SADC Model, of which 80-90% is agreed on by member states, greatly facilitates negotiations between member states and provides countries with a regional edge when negotiating with countries from outside the region. SADC Model is a combination of best practices and approaches by all member states. It includes provisions of both UN and OECD Models and puts forward the majority view, while minority views are entered as reservations. It differs from the UN and OECD Models in several respects, including by containing a provision on taxation of fees for technical services.

South-East Asia has the ASEAN Model, which was put together by taking most common treaty provisions in South-East Asia. However, in view of one of the experts, some countries in the region are not clear on

how provisions of this model operate. This, in view of that expert, illustrates that it is not enough to rely on regional models. Each country needs to have a policy framework first and then build its own model.

It was also emphasized that a country model should be updated. Countries should keep an open mind and change their model when circumstances change. A question was raised how often a model should be updated. A view was expressed that mere change in tax rates would not justify changing the model but significant changes in the economy would.

When designing their models, developing countries were advised not to deviate from conventional language in their models just in order to improve the drafting from their perception. Treaty partners would be suspicious of unfamiliar wording and would look for hidden tricks. It would also make it much more difficult when treaties needed to be interpreted by courts. If a model uses unconventional drafting, the backing of the commentary is lost. However, in some circumstances it might be necessary to depart from conventional language. The best way to decide on whether or not it is necessary is to read the commentary and to understand what the language of a provision is saying and what is going to be its outcome. If a country agrees with the outcome, it shouldn't change the language. If it wants a different outcome, it should change the language.

It was agreed that language of both UN and OECD Models was difficult even for native English speakers. Both models are particularly difficult for civil law countries but experts were of the view that even these countries still should follow their language.

One expert expressed an alternative view that it was better to design a country model first in country's own language, to ensure coherence with its domestic law and understanding of terms and then try to translate it into English relying on advice of lawyers.

Discussion also focused on potential inclusion by developing countries in their models of a provision for taxation of fees for technical services. Given that neither UN nor OECD Models include such provision, an idea was expressed that countries, which wanted to include it in their models, should look at models of other countries, which had done it. In many cases the only way to collect tax on these services is by withholding tax and the only way to do that is by including a provision on taxation of fees for technical services. One expert noted that the UN is currently considering options on how to deal with fees for technical services.

It was emphasized that finding a balance between collecting tax revenue and not applying excessive tax rates was critical in order not to "chase away" the services or causing a gross-up by foreign service providers and thus shifting the cost to local consumers. Countries may want to have a high rate in domestic law but lower it through a treaty in order to achieve this balance. Also, there are many things to consider when thinking about introducing a withholding tax of this nature, including: (1) should it be in respect of only IT services or all services in your country; (2) could it be an interim collection system, which is there to enhance compliance (e.g., the source country will withhold, but if the taxpayers disclose their accounts,

then the normal domestic rate based on net profits might apply); (3) or should it be a final withholding on gross? Also, if you want to offer a temporary exclusion for tax on fees for technical services, it may make more sense to put zero rate in domestic law and keep rate of for instance 5% in the treaty to allow for future changes to domestic law.

Country experts shared their experiences on their country models. Most countries have their own models based either on the UN or OECD Models or a combination of both. These models often include additional provisions, not included in the UN or OECD Models, mostly related to taxation of fees for technical services. In many cases, the main policy objective behind these models is attracting FDI and protection of own tax base. Some countries follow more specific economic objectives. One country had two objectives when developing its own model, namely facilitating outward investment within the region and attracting inward investment from the OECD countries. Some countries do not have any fixed model and might use different ones depending on treaty partner. When negotiating with a country in the region, countries in Southern Africa often rely on the regional SADC Model, which greatly facilitates negotiation.

One developed country expert also shared an experience that when his country sent its model to a developing country partner, the partner sometimes would not have its own model and would use the developed country model as basis and would make changes to it. Also, some countries have two models, one more source-based and the other one more residence-based and use them depending on what country they are negotiating with.

Session on "Preparing for Tax Treaty Negotiation"

Mr. Armando Lara Yaffar, Chairperson of the UN Committee chaired the session on "Preparing for Tax Treaty Negotiation". Mr. Odd Hengsle, Former Director General, Tax Treaties and International Tax Affairs, Norway was the lead discussant.

At the outset, Mr. Hengsle emphasized the importance of preparation, without which, in his view, it was not possible to achieve the desired result during negotiation. The first step in preparation for every negotiation is getting authority to negotiate regardless whether the request is initiated by you or another country. Usually, such authority would be obtained from the Ministry of Finance but it varies from country to country. There might be various reasons why Ministry of Finance or Ministry of Foreign Affairs would not want to negotiate with a specific country, including political sensitivities. If request is coming from another country, a negotiator should first evaluate the request and decide if this country should be given priority and advise the Ministry accordingly. Next step should be consulting with business, industries and relevant Ministries and Agencies to identify reasons for negotiation, which could be economic or political. In many instances the industry, which is often the party asking for a treaty, would give good indication of what problems need to be addressed.

Then, logistical arrangements need to be made. Decision needs to be made on how many members should be on the team. The number will probably be higher if negotiation is taking place locally and no travel is involved. In such case, it is wise to include a few juniors for training. It needs to be decided which persons would take part in negotiation; in which country the negotiation will take place; in which language the negotiation will be carried out and if necessary, who will provide interpretation. The country, in which the negotiation takes place, will need to find suitable meeting rooms with adequate equipment. The negotiating team which is going to travel needs to get permission to travel and arrange its travel.

As a next step, a technical briefing of the team should be prepared. Responsibilities and tasks would be allocated to different people with specific deadlines. Roles of each member of the team need to be clearly defined. The position of a chief negotiator would usually be filled by a senior official with experience in negotiation, knowledge of domestic legislation and authority to make decisions and put forward and accept proposals and counter proposals. Even if he/she has to take a proposal for approval afterwards, he/she should be able to give an indication to the counter party during negotiation of what is possible. Not all presentations during the negotiation have to be delivered by the chief negotiator. They can be distributed between different members of the team. For instance someone can give presentation on a specific aspect of domestic legislation. At least one person on the team should take thorough notes throughout the negotiation. Notes from the first round will be critical in preparing for the second round in recalling what issues are open and problematic. Also, when preparing for signature, notes will help recall why a special provision was agreed on and what are its implications. Notes are also critical to ensuring institutional memory in view of potential turnover of staff. Note taking should not be done by junior staff alone as they would not have experience to identify more and less important issues and their implications. One person on the team should be tasked with observing reactions of counter team and following what is happening on the other side.

Next step is preparing a model (a general one or one prepared for this negotiation). Many countries send their general draft model, without any changes, regardless of what country they are negotiating with. Sometimes countries would prepare a specific model for each negotiation, taking into account for instance inputs received from industry or from the ministries. Some countries have some non-negotiable provisions in their treaties, for instance relating to exchange of information. In such cases they should consider presenting them as such to the other country. Also, it is important to prepare alternative proposals for provisions for which the team expects that its original proposals would not easily be accepted. This would be based on experience in past negotiations. These alternatives don't need to be revealed to the counter party if original proposals are accepted.

The negotiation team needs to know their country's own model, which is being used for negotiation, including understanding of how articles interact with each other. They need to know why they have certain articles and be able to explain to the other party what they are trying to achieve with specific provisions. All members of the team should have this knowledge. They should also know their internal legislation and how it interacts with treaty provisions in order to be able to take care of their own needs but also to be able to explain to the other party why they need a special provision. It is also advisable to prepare a short explanation of country's own tax system. It could focus on some specificities, the team would like to explain. The team should send their model and the short explanation of their tax system to the other country. At the same time they should request a similar model and explanation of the tax system from that country. A questionnaire could also be useful to determine what is the situation without tax treaty and what would be the situation with a tax treaty. When these are received, the team can start preparing a comparison of respective models (it is good to use colours) in order to see where the

main issues of disagreement are and to determine which are more or less important. The team can then concentrate its efforts on important issues and finding suitable solutions. If it is important, they may need to take it to authority for approval. All issues need to be identified since every word will need to be agreed on in a treaty but negotiation may focus on important ones. Based on this analysis, the team may need to draft a compromise in preparation for the negotiation. By the same token, the team needs to learn the treaty partner's domestic legislation and how it interacts with treaty provisions. This would require research utilizing various available sources of information.

Next, the team needs to identify provisions in their own model, which deviate from provisions their country has agreed on in other treaties. If the team asks for a special provision, the partner will undoubtedly ask if they have this provision in all their treaties with other partners. The team needs to be able to answer this question. An explanation could be given that it was agreed on in old treaties, but now there is a new policy and government will no longer accept it. By the same token, the team needs to identify provisions in treaty partner's model, which deviate from provisions they have agreed on in other treaties. It is better to look at newer treaties and also to focus on treaties with countries which are comparable to your country or of direct interest/competition to you.

The team should also read about the other country's industries, economy, history and culture. It might be useful to talk to the Ministry of Foreign Affairs to learn about culture and customs in the other country.

During the round-table discussion, country experts focused on several issues. The first area of focus was the process of approvals for treaty negotiation. This process varies from country to country. In some cases, approval by the Ministry of Foreign Affairs is required. In other cases it is the prerogative of the Ministry of Finance. In some cases, the authority to negotiate would be given in a comprehensive manner through an approved negotiation programme, which is agreed on in advance by the relevant authorities, in others, in response to individual requests. In some cases, there are two different levels of approvals. First, a treaty negotiation programme is agreed on by the government several years in advance. Second, Ministry of Finance or Treasury needs to agree on content and policy framework of treaty to be negotiated in each individual case. It is useful to have treaty programme approved by government in advance in order to avoid the process being vulnerable to political influences. However, some flexibility is also needed in order to deal with urgent cases, for instance amending an old treaty, in which a big problem has been discovered.

The discussion focused also on whether or not a representative of the Ministry of Foreign Affairs should participate in treaty negotiation. One view was that usually such person would not be able to contribute to negotiation due to the highly technical nature of the negotiations. Another view was that in every agreement there were sensitive diplomatic questions or disputed issues, in which the Ministry of Foreign Affairs had primary responsibility. In such situations, representatives from the Ministry of Foreign Affairs would be in a better position to explain these issues. Ministry of Foreign Affairs may wish to participate in negotiation of three articles: country definitions, termination and entry into force. In order to facilitate negotiation of these articles, it may make sense to have a separate meeting between Ministries of Foreign Affairs of both countries. It may also be good to bring Ambassador to opening in order to upgrade the meeting and indicate that it is important. The Embassy may also be in better position to follow up on issues locally should such need arise.

It was also pointed out that another good way to prepare for negotiation was to study reservations and observations in the OECD Model in order to learn about the other country's positions. Observations and reservations in commentaries in the OECD Model are made by OECD members. A reservation may be

lodged by a country on the provisions of an article, saying that they are not going to follow that particular provision, but reservations are not permitted where the country wishes to follow an alternative provision that is included in the commentary. Observations are entered by the countries to indicate that they are not willing to follow an interpretation in the commentaries. The non-OECD economies can also enter positions on the articles and commentaries. In order to enter or revise a position, a non-member country would send an email to Mr. David Partington, Senior Advisor, Tax Treaties Unit, Centre for Tax Policy and Administration, OECD, who would assist them with drafting. Prior to each update of the OECD Model, Mr. Partington would also write to all countries having existing positions asking them to review their positions and revise if necessary. Next update will be in July 2014.

It was also clarified that the UN Model was different in that sense. While the OECD Model is officially adopted by the member countries with the clear indication that all members should adhere to this model convention and if a member country doesn't agree with some provision, it needs to enter reservation or observation, the UN Model is a product of 25 tax experts, who do not represent their governments. The United Nations ECOSOC only takes note of the UN Model and does not issue an official recommendation to member states to adhere to it. Therefore, it is not necessary for countries who do not agree with certain provisions to state their disagreement. Counties with different understanding can send their views to the Secretariat and these will be issued on the website.

Practices differed and views were divided regarding presenting the list of non-negotiable provisions to the treaty partner. Some experts were of the view that it could close the door on negotiation. Others felt that if a certain provision was truly a "deal breaker", sharing it upfront would prevent wasting time and money for travel, negotiation, etc. The key issue was to distinguish between a non-negotiable position and a preference. A point was also raised that it might be better to discuss such a list in person during a pre-negotiation meeting and to explain why certain provisions are non-negotiable rather than put it in writing.

Many country experts pointed out skills gaps in negotiating tax treaties as the main challenge of their countries. They were of the view that training programmes in negotiation skills, as well as a freely available paper describing in detail the process of preparing for negotiations would be useful tools to address this challenge. A paper could also be used by the negotiators to illustrate the process and what it requires to the Ministries and other policy makers, whose support is needed in order to create a proper negotiation environment. One of the experts pointed out that one of the ways to develop skills was to encourage staff to be as involved as possible in preparation for negotiations. Similarly, during negotiation, junior staff could be allowed to negotiate less important provisions of a treaty under supervision of senior staff.

Other challenges in tax treaty negotiation, which were mentioned during the discussion, included: not enough defined tax treaty policy, red tape in bureaucracy, administration not well equipped to monitor foreign transactions, especially e-transactions; tax policy lagging behind technical developments in the taxation of new and innovative financial instruments; insufficient capacity to monitor capital movement and handle transfer pricing issues and thus inability to tax these sufficiently; insufficient authority to negotiate treaties.

Most country experts were of the view that it was difficult to develop country's own model. In this context, a view was expressed that it was advisable not to start from scratch but rather begin with the UN Model, including the alternatives provided in commentaries with a view of developing a treaty with wording, which was familiar to all countries. Another option was to look at treaties of countries with similar economies to see how they handled the issues. Further possibility was to try to get support and commitment of a high-level

political figure to developing a model. This person could supplement work done by a technical person and be a driver of the process of approval. Another idea was to have workshops with politicians to explain what it was that they needed to approve. In practice, this resulted in better support from these politicians.

Interest was also expressed in materials relevant to taxation of e-commerce. In this connection, reference was made to the background reports included in the back of the OECD Model publication, which were also freely available on Google Box. Another idea was to look at the experience of other countries in this area as expressed in observations and reservations in the commentaries of the OECD Model and contact these countries for more information. In the OECD and UN Models, some conclusions on e-commerce are included in commentary on Article 5.

Session on "How to Conduct Tax Treaty Negotiations"

Mr. Armando Lara Yaffar, Chairperson of the UN Committee chaired the session on "How to Conduct Tax Treaty Negotiations". Mr. David Partington, Senior Advisor, Tax Treaties Unit, Centre for Tax Policy and Administration, OECD was the lead discussant.

At the outset, Mr. Partington stated that a key objective of treaty negotiation should be to achieve a good treaty that met the interests of each side as far as possible and was acceptable in both states. If it is a very one sided treaty, application problems may be encountered in the future. The treaty also needs to work well in practice, stand the test of time, be effective and efficient and not create undue compliance burdens. It should also improve the relationship between the parties.

Tax treaty negotiations involve convergence of positions, thus it is important to analyze and understand the needs of both sides. It does require disclosure of information, which needs to be done in a careful way in order not to inadvertently reveal sensitive information (such as a bottom line). Tax treaties should also be negotiated in good faith and honoured in that spirit.

Reaching a good agreement is usually dependent on research, planning, preparation, the conduct of the negotiations and the management of the process. He stressed the importance of good preparation, particularly if the team was not very experienced. It is important that negotiators know not only what they want but also how they are going to secure their position. The team should think about the strategy and leverage that they are going to use to achieve this. Compromises will need to be made by both sides, so it is important to identify what is important, where movement is possible, what concessions may need to be given, the value of what is sought and the cost of any concessions. The process requires a lot of research and preparation both in formulating the boundaries of your positions and in preparing the arguments to sell positions. It is wise to also be prepared to respond to the arguments of the other side because the process does involve selling and bargaining.

Good communication is another important component of the negotiation process. Negotiators need to be clear when presenting arguments in order to ensure that the other side understands what is being communicated. This also involves listening to the other side and watching their body language. Taking good notes will be valuable for understanding the positions and avoiding misunderstandings.

The way negotiators carry themselves during the negotiations is a matter of style and experience. However, it is advisable to put egos aside and be open to the other side's ideas. It is important to create a relationship with the other party based on trust, respect, credibility and goodwill because both teams need to work

together to bridge the differences in their positions. It is not advisable to be arrogant and to upset the other side, because this will create a barrier to reaching an agreement. If the other side is arrogant or aggressive, it is advisable not to get upset and respond in the same manner. He suggested that when faced with this behaviour one should remain passive and not show that he/she is being affected by it. It is always advisable to try to remain relaxed, hold your ground, be polite and continue to pursue your negotiation strategy.

When conducting negotiations it is useful, but not essential, to have your own model as the basis for the negotiation. If the other side agrees to use your model it is better but normally both models would be on the table. In practice it varies. Sometimes one model is used and the suggestions of the other party are inserted in brackets. Sometimes countries merge their models.

Practice also varies in terms of where to start the negotiation and how to proceed through the provisions of the treaty, including what should be discussed in the first and the second rounds. One option is to have a preliminary meeting of about 2 hours in the lead-up to making a decision to negotiate the treaty to understand respective positions and identify any major policy differences, particularly potential issues that might prevent the conclusion of the agreement ("deal breakers"). The most common approach is to start at the beginning and work thought each article so as to formally agree uncontentious items and exchange views on areas where positions differ. This approach deals with items easily agreed upon and provides information and an overview of the significant items. Depending on the pace of the negotiations, the parties may return to some of these unresolved significant items for further discussion in the first round, but it is more likely that this will be done in the second round some months later. Another option is to start the negotiation with any exchange of views on the significant policy issues before commencing an article-by-article discussion that starts at the beginning.

Who leads the discussion on a particular issue is often decided in an "organic" way. There are no set rules and it depends on dynamics between the two teams. In practice sometimes the stronger team would lead, at other times both teams would be leading. It is often better for you if the other party leads the discussion when they are seeking a concession because you don't want to do their negotiation for them.

At the conclusion of a discussion, the outcome should be accurately summarized or read back for confirmation by the parties and recorded in a written working draft. This avoids misunderstandings. It is critical that the working draft accurately records the agreed outcomes. One way to do this is to project it onto a large screen which is visible to both teams. If a mistake is subsequently found, it should be discussed and corrected as soon as possible. It might also be advisable to initial the agreed text and to draw up an agreed minute after the negotiation round.

Square brackets are usually used to indicate unresolved text. Sometimes both State's positions are recorded within the square brackets, particularly where different rates or time thresholds are sought. It may be useful to indicate whose proposal is in brackets, possibly by including a country reference in superscript after the closing bracket. The team should coordinate the discussion of linked provisions. This may mean that the discussion of an item is delayed until the substantive provision is discussed. For example, the discussion of the definition of "international traffic" in Article 3 is often delayed until when Article 8 is discussed.

Unless the two provisions are practically identical, the process of discussing an item involves several steps. Normally one team would introduce the item, often starting at high level, by explaining what is important to that country and why. The differences between the models are often highlighted during these introductory exchanges, usually identifying their relative significance (policy, technical or drafting). It is wise to negotiate issues separately to keep the negotiations structured, focused and avoid misunderstandings.

After the introductory comments, the teams present arguments in support of their positions, pose questions and make counter arguments. Communicate clearly to ensure that your position is heard and understood. The use of examples on a white board or a flip chart can be very useful in this regard. It is important to listen carefully in order to understand responses. The answers may hold the key to resolving the issue. Be aware that the other team is responding not just to what you are saying but also your body language. Depending on the issue, it might be good not to use all arguments right away and hold some back for later. Anticipate their responses and be prepared to counter. Do not be put off if the other team does not accept your brilliant argument straight away. Their response may be linked to other issues. You should try to find out precisely what they are not accepting and why they are not accepting it. Make sure they understand your arguments but if no progress is being made, move on to other issues. Last, it is very important to close a deal before it is lost or before the other team changes their mind.

There are several common arguments that can be used, which fall under the following headings: (1) policy/logic; (2) precedent; (3) anti-abuse; (4) effectiveness; (5) revenue; and (6) firm policy.

The policy/logic argument plays on reason and sound policy and is often based on economic arguments, such as for instance economic efficiency. It can be based on mutual benefit (we will both benefit because …).

Precedent-based arguments have many strands. The argument could refer to the UN or OECD Models as internationally accepted standards to enhance credibility of a position. This argument may refer to other treaties to demonstrate credibility and wide acceptance (we got it in our last 6 treaties). Precedent-based argument may also refer to other treaties of the other country to highlight a potential competition concerns. For example, if a competitor country has a better rate, your businesses will be disadvantaged. If you have given certain concession (such as a lower withholding rate) to one country, it will be very difficult to avoid giving it to others.

Anti-abuse based arguments support provisions aimed at preventing abuse by taxpayers. Being abused by taxpayers is not in the interest of either country. It is good practice to use examples to illustrate a concern, including how the other side will be affected, because it avoids misunderstandings over the facts and focuses attention.

Another argument is that a provision is not effective. However, reference should be made to a problem rather than to people. For instance instead of saying "your provision doesn't work" it is advisable to say "this provision doesn't work" and then to use examples to illustrate. To use this argument effectively, it is important to understand what the parties are seeking to achieve.

Revenue-based arguments (we want the money) are also used and may be linked to economic, anti-avoidance or competition arguments. Finally, the firm policy argument can also be used. Some countries would have non-negotiable items. Negotiators have certain language to communicate how firm a certain position is. In some cases it may simply be part of signalling/bargaining strategy. Firm policy tester is to see the outcome of other negotiations. Also test it by coming back to it. If they say that a position is non-negotiable, ask them why.

When negotiating a tax treaty it is important to know the value of what you are trading in order to increase your bargaining power. Extract a high price for a valuable item. If it is apparent that the other team seeks a concession from you that you can give at little cost, then handle the matter carefully and exchange it for something that you consider is valuable. This is tied to how information is disclosed. Information should be disclosed carefully and wisely. Poor disclosure or signals can be harmful or confusing. It is important to maintain discipline within your team so that information is not disclosed that might prejudice your bargaining. There are possible ways to signal your intentions and indicate a path forward without committing before other parts of the deal are discussed.

It is good to eliminate the negative and accentuate the positive when you are selling your position. You should negotiate in good faith, but there is no obligation to disclose the weaknesses of your position. You don't need to negotiate for the other side. However, it is never advisable to lie as it would result in loss of reputation and trust. If you don't know the answer to something, don't make it up. It is not a sign of weakness and it is acceptable to go check and come back with an answer later.

At the conclusion of negotiations the text agreed by the negotiators is initialled and taken back to their respective countries for approval by Ministers and ultimately signature by the States' representatives. The signed agreement is then ratified under the laws of both states. After this has been completed the procedures for entry into force are followed to enable the agreement to apply under the laws of both States.

During the round table discussion several points were raised. Treaty negotiators are a very small group and form a close circle. If you spoil your reputation with one, by lying or saying things without the relevant knowledge, the others would know very quickly and may refuse to negotiate with you or make the negotiation process difficult by insisting on proof of all arguments.

One country expert brought up a challenge of moving away from concessions given in old treaties in view of competition argument. A view was expressed that it was best to say upfront during a negotiation that the country's policy has changed for this and that reason and it does not want to sign up to this anymore. It is important to prepare carefully before the negotiation on how this will be explained and what kind of language is going to be used. If you say "it will be difficult to change" the other side will be testing the waters. Another strategy is to negotiate with a country, for which not getting this particular concession is not going to be such an issue. This will set up a new precedent. Then you can come back and say: "there was a change in our policy as evident from recent negotiation". Another approach is to differentiate between treaty partners in different circumstances and explain the reasons. This is not always possible as sometimes the policy simply changes.

One country expert raised a question of how to react when the other party was making negative comments about your internal law. The view was expressed that it should be put aside by saying that this was not about the country's domestic law but about how both treaty partners were going to deal with issues in their relationship. On the other hand, if you have something special in your domestic law, for instance branch tax, that you want to maintain under the treaty or may raise controversial issues, you need to prepare your arguments when preparing for negotiation. You may also look at how other countries, which have it, dealt with it in their treaties.

Session on "Post-negotiation Activities"

Mr. Wolfgang Lasars, Director, International Tax Section, Federal Ministry of Finance, Germany and Member of the UN Committee chaired the session on "Post-negotiation Activities". Mr. Armando Lara Yaffar, Member of the UN Committee was the lead discussant.

Mr. Lara Yaffar began by bringing up an example of a treaty, which came into force more than 5 years after signing. Such delays could create diplomatic consequences, for instance under pressure from private sector. In order to prevent such delays, countries should know exactly what steps are required after negotiation in order for a treaty to enter into force and try to achieve it as soon as possible.

A treaty needs to state clearly the date of entry into force and this date should be agreed on, normally through an exchange of notes, and interpreted the same way by both Ministries of Foreign Affairs. At the end of negotiation, countries should explain to the other party their procedures for entry into force of a treaty. These procedures differ from country to country. For instance in some countries it might be required to send treaty to the Supreme Court.

The language of the treaty is very important. If more than one language is involved, it is necessary to specify which language prevails. Mistakes can be made in translation, which can create problems in interpretation. Some countries cannot put English as the official language. Even if negotiated in English, they have to have the treaty in their official language. Sometimes it is possible to agree that the text in one of the languages will be used in case of divergence in interpretation.

It is advisable to try to discuss the content of the treaty internally with tax administration or competent authority, which will be in charge of applying and interpreting the treaty. Different understanding can create problems for taxpayers and for the counter party. Some countries develop technical explanations for tax administration trying to explain the meaning of the articles. Others issue guidance to taxpayers on how to interpret treaty.

When there is a substantial change in domestic legislation, for instance a new tax is introduced, the country has an obligation to notify the other party and sometimes even to get their agreement on how the treaty deals with that tax or the issue addressed by the change in legislation.

During the round-table discussion, country experts shared experiences from their countries regarding procedures of obtaining an approval of the treaty after initialling. These vary from country to country in terms of which Ministries needed to approve it and in what order, who has authority to sign (president, minister, diplomatic missions), whether and at what stage the treaty needs to be presented to Parliament. It was agreed that it was very important to be very clear about this procedure. As an important final step, publishing the agreement in the country's government gazette or on an official website was mentioned. In this connection, it was also advised to ask the treaty partner for a copy of their gazette including the treaty.

On the issue of obtaining necessary approvals for entry into force, it was suggested that it could be facilitated by consulting with relevant Ministries at the stage of developing of the model and getting their initial consent. On the other hand, a view was expressed that it was better to consult only with those who actually had to approve it in order to avoid unnecessary questions and delays.

It is important to consult and agree with the other country when the treaty can be made public. Industry usually knows that a treaty is being negotiated and is eager to know what is in the treaty. In some countries, a treaty cannot be disclosed before it is approved by the Congress/Parliament. In this case, the other country should always consult with that country before publicly releasing the contents of the treaty. It is important to have a firm policy and clearly communicate it to the other party. In some rare cases, there are private sector representatives on the other team, which makes the agreement between countries on when the treaty can be made public even more important.

The discussion also focused on how to deal with changes, which needed to be made to the treaty if mistakes, typos, wrong quotations were found. It was important to distinguish between changes, which needed to be made after initialling and those which needed to be made after signing. If changes needed to be made after initialling, a country would contact the counter part through diplomatic channels. If the changes were substantial, a new proposal needed to be made. Sometimes there would be another round of negotiations. It is more difficult to change the agreement after signing. Unless the change is merely a technical correction to which both parties agree, an amending protocol will be required and it would usually depend on the internal procedure but as it forms part of the treaty, it would need to be made public to Parliament.

It was important to distinguish between two dates: entry into force and the start of application of the provisions. When the instruments of ratification are exchanged the agreement enters into force, normally during the year. The agreement will be applied normally on 1 January of the following year. However, an agreement might be applicable retroactively. Two diplomatic possibilities for entry into force article are: ratification clause or exchange of notes. It needs to be clarified with Ministry of Foreign Affairs which procedure should be applied according to constitution or legal practice.

Countries also have different practices regarding translation. All agreed however that it was important to check it. Translation can take long if the language is very difficult due to the technical content. In some countries translation is done by the Ministry of Finance and only reviewed by the Ministry of Foreign Affairs, in others it is done by the Ministry of Foreign Affairs. The other country normally will want to check your translation also. It might also help to send your model convention to translators. The UN Model is available in English and in the process of translation into all official UN languages (Arabic, Chinese, French, Spanish and Russian).

Mr. Lasars agreed to share, as a sample, a list of practical steps, which needed to be taken after initialling an agreement, which Germany uses (available at FfD website at: http://www.un.org/esa/ffd/tax/2013CBTTNA/presentations.htm).

Session on "Analysis of Existing Background/Training Resources"

Mr. Alexander Trepelkov, Director, FfDO, UN-DESA, chaired the session on "Analysis of Existing Background/Training Resources". Mr. David Partington, Senior Advisor, Tax Treaties Unit, Centre for Tax Policy and Administration, OECD was the lead discussant.

Mr. Partington started by describing the OECD's wider tax training programme, comprising of over 80 events per year. This programme is supported by five Tax Centres and partnership arrangements with various countries and organisations. It aims to provide good regional coverage for non-OECD economies and includes events on a wide range of topics tailored to the needs of each region. A large part of the programme relates to the OECD's core work and instruments including, double tax agreements, transfer pricing and exchange of information. The objective of the programme is to build capacity, often through dialogue, not forcing OECD instruments on countries but rather increasing understanding and promoting good policies and conventional application of treaties, transfer pricing and exchange of information practices.

Within the area of tax treaty technical assistance, which features 14-18 events per year with wide regional coverage, the primary events are on the application and interpretation of tax treaties. These are conducted on three levels: (1) introductory – covering most articles of a treaty and focused on awareness and interpretation; (2) special issues - focused on key treaty provisions, such as residence, the permanent establishment definition (PE), profit attribution, the taxation of personal services and investment income, etc.; and (3) advanced - focused on discussion of a smaller group of issues on more advanced level, such as for instance clarifications on interpretation of PE or beneficial ownership. All levels focus on practical aspects and involve a lot of case studies. The goal is to provide participants with the skills and knowledge to solve problems themselves by referring to OECD Commentaries and other resources. Other events focus on treaty policy and on practical negotiation of tax treaties.

The annual tax treaty meeting held in Paris each September is one of the OECD's flagship events regularly attended by treaty negotiators and experts from over 100 countries. Countries that have not been invited in the past, but would wish to attend, should contact Mr. Partington by e-mail (david.partington@oecd.org).

For training on tax treaty negotiations, the OECD conducts a practical negotiation workshop in most regions of the world every 2-4 years, depending on demand. This workshop allows participants to get first-hand experience of the negotiation of tax conventions and to learn about problems commonly experienced during the negotiation, application and interpretation of tax conventions. It is useful for understanding treaty policy matters because when you are negotiating, you must understand why you are taking positions and why the counter party is taking positions. The workshop is therefore especially useful for officials who will be involved in the negotiation of tax conventions but is also helpful for officials who will have to apply or interpret tax conventions as part of their work. The workshop was developed about 20 years ago for training treaty negotiators from the former Soviet republics. Today, most countries have had at least one of their treaty negotiators on the course.

The workshop primarily takes the form of a very realistic simulated negotiation of all the provisions of a bilateral convention with respect to taxes on income and on capital between two fictitious countries: Fredonia and Utopia. The negotiations are based on fictitious treaty models, recent treaties and descriptions of the tax legislation of the two countries. Utopia is a developed economy that seeks many OECD

Model provisions and Fredonia is a developing country that seeks many of the UN Model provisions. Participants are divided in six teams, representing either Utopia or Fredonia. They are given the fictitious models and legislation of the country. One instructor acts as the technical advisor for each team, however, participants are expected to head the actual negotiations of each provision and each participant is expected to head the discussion on two or three articles during the week. The simulated negotiation is supplemented by presentations by the instructors on tax treaty negotiation.

The programme starts each day with a 1.5 hour lecture on various topics related to treaty negotiation. Then, participants in teams of 3-5, meet with their instructors for two to three hours of preparation for the negotiation, which takes place in the afternoon. During the negotiation the instructors are in the room to give feedback but stand back to allow participants to conduct the negotiation. There is a short debriefing session at the end of day.

Participants, who enter this course should have a reasonable understanding of the provisions of tax treaties and are expected to have familiarized themselves with the simulated negotiation papers in advance of the workshop. Preparation for the simulated negotiation each day should focus on how to present and argue positions. This valuable time cannot be spent explaining how basic treaty provisions operate. The focus is mainly on how to negotiate. For that reason participants must be well prepared and have a reasonable understanding of the provisions of tax treaties and the Fredonia and Utopia positions. Assignments are issued for completion each night of the workshop. Participants get from this workshop what they put into it in the form of preparation and participation.

There are two versions of this course, advanced and basic. The basic version removes some issues so that participants can focus on developing negotiation skills rather than trying to understand obscure technical issues. It is possible to combine this course with a technical seminar or make it a part of an incremental programme. The course is available in English, French and Spanish. The negotiation workshop is highly rated but it is expensive to conduct because it requires one instructor for every 6 participants.

Another way to secure negotiation skills is through on-the-job training. Countries, which have an existing treaty programme can develop the skills of their staff by involving them in the preparation process, allowing them to observe negotiations, having them take notes and permitting them to negotiate easier provisions or articles.

Other sources of training include: books on negotiating, following treaty developments, taking course offered by organisations, such as the IBFD. For countries that have little experience negotiating tax treaties, a useful strategy would be to engage external consultants, usually retired treaty negotiators, to assist with setting up the negotiation unit, developing model, the negotiation strategy (which countries to start with), preparing the arguments and counter arguments. He/she can also be present in the negotiations.

During the round table discussion country experts shared their experiences on learning the treaty negotiation skills. Some participants attended negotiation courses offered by the OECD and IBFD. In this connection, one participant emphasized the importance of preparation for the negotiation seminar and expressed a view that it would be useful to combine/precede it with a technical course on treaty provisions.

Several participants also raised the issue of using an external consultant. In this connection, two main issues were raised: (1) how to choose a consultant; and (2) how to pay for the service. It was difficult for existing negotiators to be advisors because they have conflicting interests. An idea was mentioned to use the retired negotiators. In this connection it was suggested that the United Nations could develop a roster of available persons. The Secretariat explained that the United Nations could not officially issue

any specific roster but could maintain an internal one. The OECD on its part explained that they were already providing interested countries with the names and contact details of retired negotiators who were available to assist. In terms of funding, an idea was to find an aid agency, which can sponsor a consultant. A view was expressed that an aid agency could pay for a consultant to assist with developing a model and strategy. However, such agencies may not be prepared to fund consultants to participate in an actual treaty negotiation if they supported both countries.

Ideas were also exchanged regarding possibility of UN-OECD collaboration on holding jointly some of the practical negotiations workshops.

Parallel Sessions on Tax Treaty Administration

Session on "Overview of Major Issues"

Mr. Alexander Trepelkov, Director, FfDO, UN-DESA, chaired the session on "Overview of Major Issues". Prof. Hugh Ault, Boston College Law School, was the lead discussant.

Prof. Ault began the discussion by introducing the topic of the relationship between tax treaties and domestic tax law. He recalled the importance of the procedural steps that normally needed to be followed to give force to tax treaties. Then, he mentioned that the status of tax treaties might vary from country to country. In most cases, either they have the same status as domestic law, or they are superior to domestic law.

Next, country representatives were asked to describe how tax treaties were implemented in their respective countries and whether or not treaties took precedence over domestic law in case of conflict. Most of the experts reported that in their countries tax treaties needed to first be approved by the Congress/Parliament and only then, might be ratified by the President/Government. Only in a few countries, approval by the Congress/Parliament is not required. In most cases, tax treaties take precedence over domestic statutory law. In these countries, however, tax treaties are generally ranked below the Constitution.

Then, the discussion focused on the impact of tax treaties on the modalities of assessment and collection of taxes. A large majority of the represented countries use a self-assessment system. As a result, in some of these countries the taxpayers may apply directly the treaty benefits, which they are entitled to, on a self-assessment basis. However, a few of the countries have not yet implemented internal rules/procedures to allow taxpayers to apply directly the treaty benefits. In such cases, the taxpayers have to self-assess and pay taxes as if there were no tax treaty and, subsequently, file a request with the tax administration to claim the application of treaty benefits and obtain any due tax refund. In some other cases, internal rules/procedures are provided only to allow taxpayers to apply directly reduced withholding tax rates as granted under tax treaties.

Furthermore, the organizational aspects of allocating responsibility within the relevant authorities for tax treaty negotiation and administration were discussed. In this respect, it was pointed out that, in case different bodies/officials were responsible for tax treaty negotiation and administration, it was critical that they interacted on a regular basis to effectively understand the respective problems, as encountered in dealing with tax treaties, and supported each other in addressing the relevant issues. Moreover, the importance of providing public guidance on the application of tax treaty provisions (e.g. in the forms of circulars, rulings, on-line informative tools etc.) was also emphasised.

In conclusion, it was advised that an expert paper be prepared on the "Overview of Major Issues" in tax treaty administration, which would be used as a capacity building tool for the benefit of developing countries. This paper should cover at the minimum the following points:

- Giving effect to the provisions of tax treaties
  - Interaction between tax treaties and domestic law - general aspects
  - Provisions of bilateral treaties concerning implementation issues
  - Implementation by general rules: legislative or administrative
  - Impact of tax treaties on the modalities of assessment and collection of taxes (self-assessment, assessment by the tax authorities, withholding)
  - Burden of proof and time limits with respect to claims of treaty benefits
- Organizational aspects of allocating responsibility to government officials for the administration of tax treaties
- Requirements to claim treaty benefits (including certifications from foreign tax authorities)
- Publication of guidance concerning the application of tax treaties and the use of forms

Session on "Taxation of Non-residents"

Mr. Mansor Hassan, Member of the UN Committee, chaired the session on "Taxation of Non-residents". Mr. Michael Lennard, Chief, International Tax Cooperation Section, FfDO, UN-DESA, was the lead discussant.

At the outset, Mr. Lennard highlighted the importance of recognizing what were the most significant stocks and flows that were relevant to country's development and who did those stocks and flows attach to, in order to understand to what extent non-residents were liable to pay taxes on them. Then, he stressed the importance of identifying what was the applicable law for the purpose of taxing non-residents, which involved looking both at domestic tax law and tax treaties. Moreover, the lead discussant referred to the issue of how to administer, in practice, the applicable law and, in this context, he pointed out how important it might be to have a dedicated intelligence unit to support an effective application of law provisions.

Next, the chair reiterated the importance of the intelligence aspect and referred to the case of the Surveillance Division established within the Inland Revenue Board of Malaysia. This Division is responsible for intelligence activities aimed at the acquisition of data and information about resident and non-resident taxpayers, including through exchange of information with other governmental agencies. Then, he also mentioned the exchange of information mechanisms under tax treaties and tax information exchange agreements (TIEAs).

Several country representatives emphasized the inherent difficulties that their administrations faced with regard to exchange of information. Spontaneous and automatic exchanges of information are considered useful tools in curbing international tax avoidance and evasion but are very costly procedures to implement, especially for developing countries. In order to be effective, these procedures require that information is exchanged in a way that makes it easily usable by the receiving administration. This may entail setting up appropriate IT infrastructures and establishing standard protocols to compile and process such information.

With regard to exchange of information under tax treaties and TIEAs, most of the country experts pointed out that developing countries generally received far more requests, mostly from developed treaty partners, than they sent. Due to limited resources, it is often a challenge for these countries to promptly respond to those requests. In this context, one expert reported on a recent practice adopted by his country, of proposing to treaty partners the inclusion of additional provisions in the Protocol to the treaty, aimed at further clarifying some practical aspects of exchange of information.

Furthermore, some country representatives noticed that, in many jurisdictions, bank secrecy and confidentiality laws still prevented, in practice, the disclosure of information by financial institutions to government authorities. This may represent an obstacle to effective exchange of information. In this respect, it was then recalled that both the UN and OECD Models now expressly provided that countries could not decline to supply information on grounds of domestic bank secrecy laws.

Then, country representatives were asked if, under their respective domestic tax laws, non-residents had to meet any specific requirements/formalities, which were meant to ensure that they would comply with tax obligations arising from activities and/or investment carried out therein. Most of the experts reported that in case a non-resident ran a business or otherwise earned income in their country, he or she had to register with the tax administration and apply for a Taxpayer Identification Number (TIN). In a few countries, however, there are no such requirements to fulfil, while in some other cases specific thresholds may apply, below which registration is not compulsory.

Moreover, the procedures to be followed by non-residents to claim treaty benefits were discussed. In general terms, non-resident taxpayers are normally required to provide the local tax administration with a certificate of residence attesting that they are a resident of the other treaty country. Typically, the burden of proof lies with the non-resident taxpayer to prove that he or she is entitled to treaty benefits.

Subsequently, country experts were asked if treaties concluded by their countries included provisions dealing with assistance in the collection of taxes. Most of them reported that their treaties did not comprise these provisions. Others pointed out that a few of their treaties provided assistance in the collection of taxes, even though in practice it was often difficult to fully comply with the relevant obligations, due to the existing domestic laws and/or circumstances.

The discussion then focused on the importance of anti-abuse provisions aimed at preventing the improper use of tax treaties. It was recalled that the recently updated Commentary to Article 1 of the UN Model provided a thorough analysis of the different approaches used by countries to address this issue, including specific and general anti-abuse rules found in domestic tax law and/or tax treaties and judicial doctrines that were part of the domestic law. Most of the country experts reported that in their domestic tax law and/or treaties they had general and/or specific anti-abuse provisions, but it was often challenging to effectively apply them in practice. Particularly, it was pointed out that it was normally very difficult to enforce anti-abuse rules aimed at disregarding artificial arrangements, which were entered into only for the purpose of getting tax benefits under a treaty. In fact, this requires that the tax administration has all the relevant information needed to find out about such arrangements, which generally is not the case. In this respect, the relevance of exchange of information mechanisms was emphasized once again.

In conclusion, it was advised that an expert paper be prepared on "Taxation of Non-residents", which may be used as a capacity building tool for the benefit of developing countries. This paper should cover at the minimum the following points:

- Ensuring compliance with domestic law by non-residents
  - Taxpayer identification numbers
  - Registration requirements for non-residents
  - Appointment of local representatives or agents
- Impact of tax treaties
  - Procedures for claiming treaty benefits under various methods of assessment and collection
  - Information gathering
  - Assistance in collection
  - Non-discrimination
  - Anti-avoidance rules
  - Time limits
  - Burden of proof

Session on "Persons Qualifying for the Benefits of Tax Treaties"

Prof. Hugh Ault, Boston College Law School, chaired the session on "Persons Qualifying for the Benefits of Tax Treaties". Ms. Joanna Wheeler, Senior Principal, IBFD was the lead discussant.

Ms. Wheeler introduced the main aspects of the requirements to qualify for the benefits of tax treaties, namely: (1) the issues relating to the identification of persons eligible to claim treaty benefits; (2) the definition of residence for treaty purposes, including the "liability to tax" requirement; (3) the applicability of treaty benefits to specific income (e.g. income channelled through conduit companies, income not beneficially owned by recipients, etc.); (4) the treaty entitlement of special types of entities, including

exempt entities (e.g. pension funds), partnerships, transparent/hybrid entities, trusts and trustees, collective investment vehicles (CIVs) and permanent establishments in triangular cases.

Subsequently, country representatives were asked which of the above-mentioned aspects were the most relevant and/or caused most problems when applying tax treaties. With regard to the identification of persons entitled to treaty benefits, several country experts pointed out that tax administrations generally encountered difficulties when dealing with the eligibility of foundations and/or other tax exempt entities, especially with regard to the requirement of "liability to tax". Similar problems were faced also when dealing with trusts and trustees. Then, reference was made to the issue of treaty entitlement of partnerships and transparent/hybrid entities, including cases involving legal/tax systems that did not contemplate/recognize this kind of entities.

Furthermore, it was mentioned that cases involving conduit structures generally entailed significant interpretative issues for the purpose of applying tax treaties. Particularly, the concept of "beneficial owner" is often difficult to interpret and apply, as well as "limitations on benefits" (LOB) provisions aimed at preventing treaty shopping. In this latter respect, it was also pointed out that, even though only a few of the treaties concluded by the represented countries currently comprised LOB clauses, treaty partners (especially developed countries) were increasingly asking for the inclusion of these provisions.

In conclusion, it was advised that an expert paper be prepared on "Persons Qualifying for the Benefits of Tax Treaties", which may be used as a capacity building tool for the benefit of developing countries. This paper should cover at the minimum the following points:

- Persons qualifying for treaty benefits
  - Types of persons (companies, individuals, associations, etc.)
  - Identification numbers and registration requirements
- Residence
  - Liability to tax
  - Tiebreaker provisions: individuals and other persons
  - LOB provisions
  - Treaty articles for which no residence is required
- The income for which treaty protection is claimed
  - The concept of income "derived by/paid to"
  - Beneficial ownership
  - Conduit structures
- Special cases
  - Exempt entities (pension funds)
  - Partnerships
  - Transparent/hybrid entities
  - Trusts and trustees

Due to the existing extensive literature on the definition of "beneficial ownership", the relevant main findings may be summarized and reference made to the most important scholarly contributions for further analysis.

Session on "Taxation of Residents on Foreign Source Income"

Mr. Mansor Hassan, Member of the UN Committee, chaired the session on "Taxation of Residents on Foreign Source Income". Prof. Hugh Ault, Boston College Law School was the lead discussant.

Prof. Ault began the discussion by introducing the topic of international double taxation and forms of relief. Traditionally, a distinction is made between juridical double taxation and economic double taxation. International juridical double taxation is generally defined as the imposition of comparable taxes by two tax jurisdictions on the same taxpayer with respect of the same taxable income or capital. On the other hand, international economic double taxation is normally described as the imposition of comparable taxes by two tax jurisdictions on different taxpayers with respect of the same taxable income.

Relief from international double taxation may be provided by way of domestic tax law or tax treaties. Generally, tax treaties limit the application of the relief to cases of juridical double taxation and provide for relief in two forms, namely: (1) the exemption method; and (2) the credit method. Under the exemption method, the residence country normally exempts the income derived from, or the capital situated in, the other country. The exemption may take one of two forms, namely: (i) a complete exclusion of the income or capital from the taxable base; or (ii) the recognition of the income or capital solely for determining the tax rate applicable to the remaining income or capital (so called "exemption with progression"). On the other hand, under the credit method, foreign taxes paid on foreign income or capital are typically creditable against domestic taxes on that income or capital.

Under domestic tax laws, relief is normally granted for both juridical and economical double taxation. Similarly to tax treaties, domestic tax law may exempt the foreign income or capital or, otherwise, provide a tax credit for the foreign taxes imposed on that income or capital. In addition to the tax credit for taxes imposed on the person claiming the credit (so called "direct credit"), an "indirect credit" may be granted in relation to dividends for the tax levied on the profits of the company, out of which the dividends have been paid (referred to as "underlying tax").

During the group discussion, it appeared that neither the exemption method nor the credit method was normally used by countries as the only method to provide double taxation relief. Depending on the specific features of the domestic tax law system, each method might be supplemented by elements of the other. Some countries that apply the exemption method, for instance, may use the credit method with respect to dividends, interest and royalties. Then, it was emphasized that it was important to always consider whether there were differences between double taxation relief provided under domestic tax law and the relief granted under tax treaties.

Some experts also illustrated the case of their countries, which applied a territorial tax system for companies (i.e. taxes were imposed only on domestic income) and exempted their foreign income accordingly, while they taxed resident individuals on their worldwide income and granted them a tax credit for the foreign taxes imposed on their foreign income. Then, several country representatives reported that in case the credit method was applied, their tax administrations generally required that the taxpayers proved that foreign taxes had been actually imposed on the foreign income or capital, in order to grant the relevant tax credit. Moreover, it was mentioned that several limitations might apply in determining the amount of the tax credit (e.g. per-country limitation, per-income limitation etc.).

Furthermore, the lead discussant pointed out the importance of implementing effective procedures to gather information about foreign income derived and assets owned by resident taxpayers, to prevent not reporting such income and assets by residents with the view of escaping taxation.

In conclusion, it was advised that an expert paper be prepared on "Taxation of Residents on Foreign Source Income", which may be used as a capacity building tool for the benefit of developing countries. This paper should cover at the minimum the following points:

- Elimination of international double taxation
  - Impact of tax treaties
  - Relationship between the relief provided under domestic tax law and the relief provided under tax treaties
- Exemption method
  - Full exemption
  - Exemption with progression
  - Procedural requirements
- Credit method
  - Procedural requirements
  - Proof of payment of foreign taxes
  - Tax credit limitations
- Information gathering about foreign income derived and assets owned by residents
- Anti-avoidance rules

Session on "Taxation of Non-residents on Business Profits"

Mr. Mansor Hassan, Member of the UN Committee, chaired the session on "Taxation of Non-residents on Business Profits". Prof. Jinyan Li, Osgoode Hall Law School, York University, was the lead discussant.

The group discussion started with an exchange of experiences on how tax administrations normally got to know about business profits earned by non-residents in their country. A critical role is generally played by the effective implementation of exchange of information mechanisms. In most cases, non-residents are required to register with the tax administration and/or get a license from local authorities in order to run a business therein. However, especially in case of small business operations, it may happen that non-residents fail to comply with these requirements. In such circumstances, information may be derived from other governmental agencies, like the immigration services and/or the customs administration. Also, in some countries all the payments to non-residents have to go through the central bank, which may be asked by the tax administration to provide the relevant information.

Moreover, the definition of PE was discussed and country representatives were asked which types of PE were most commonly encountered in practice and/or caused most problems when applying tax treaties. Several experts mentioned that, in addition to cases involving a fixed place of business, tax administrations in their countries typically dealt with cases regarding construction sites and agents. Treaty rules related to services, including the deemed services PE provision, are often dealt with by them as well. On the other hand, a large majority of the discussants reported that, in their experience, only a small number

of cases involved the special deeming rules regarding insurance enterprises (Article 5(6) of the UN Model) and stock agents (Article 5(5)(b) of the UN Model).

Incidentally, some country representatives expressed the wish for new treaty provisions to deal with businesses run through electronic means. According to the existing rules, in the absence of a physical presence in a specific country, typically the income derived by non-residents from business activities that they carried out in that country through electronic means (e.g. e-commerce) is not taxable therein. In view of these country experts, however, these income should be taxable in the source country.

Subsequently, the issue of attribution of profits to PE was discussed. Country representatives reported that normally the trading accounts of the PE were used to ascertain the profits attributable to it. In general, the arm's length principle applied under tax treaties. Accordingly, the PE was to be attributed the profits, which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it was a PE. To this end, some of the represented countries applied to PEs the transfer pricing rules that are applicable in case of transactions between associated enterprises. In several countries, however, limitations may apply with respect to the deductibility of expenses, especially for interest payments (including thin capitalization rules), and no deduction is granted for notional payments for internal dealings between the head office and the PE.

Several experts reported that treaties negotiated by their countries normally included in Article 7 the "limited force of attraction" principle found in the UN Model (i.e. the PE country may tax not only the profits attributable to the PE, but also the profits deriving from transactions effected directly by the head office in the PE country to the extent that such transactions were of the same or similar kind as those effected through the PE). In these countries, the limited force of attraction principle is also generally provided under the domestic tax law, thus making the treaty provision effective. In the case of one country, a "full force of attraction" principle applies in determining the profits taxable in the PE country (i.e. profits deriving from all the transactions carried out by the enterprise in the PE country may be taxed in that country, whether the transactions are attributable to the PE or not or whether the transactions are of the same or similar kind as those carried out by the PE or not).

In conclusion, it was advised that an expert paper be prepared on "Taxation of Non-residents on Business Profits", which may be used as a capacity building tool for the benefit of developing countries. This paper should cover at the minimum the following points:

- PE
  - Fixed place of business
  - Fixed base
  - Construction site
  - Agency PE
  - Other special deeming rules
    - Insurance, services PEs, other
- Taxation of profits attributable to a PE
  - Determination of profits attributable to a PE or fixed base
    - Transfer pricing
    - Deductibility of expenses, base erosion

    - Thin capitalization
    - Source rules
    - Non-discrimination
- Trading accounts, books and record
- Time limits and burden of proof

Session on "Taxation of Non-residents Service Providers"

Prof. Hugh Ault, Boston College Law School, chaired the session on "Taxation of Non-residents Service Providers". Ms. Ariane Pickering, Former Chief Treaty Negotiator, Australian Department of the Treasury, was the lead discussant.

Ms. Pickering briefly introduced the different treaty articles that might apply, depending on the relevant circumstances of each situation, with respect to the taxation of services provided by non-residents. These included: (1) Article 5 on PE, including the deemed services PE provision, and Article 7 on attribution of profits to PEs; (2) Article 8 on shipping, inland waterways transport and air transport operations; (3) Article 14 on independent personal services; (4) Article 15 on dependent personal services; (5) Article 16 on activities of directors and top-level managers; (6) Article 17 on activities exercised by artistes and sportspersons; (7) Article 19 on government services; and (8) Article 20 on students. Moreover, reference was made to other common treaty provisions that dealt with technical services (e.g. Article 12 on royalties).

During the group discussion, it was pointed out that the major challenges faced by tax administrations were: (1) to identify non-resident service providers (especially in case of small operations); and (2) to get information about the actual amount of payments received by them as a consideration for their activities. Even though, in many countries, non-residents are generally required to register with the local tax administration in order to carry out activities therein, it is very common that they fail to do so and/or to properly report the income derived from services provided in that country. Another problematic issue relates to the computation of time of presence or activities for the purposes of those treaty provisions that include specific time thresholds in order to allow for source country taxation.

Subsequently, country experts reported on how non-resident service providers were taxed in their jurisdictions. Depending on which treaty article applies in any specific situation, services may be taxable through different modalities. In some cases, the relevant income is taxable by assessment. In other cases, withholding taxes apply. Withholding taxes may be either final or provisional. In the latter case, the amount withheld has to be credited against the taxpayer's final tax liability and adjusted accordingly.

Generally, in case of a PE, the net income is taxable by assessment. In case of dependent personal services, the income is normally subject to non-final withholding taxes. Withholding taxes, either final or non-final, typically apply also to directors' fees and the income derived by artistes and sportspersons. On the

other hand, very different regimes apply to independent personal services. In some cases, the relevant net income is taxable by assessment, in other cases, withholding taxes, either final or non-final, apply.

Then, a large majority of represented countries pointed out that treaties concluded by their countries also included special provisions dealing with technical services. In this respect, it was also recalled that the UN Committee, at its eight session, which was held in Geneva on 15-19 October 2012, agreed that a new provision dealing with technical services would be included in the UN Model.

In conclusion, it was advised that an expert paper be prepared on "Taxation of Non-residents Service Providers", which may be used as a capacity building tool for the benefit of developing countries. This paper should cover at the minimum the following points:

- Independent services
  - Treaty rules dealing with independent services
  - Identification of non-resident service providers
  - Taxation by assessment or withholding
- Dependent services
  - Treaty rules dealing with dependent services
  - Definitional and identification issues
  - Use of withholding taxes at source
- Technical services
  - Special treaty provisions concerning fees for technical services
  - Definition of "technical services"
  - Application of withholding taxes
- Other services
  - Entertainers and sportspersons
  - Activities performed by directors and top-level managerial officials
  - Government service, students
  - International shipping and air transport

Session on "Investment Income and Capital Gains"

Mr. Mansor Hassan, Member of the UN Committee, chaired the session on "Investment Income and Capital Gains". Prof. Jan de Goede, Senior Principal, IBFD, was the lead discussant.

Prof. de Goede began the discussion by introducing the legal framework of taxation of investment income and capital gains under tax treaties. In particular, he provided a brief overview of treaty articles dealing with income from immovable property, dividends, interest, royalties and capital gains. He also described the policy rationale underlying each of these articles. Then, he introduced the main definitional issues that might arise with respect to the different relevant categories of income covered under the above-mentioned articles and asked the country representatives which of these issues, in their experience, were the most relevant and/or caused most problems when applying tax treaties.

A large majority of country representatives reported that their tax administrations very often faced significant interpretative issues with respect to the definition of royalties. They also pointed out that most of the treaties concluded by their countries included in the definition of royalties the payments for the use of, or the right to use, industrial, commercial or scientific equipment. It was also mentioned that, in some

cases, domestic tax laws discriminated, in terms of applicable taxation, between different types of royalties (normally providing different withholding tax rates), while this was not the case under tax treaties.

Moreover, reference was made to some general interpretative issues related to the definition of dividends and interest, including the qualification of income deriving from hybrid financial instruments, even though this issue appeared to be still not very common in the represented countries. Also, a couple of country experts mentioned very specific cases faced recently by tax administrations in their countries. One country expert referred to the difficulties that might arise, in case of sales of shares, as to whether or not reserves for undistributed profits might be disregarded for the purposes of the calculation of potential capital gains and considered as dividends. Another country representative mentioned the issue of non-arm's-length payments of interest on loans granted by a parent company to its subsidiary, which involved reclassifying the non-arm's length portion of the payments as dividends.

Subsequently, it was reported that treaties concluded by the represented countries often included the UN Model-based provisions dealing with capital gains from the alienation of shares in property-rich companies (Article 13(4) of the UN Model) and from the alienation of substantial participations (Article 13(5) of the UN Model).

Furthermore, the modalities of levying taxes over investment income and capital gains were discussed, both, in cases where there was a cash flow from the source country and in cases where there was no such cash flow (e.g. sales of shares in resident companies by non-resident sellers to non-resident buyers, and rentals of immovable property in the source country by non-resident owners to non-resident tenants). In general, most of the represented countries tax dividends, interest and royalties by way of withholding taxes on gross amounts, while income from immovable property and capital gains are normally taxable by assessment. However, several different variations in the way of levying taxes on the above-mentioned income may apply. For instance, in cases where withholding taxes apply on gross income, an option can be granted to the taxpayers to file a tax return, so that they may claim the deductibility of any relevant expenses.

Finally, the lead discussant recalled the main requirements to qualify for treaty benefits, including the "beneficial ownership" requirement provided under the treaty articles dealing with dividends, interest and royalties. Also, reference was made to anti-abuse rules in general, as provided under domestic tax laws and/or tax treaties, and to LOB clauses.

In conclusion, it was advised that an expert paper be prepared on "Investment Income and Capital Gains", which may be used as a capacity building tool for the benefit of developing countries. This paper should cover at the minimum the following points:

- Taxation of investment income and capital gains
  - The different categories of income: dividends, interest, royalties, income from immovable property and capital gains

  - Treatment under tax treaties and relationship with rules under domestic tax law
  - Qualification for treaty benefits (including residence and beneficial ownership requirement for dividends, interest and royalties)
  - Definitional issues
- Information and enforcement issues
- Anti-abuse provisions

In dealing with the definitional issues, special regard should be given to the definition of royalties. Also, as it appeared that, at present, only a limited number of definitional issues faced by developing countries involved hybrid financial instruments, a brief introduction to this topic might suffice.

Joint Sessions

Session on "Sharing Regional Experiences and Perspectives"

Mr. Alexander Trepelkov, Director, FfDO, UN-DESA, chaired the session on "Sharing Regional Experiences and Perspectives". The session featured three presentations by representatives of regional organizations of national tax administrations.

Mr. Miguel Pecho, Director of Tax Studies and Research, CIAT, provided a brief overview of CIAT activities in the area of international taxation within the Latin American and Caribbean region. According to the speaker, topics of major interest for NTAs of CIAT member countries are: (1) negotiation and administration of double tax treaties; (2) control of transfer pricing manipulation; and (3) cooperation and mutual assistance between NTAs to tackle tax evasion. Mr. Pecho provided an overview of the double tax treaty network in the region, including statistics on treaty partners, which were usually capital exporting countries. Then, he briefed on CIAT's activities in the area of transfer pricing and exchange of information.

Ms. Elizabeth Storbeck, Coordinator of the Working Group on Exchange of Information and Tax Treaties, ATAF, focused her presentation on exchange of information issues for African countries. In this connection, she provided a brief overview of history, methodology and activities of the ATAF Exchange of Information and Tax Treaties Working Group, which was tasked with monitoring ATAF members' activities regarding tax treaties and exchange of information. The speaker also covered briefly: (1) ATAF Technical Conference on Exchange of Information (Kampala, Uganda, April 2012); (2) ATAF Agreement on Mutual Assistance in Tax Matters; and (3) OECD/ATAF Practical Guide on Exchange of Information for Developing Countries. Ms. Storbeck concluded with an overview of international engagements and capacity building events undertaken by ATAF during 2012 and planned for 2013.

Mr. Mansor Hassan, Study Group on Asian Tax Administration and Research (SGATAR), and Member of the UN Committee, began his presentation by briefly reviewing the history and membership of SGATAR. Established as a study group for review and exchange of information on tax structure of countries in the Southeast Asia, SGATAR aims at providing an opportunity for members to get together annually and exchange information, ideas and experiences in the field of taxation. SGATAR is a loose regional grouping and has no formal organisation or permanent secretariat. Members take turn to host its Annual Meetings and provide for the secretariat needs. SGATAR is currently considering establishing a training secretariat, which would coordinate training activities for the benefit of its member countries. The speaker concluded by providing an overview of SGATAR activities including the ones planned for the near future.

Session on "Sharing Experiences on the Relationship between Domestic Tax Legislation and Tax Treaties"

Mr. Armando Lara Yaffar, Chairperson of the UN Committee, chaired the session entitled "Sharing Experiences on the Relationship between Domestic Tax Legislation and Tax Treaties". Prof. Hugh Ault, Boston College Law School, was the lead discussant.

At the outset, Prof. Ault proposed to focus on three subtopics: (1) the process of getting tax treaties into domestic law; (2) interpretation of tax treaties, including meaning of terms that are not defined in treaties; and (3) relation between dispute resolution mechanisms in the treaty and dispute resolution mechanism in domestic law.

The requirements for treaties to become part of the domestic law vary between countries. In some countries it happens automatically, but in others certain additional steps need to be taken. Also, in some cases implementing legislation is required for treaties to become part of the domestic law. Once a treaty becomes part of the domestic law, it is important to understand the relation between the treaty and the rest of the domestic law. In most countries represented at the meeting, tax treaties take precedence over domestic statutory law, but they are often ranked below the Constitution.

In few other countries, treaties are considered at the same level as domestic law in terms of sources of law. In such cases, the "last-in-time" rule applies in resolution of conflicts between treaties and domestic

law, by giving effect to whichever was adopted later. This may result in the so called "treaty override". Treaty override takes place when an inconsistent domestic law provision is enacted after the treaty has come into effect. Treaty override may have significant effects when newly enacted domestic law provisions substantially impact on the treaty allocation of taxing rights, for instance through changes to the rates of source withholding taxes, or through changes to the definition of a specific item of income, which result in a different classification and consequential tax treatment of that income.

In this connection, the Vienna Convention principle "*pacta sunt servanda*" was recalled, according to which every treaty in force was binding upon the parties to it and had to be performed by them in good faith. In this context, it is important to distinguish cases where a country deliberately overrides its treaty commitments from cases that may arise as a consequence of the interpretation of ambiguous treaty provisions. Then, it should be kept in mind that if a country is not satisfied with the application of a specific treaty, it may unilaterally terminate that treaty.

Furthermore, it was mentioned that possible conflicts with tax treaties may arise from the application of domestic anti-abuse rules. Some experts shared their experiences in dealing with such cases. One country representative, for instance, reported on a recent practice adopted by his country, of proposing to treaty partners the adoption of miscellaneous provisions, including a provision that allowed countries to apply their own domestic anti-abuse rules.

The discussion then focused on the application of tax treaties. In some countries, taxpayers may apply tax treaty provisions directly. Thus, for example, if the treaty provides for a lower withholding tax rate on a specific item of income, as compared to the domestic tax law, then the lower treaty rate is directly applicable. In other countries, the withholding tax is applied at the domestic rate and then the taxpayers can claim a tax refund upon presenting relevant documentation. However, it was pointed out that in some countries the procedures to claim such tax refund were not well defined and/or implemented. In the context of tax treaty application, it was also recalled that, in general, treaties did not establish taxing rights. Therefore, for instance in case of cross-border dividend payments, even though the relevant treaty allowed the source country to apply withholding taxes, these would not apply if those payments were exempt under the domestic tax law of the source country.

The discussion then moved to the second subtopic. Some treaty terms are not defined in the treaty. Moreover, a number of defined treaty terms in turn use terms that are not defined in the treaty (e.g. the term "interest" is defined as income from debt-claims of every kind, but the term "debt-claim" is generally not defined). In such cases, Article 3(2) helps to interpret the treaty as it provides that, unless the context otherwise requires, any term not defined shall have the meaning that it has under the law of the country applying the treaty (usually the source country).

In this context, several questions were posed. If the source country is applying its domestic law and concludes that it has taxing rights, then what is the impact on the residence country if the residence country thinks that this income is not taxable in the source country? In these circumstances, is the residence

country required to give double tax relief? Several experts stated that their countries encountered this problem. In one case, the double tax relief was granted based on the recognition that, in accordance with the other country's domestic tax law, it was the right interpretation of the treaty. In another case, the problem was solved through consultations with experts from the OECD and exchange of protocols with the treaty partner.

The last part of the discussion focused on two parallel systems for resolving tax treaty disputes: domestic litigation and MAP as set out in Article 25 of the treaty. Article 25 provides that in case a person considers that the actions of one or both treaty countries result or will result in him/her being taxed not in accordance with the treaty, he/she may present the case to the competent authority of the country of which he/she is a resident. The competent authority, if it is not itself able to arrive at a satisfactory solution, shall endeavour to resolve the case by MAP with the competent authority of the other country.

It is important to consider how the above-mentioned two separate and distinct methods of resolving disputes interrelate. In this context, several questions were posed. Does the taxpayer, who gets into MAP, have to give up his/her rights to litigate the issue under domestic law or can he/she pursue both instruments? And if yes, can he/she do it at the same time? If the two countries come to a mutual agreement, can the taxpayer then go back to the judicial procedure if he/she does not agree with the result of the MAP?

Country practices differ. In some cases the taxpayer may be allowed to initiate the MAP and simultaneously pursue domestic remedies, but the competent authorities may decide not to enter into talks until the domestic actions are finally determined. In other cases the competent authorities may enter into talks, but without settling an agreement unless and until the taxpayer agrees to withdraw domestic law actions. This generally ensures that there are no two different resolutions of the dispute, which might be contradictory.

In this connection, it is critical to consider how MAP may impact on the domestic statute of limitation provisions. In some cases, there is a suspension of the statute of limitation period in case MAP is started. In other cases, however, there is no such suspension and, thus, it may be critical that a time limit is set within which the MAP has to be concluded.

Finally, a situation was considered, in which a taxpayer first went through domestic litigation, got a decision, which he did not agree with, and then applied for MAP. Would the competent authority be required to follow the court decision? A view was expressed that, theoretically, even though a domestic court already decided in favour of the tax authority, a different conclusion could be reached during the MAP. In practice, however, it would be unlikely that the tax authority, which already "won" the case, would agree to MAP. One expert mentioned that in such case, her country's revenue authority would have a duty to present the conclusion reached by the court to the treaty partner and argue in favour of it.

Session on "Sharing Experiences on Improper Use of Tax Treaties, Tax Avoidance and Tax Evasion"

Mr. Armando Lara Yaffar, Chairperson of the UN Committee, chaired the session on "Sharing Experiences on Improper Use of Tax Treaties, Tax Avoidance and Tax Evasion". Professor Hugh Ault, Boston College Law School, was the lead discussant.

At the outset, Prof. Ault provided an overview of the different approaches used by countries to prevent and address the improper use of tax treaties, tax avoidance and tax evasion, including general

and specific legislative anti-abuse rules found in domestic law, judicial doctrines that were part of the domestic law, and general and specific anti-abuse rules found in tax treaties. He also recalled that the recently updated Commentary to Article 1 of the UN Model provided a comprehensive analysis of these different approaches.

Next, the lead discussant pointed out that general anti-abuse rules often proved to be more effective than the specific ones. In fact, given the more limited scope of application of the latter, it might be easier for the taxpayers to circumvent them. In addition, they leave less flexibility to courts in interpreting and applying them for the purposes of challenging abusive arrangements.

Subsequently, country experts shared their practical experiences in dealing with improper use of tax treaties. Several experts referred to examples involving arrangements by which persons, who were not entitled to treaty benefits, channelled their investment through other persons, who were entitled to such benefits, to indirectly access these benefits (so called "treaty shopping").

In this respect, it was mentioned that, in practice, different approaches were used to address such issues. For instance, reference was made to the application of domestic general anti-abuse provisions and/or judicial doctrines, which aimed at disregarding for tax purposes the above-mentioned arrangements when they were purely artificial (i.e. there was no substantial economic activity carried out at the level of the conduit entities).

Moreover, examples of specific anti-abuse rules that might be included in treaties were discussed, including provisions that denied treaty benefits to entities not owned, directly or indirectly, by residents of the country of which the entity was a resident, and provisions that granted treaty benefits in the source country only if the income in question was subject to tax in the country of residence.

With regard to cases where taxpayers established their tax residence in a specific country primarily to get tax treaty benefits, it was pointed out that making these benefits conditional upon requirements other than the mere residence (e.g. citizenship/nationality), which entailed a closer tie with the country, could effectively prevent/address such issues.

Furthermore, it was mentioned that it was possible to include in tax treaties anti-abuse rules that denied the benefits of specific treaty Articles that restricted source taxation (e.g. Articles 10, 11, 12), in case artificial transactions had been entered into for the main purpose of obtaining these benefits.

Then, the group discussion focused on analysis of other arrangements, which were commonly entered into in order to shift profits from one taxpayer to another for the primary purpose of getting tax benefits. It was recalled that profits could be shifted between associated enterprises when non arm's length prices were charged for the transfer of goods, services or intangible rights between them. Generally, domestic tax legislations encompassed rules that addressed these cases, in line with the general principles provided under Article 9 of both the UN and OECD Models.

Other common modalities used by taxpayers to obtain unintended treaty benefits were discussed as well, namely: (a) arrangements that modified the treaty classification of specific items of income; and (b)

transactions that sought to circumvent specific thresholds found in treaty provisions. Depending on the circumstances, such arrangements could be addressed through specific or general anti-abuse rules, either under domestic tax laws or treaties, or through judicial doctrines.

Finally, the group discussed the cases known as "international hiring-out of labour", where companies, which wished to hire foreign employees for a short period of time entered into special arrangements with non-resident intermediaries, who acted as the formal employer, so that the employees seemed to fulfil the conditions of Article 15, paragraph 2, and, as a result, to qualify for the relevant exemption from taxation in the source country (i.e. the country where the employment was exercised). In order to challenge such arrangements and ensure proper interpretation of Article 15, reference could be made to the guidance provided in the UN Commentary to this Article, as well as to any specific or general domestic anti-abuse rules and/or judicial doctrines that might apply in these cases.