The Platform for Collaboration on Tax

DISCUSSION DRAFT:
Toolkit on Tax Treaty Negotiations

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International Monetary Fund (IMF)
Organisation for Economic Co-operation and Development (OECD)
United Nations (UN)
World Bank Group (WBG)

This document has been prepared in the framework of the Platform for Collaboration on Tax (PCT) under the responsibility of the Secretariats and Staff of the four organizations. The work of the PCT Secretariat is generously supported by the Governments of Japan, Luxembourg, the Netherlands, Norway, Switzerland, and the United Kingdom. This draft should not be regarded as the officially endorsed views of those organizations, their member countries or the donors of the PCT Secretariat.

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Introduction

Context and purpose of the Toolkit

This document introduces the Toolkit on Tax Treaty Negotiation (the "Toolkit"), which has been prepared in the framework of the Platform for Collaboration on Tax (the "PCT") by the IMF, the OECD, the UN and the WBG (the "PCT Partners").

The Toolkit represents a joint effort to provide capacity-building support to developing countries on tax treaty negotiation, building on previous contributions and reducing duplication and inconsistencies.

The updated version of the UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries (the "UN Manual") is an excellent resource, and the Toolkit builds on it by providing tax officials who have little or no experience in tax treaty negotiation with the tools they need to implement some of the guidance in the UN Manual. It does so by building on Section II of the UN Manual, which sets out how to conduct a tax treaty negotiation in all its phases (preparation, conduct and follow-up), complementing it with a set of tools and resources.

The nature of the Toolkit is that it can be regularly updated with new tools, centralized and accessible, and be improved following feedback from users and experienced negotiators. Having a web-based product is the ideal way to do this.

Some of the tools and resources are already publicly available; however, they might be dispersed or difficult to find. The Toolkit will therefore help to promote and spread the use of those resources. In other cases, the proposed tools still need to be collected or developed with contributions and suggestions from experienced negotiators.

For instance, one of the tools proposed in this document is a shared calendar of training events on tax treaties. Having a centralized and accessible source of information about the courses, workshops and seminars on tax treaties organized by the PCT Partners would not only be useful for tax officials but would also contribute to achieving some of the expected outputs in the area of capacity development issues. Among other collective actions, the 2016 "Concept Note" (which describes the purpose and functions of the PCT) foresees: "(…) ensuring synergies and an effective division of labor among the major providers based on transparent information about who is doing what (…)".[1]

Following the structure of Section II of the UN Manual, the Toolkit contains extracts from the main ideas and guidance from the Manual, followed by links or references to additional information and related websites, templates, examples, audiovisual contents, checklists and other useful information and resources to implement the guidance in the UN Manual.

Many countries are currently reviewing their existing treaty network and treaty policy in light of a better understanding of revenue losses associated with treaty abuse, the recommendations resulting from the BEPS project, including the minimum standard to combat treaty shopping, and the 2017 updates of the OECD Model Tax Convention on Income and on Capital ("OECD Model") and of the UN Model Double Taxation Convention between Developed and Developing Countries ("UN Model"). This toolkit should help new treaty teams or team members to swiftly initiate that work.

[1] https://www.tax-platform.org/sites/pct/files/publications/104902-SECOND-REVISION-concept-note-platform-for-collaboration-on-tax.pdf.

This Toolkit does not establish any international policy standard. Rather, it is intended to provide capacity-building support to developing countries on tax treaty negotiation. Importantly, the supporting materials provided in this Toolkit are being cited for the general purpose of providing this capacity-building support to developing countries and are not being formally endorsed by the PCT, the four partner organizations, their respective managements, or the organizations' member countries, unless specifically indicated otherwise within the materials themselves.

Pictograms

: The boxes with this pictogram provide context and essential explanations.

: The boxes with this pictogram contain guidance or recommendations

: The boxes with this pictogram contain references to additional information, related websites, templates, examples and other useful tools and resources.

Toolkit on treaty policy, domestic model and treaty negotiations

+ A. Why negotiate tax treaties?

+ A.1. Purposes of tax treaties

Typically, tax treaties are negotiated with the objectives of encouraging cross-border trade, investment and the transfer of skills and technology (by preventing double taxation, prohibiting tax discrimination and providing more tax certainty and stability) and to enhance tax co-operation between countries in order to counteract international tax avoidance and evasion. A country may also negotiate a tax treaty to pursue political or diplomatic objectives: as an expression of willingness to conform with international tax standards or as a sign of close political and/or economic relationship between the parties. A country may also be asked to enter into a tax treaty for other non-tax reasons, such as a condition for obtaining economic assistance.

It is important, however, not to lose sight of the fact that tax treaties are essentially tax instruments. Any "non-tax" reasons for entering into a tax treaty must therefore be evaluated critically, as these non-tax reasons can result in pressure to enter into negotiations when there are no compelling tax policy reasons for doing so or where there are more important priorities for the negotiating team. Some of the objectives described above (such as increased administrative cooperation in order to counteract international tax avoidance and evasion) may be achieved without entering into a comprehensive tax treaty, e.g. through alternative international agreements or domestic measures (see subsection A.3). Countries will want to consider such alternatives before agreeing to negotiate a tax treaty and in considering whether existing treaties continue to serve their intended objectives.

Countries entering into tax treaty negotiations need a good understanding of the ways in which treaties operate and of the potential benefits and costs arising from treaties (see subsection A.2).

A country's decision to negotiate a tax treaty should be the based on an analysis of the relevant economic factors, a review of the tax regimes of both countries (with the primary objective of identifying risks of double taxation and non-taxation) and an analysis of the tax treaty model of the other country (if available) and of its recent tax treaties in order to identify the main elements of its tax treaty policy.

Further, a country's decision to negotiate a tax treaty should also be guided by an assessment of its available resources, including in terms of the availability and skills of current tax officials. Availability should be measured as the opportunity cost of using these resources to undertake other endeavours. Assessing current skills and knowledge is also vital as it would not be prudent to engage in treaty negotiations without the necessary technical expertise. Engagement of external experts should be considered where a country has low capacity and/or experience in tax treaty negotiation.

Actual risks of double taxation: A question that should always be considered before agreeing to enter into tax treaty negotiations with a country is whether there is a material risk of double taxation with that country, which is unlikely where a country levies little or no income tax. Countries should also consider whether there are elements of the other country's tax system that could increase the risk of non-taxation, such as tax advantages that are ring-fenced from the domestic economy. In developing countries, investments are often structured via investment hubs that tend to have low tax rates. Revenue losses from treaties with these low tax hubs can be substantial due to "treaty shopping" with foreign investors routing investments through a conduit entity in the hub, or domestic investors "round-tripping" their investments via the hub. These strategies are the reason for the recent addition of strong anti-treaty shopping rules in both the OECD and UN Models.

- See paragraphs 55 - 62 of the UN Manual
- See paragraphs 15.1 – 15.6 of the Introduction to the OECD Model: "Tax policy considerations that are relevant to the decision of whether to enter into a tax treaty or amend an existing treaty" here
- See paragraph 17.4 of the Introduction to the UN Model, on tax policy considerations to enter into a tax treaty
- Access the shared calendar for workshops, courses and seminars on tax treaties organized by the PCT Partners
- A pilot tax treaty database was launched in February 2016 by ICTD and covers around 500 treaties that low- and lower-middle income countries in sub-Saharan Africa and Asia have signed since 1970
- Find more information about BEPS Action 5 peer review and monitoring on harmful tax practices
- Find more information about BEPS Action 6 on prevention of tax treaty abuse
- Find more information about preventing the improper use of tax treaties in the Commentary on Article 1 of the OECD Model and the UN Model
- For recent analytical work investigating the costs and benefits of concluding tax treaties with investment hubs, see Beer and Loeprick (2018)
- Find the Knowledge Sharing Platform for Tax Administrations

+ A.2. Consideration of potential costs and benefits

A tax treaty is usually structured so as to include (a) general provisions and definitions, (b) substantive provisions on taxation (distributive rules) and elimination of double taxation, and (c) provisions on non-discrimination and international cooperation and assistance. The distributive rules will in most likelihood reduce the amount of tax that a source country can charge non-residents based on its domestic law (ignoring any behavioural changes effected by the treaty). That said, commitments on international cooperation may result in an increase in the amount of tax being collected, even though they may also require additional administrative resources.

Administrative measures are essential for a country to fulfil its international obligations deriving from a tax treaty. Generally, a treaty has to be implemented through domestic tax law and most treaty rules will be applied through the usual administrative processes required to assess and enforce income taxes (e.g. self-assessment, assessment, withholding, tax examination and administrative and judicial dispute resolution). However, the application of tax treaties may require the performance of additional administrative functions, for example in the application of reductions or refunds of withholding taxes, the resolution of treaty-related disputes through the mutual agreement procedure, the exchange of tax information and the assistance in the recovery of taxes. These administrative measures and the resources that they require will add to the resources required for the negotiation and updating of a country's tax treaties.

It is important to consider the potential costs and benefits before deciding to embark on tax treaty negotiations and in assessing whether existing treaties remain appropriate. In particular, countries would benefit from identifying existing treaties that cause substantial revenue losses and produce little increase in direct inward investment – and renegotiating them, or seeking to have their application modified through the MLI – rather than entering into new tax treaties.[2]

While the determination of a treaty's cost-benefit trade-off for a country is not straightforward, a range of options exist to try to measure some of these costs and benefits. Treaties are frequently primarily used as a tool to attract investment into developing economies (Zolt 2018, see toolbox)[3]. Challenges to measuring treaty effects may thus be similar to analysing other types of tax expenditures and could be informed by approaches summarized in the 2015 PCT toolkit "Tools for the assessment of tax incentives" (see toolbox). For income flows (dividends, interest and royalties) the theoretical impact on tax revenues can be captured relatively easily, comparing treaty withholding tax rates with the domestic rate (see in the toolbox for instance, McGauran (2013), Balabushko et al. (2017), and Janský and Šedivý (2018). This theoretical impact has analytical value even without taking into account the behavioural effects of higher withholding tax rates. For other aspects of treaty costs, including indirect costs of base erosion and profit shifting linked to treaties, taxpayer information can be analysed (Balabushko et al. 2017) and often administrative experience can at a minimum provide anecdotal evidence of aggressive tax planning strategies (and associated costs) that take advantage of specific treaties, although such an analysis would not take account of the effect of new treaty rules designed to address treaty shopping and treaty abuse.

The following are some of the most important issues that should feed into an analysis before deciding to negotiate a tax treaty or in assessing whether existing treaties remain appropriate. As will be seen, many of these issues may, depending on the circumstances, be seen as either a benefit or a cost (or both):

Impact on foreign direct investment: The evidence on whether tax treaties increase foreign direct investment is mixed[4] – however, an incremental benefit only arises if it leads to positive spillovers for local residents (e.g. increased employment and income that would not have occurred otherwise).

Loss of tax revenues: The restrictions that a tax treaty imposes on source taxation (e.g. of passive income, business profits and capital gains) may result in a direct loss when compared with the revenues that would be collected without the provisions of a tax treaty. Behavioural effects of a tax treaty also need to be considered. These include a potential increase of foreign investment and reduction of tax evasion resulting from treaty provisions allowing the exchange of tax information and the assistance in the recovery of taxes. At the same time, restrictions on source taxation can exacerbate tax avoidance. This is because changes in withholding tax rates, for instance, can affect the costs of shifting income abroad through debt financing or royalty payments, both being important elements of global profit shifting dynamics. However, some forms of source taxation are difficult to administer and are often borne by the resident payer of the income rather than by its foreign recipient.

Difficult to modify, replace or terminate: Many countries also find it difficult to terminate a tax treaty even though termination, unlike a modification or replacement, may be done unilaterally. On the one hand, this can restrict the effect of future domestic tax changes that a country may want to adopt. On the other hand, a stable treaty network provides more certainty to foreign investors (including protection against some forms of discriminatory taxation).

[2] Examples of countries that have renegotiated or cancelled tax treaties include Argentina in 2012, Rwanda in 2013, Mongolia in 2013, India in 2016, and Senegal in 2019.

[3] Where the residence State does not tax income on which the source State has reduced its taxation as a result of a tax treaty, tax revenue is not shifted between the source State and the residence State but between the source State and the taxpayer, resulting in economic effects much like a tax incentive. However, where treaty provisions have the effect of eliminating double taxation, they act to remove a tax obstacle to cross-border trade and investment and, unlike a domestic tax incentive, remove rather than create economic distortions.

[4] For a summary of the empirical discussion see, for instance Zolt (2018) reference in the toolbox. Difficulties in isolating treaty effects and the subordinated role of taxation in investor decision-making likely explain inconclusive empirical findings.

Integration with a country's domestic international tax policy: Where a country has a stable domestic tax regime, it is more likely to have an integrated and coherent treaty policy framework and a defensible model tax treaty, which is a prerequisite for negotiating more robust and consistent tax treaties. It follows that the prospect of significant changes to a country's domestic tax regime could suggest that a country should not negotiate tax treaties until those changes are complete given the heightened risks.

Administrative capacity to negotiate and administer tax treaties: A country should not agree to negotiate tax treaties until it has the necessary technical expertise, having first researched the terms upon which a potential treaty partner has negotiated tax treaties with other countries. Countries should also consider whether they have the capacity to administer tax treaties before agreeing to negotiate them. The proper negotiation and practical application of tax treaties may require substantial resources from a tax administration. That said, treaties' provisions on dispute resolution, exchange of information and assistance in collection will make it easier for tax administrations to apply their countries' laws to cross-border transactions.

- See paragraphs 55 - 62 of the UN Manual
- See paragraphs 15.1 – 15.6 of the Introduction to the OECD Model: "Tax policy considerations that are relevant to the decision of whether to enter into a tax treaty or amend an existing treaty" here
- Find some studies and papers on these matters:
  - Zolt (2018)
  - PCT Toolkit "Tools for the assessment of tax incentives"
  - McGauran (2013)
  - Balabushko et al. (2017)
  - Janský and Šedivý (2018)

+ A.3. Consideration of whether there are alternative ways to achieve the same policy objectives

In some cases, alternative instruments may be used instead of a tax treaty. For instance, where a main reason for wanting to conclude a tax treaty is to obtain administrative assistance from another country, such as the benefit of exchange of information or assistance in collection of taxes provisions, an alternative approach would be to use a tax information exchange agreement (TIEA) or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("MAAC"). This approach, however, requires that the other country signs and ratifies the MAAC (unless it has already done so) or be willing to conclude a TIEA rather than a tax treaty. It should also be noted that TIEAs do not allow for assistance in the collection of taxes and that many countries have reserved the right not to have the assistance in collection provisions of the MAAC apply to them. Also, neither TIEAs nor the MAAC allow tax administrations to consult each other to address cases of double taxation that are typically addressed through the mutual agreement procedure of tax treaties.

If one of the reasons for negotiating tax treaties is to address specific tax issues for shipping or airline enterprises, a more targeted approach would be to include the required tax provisions in an air transport or shipping agreement, as has been done by many countries.

Relieving many forms of double taxation may also be done without tax treaties. Most countries provide some level of relief from double taxation unilaterally. Many cases of residence-source juridical double taxation can therefore be eliminated through domestic provisions (ordinarily in the form of either the exemption or a credit method) which operate without the need for tax treaties. However, these domestic provisions do not cover all cases of double taxation. For instance, where an individual or company is a resident of two countries under their domestic laws, double taxation cannot be eliminated without some agreement between those countries. Also, the source rules of countries often differ, which means that a country's domestic rules for relieving residence-source double taxation will not apply where the other country takes the view, contrary to the first country, that an item of income has its source on its territory. More importantly, the domestic law of many countries does not allow for unilateral relief of cases of economic double taxation arising from a transfer pricing adjustment made in another country: even where domestic law allows such unilateral relief, it cannot require countries to consult in order to solve disagreements in such cases, which is what the mutual agreement procedure of most tax treaties requires.

If a country's ultimate objective for entering into tax treaties is to attract foreign direct investment, one could also argue that an alternative to treaties could be to adopt unilateral measures in domestic tax laws governing taxation and investment (e.g. investment/cost-based incentives; not harmful preferential tax regimes). On the one hand, measures in domestic law can be better tailored and targeted to a country's specific circumstances, thereby reducing redundancy and crowding out effects; also, these measures can be designed to be more transparent and easier to monitor, with an increasing number of countries regularly publishing tax expenditures and subject to peer reviews. On the other hand, such domestic tax incentives create economic distortions and risk promoting a "race to the bottom". In addition, many developing countries have been adversely affected by the adoption of ineffective and inefficient tax incentives (2015 PCT toolkit), as well as the inclusion of special tax regimes in concession agreements, in particular where the tax provisions of such agreements have stability clauses or have been made subject to binding investor-state dispute resolution mechanisms.

Consideration should also be given to whether a country's objective can be achieved through alternative instruments, taking into account their scope and limitations.

- Find more information about BEPS Action 5 peer review and monitoring
- Find the Model TIEA and related protocol together with a number of countries' agreements on exchange of information for tax purposes
- For recent analytical work investigating the impact of exchange of information in tax matters in reducing international tax evasion, see Beer, Coehlo and Leduc (2019)
- Find information about the Convention on Mutual Administrative Assistance in Tax Matters

B. Tax treaty policy framework and country's model tax treaty

B.1. Designing a tax treaty policy framework

The tax treaty policy framework should establish and explain the main policy outcomes that a country wishes to achieve when negotiating tax treaties ("to know what it wants"), including the identification of priority countries, the degree of flexibility that the negotiators may have and a minimum acceptable outcome in order to reach agreement.

The UN and the OECD Models are helpful since it is harder to negotiate provisions that are not based on one of those Models.

Some factors that should be taken into account include:

– international treaty norms reflected in the UN Model and the OECD Model

– commitments related to, or impacting, tax treaty provisions made as participants in regional groupings and international organizations;
– key aspects of the country's economy, including its main sources of revenue and areas of current or potential foreign investment;
– the domestic tax law and policy of the country and the way tax treaties will interact with that domestic tax law and policy; and
– the ability of the country's tax administration to implement its treaty obligations.

Therefore, the tax treaty policy framework should be agreed on a whole-of-government basis and decisions to depart from specific policy choices endorsed in the UN or the OECD Models should be, if possible, exceptional and always carefully reasoned.

In light of the above factors, a sensible starting position for the development of the tax treaty policy framework would be for a country to carefully consider all the provisions of the UN Model and the OECD Model (including the alternative provisions contained in its Commentary) and the interaction of those provisions with their own domestic and international tax policy, with a particular focus on defining a policy position on each of the following (with an inclination to protect source country taxing rights):

– Withholding tax rates for dividends, interest, royalties, technical service fees, and capital gains;
– A MAP-based tiebreaker for dual resident entities;
– A definition of permanent establishment ("PE"), which may include a services PE;
– A technical services fee article following Article 12A of the UN Model;
– A definition of royalties including payments for the use of industrial, commercial or scientific equipment;
– The right to comprehensively tax indirect transfers of immovable property; and
– A principal purpose test ("PPT"), with the consideration of the use of a limitation-on-benefits ("LOB") provision; and
– All the other BEPS tax treaty-related measures.

In applying this tax treaty policy framework when preparing for each negotiation, countries should ensure that they analyze at least the following points:

- The objectives of entering into the tax treaty, with confirmation that alternative instruments have been considered;
- The reasons for entering into a tax treaty with the specific treaty partner, including the current volume of cross-border trade and investment with the treaty partner;
- How the tax treaty is expected to increase the level of cross-border trade and investment with the treaty partner;
- An estimation of the potential revenue effect of the treaty for the country and
- Any other benefits or costs to the country that may result from the tax treaty.

► See paragraphs 63 - 76 of the UN Manual

► Find the 2017 OECD Model (PDF)

► Find the 2017 UN Model (PDF)

► Find information about commitments in the context of the Inclusive Framework on BEPS

► Find information about commitments in the context of the Global Forum on Transparency and Exchange of Information

- Find the 2020 PCT Toolkit on "Taxation of Offshore Indirect Transfers"

B.2. Designing a country's tax treaty model

The model treaty should reflect the choices made when developing the country's tax treaty policy framework and should take the form of a draft treaty showing the different provisions that the country would ideally want to include in its tax treaties.

Countries should, as far as possible and to the extent that this is consistent with their policy objectives, adopt the structure of the UN Model and the OECD Model and use the wording of provisions found in these models and their commentaries.

- See paragraphs 63 – 68 and 77- 79 of the UN Manual
- See Section III of the UN Manual that provides a summary of the various provisions of the UN and OECD Models and discusses possible alternatives
- For an example of a regional treaty model, find the ATAF model
- For an example of a country's tax treaty model, find the USA Model

C. Preparing for tax treaty negotiation

C.1. Obtaining authority to negotiate

In most countries, treaty negotiators require authorization from appropriate authorities to negotiate with another country. Sometimes a new authorization is required for each round of negotiations. Practice, however, varies among countries.

Regardless of the process for authorization, the ministry in charge of foreign affairs should be consulted before any decision is made to undertake negotiations with another country. However, the final decision whether to engage in treaty negotiations should rest with the ministry in charge of finance (or otherwise have its support if the making of that decision has been given to the tax administration), which has primary responsibility for fiscal policy matters, including tax policy.

- See paragraphs 80 – 84 of the UN Manual
- Find a Template Authorisation Request (Word)
- Find a checklist for pre-negotiation phase (PDF)

C.2. Contact and logistics

Efficient communications and a careful organization of a negotiation meeting is essential for the effectiveness of the event. It is important that the organizer ensures the access to a suitable venue, necessary equipment and materials, and ensures efficient time management.

Conducting negotiations through face to face meetings has proven the most efficient way of doing things. It would seem difficult to use video-conferencing or other tele-communication mechanisms when having a first discussion of the differences in the draft treaties submitted by each State or when addressing complex substantive issues. In general, as long as there remains a prospect of having face to face meetings in the near future, it would seem better to restrict the use of telecommunication to narrow specific issues, procedural details or a preliminary background explanation of the States' respective positions.

Where two countries have agreed to undertake tax treaty negotiations, they need to agree on the dates, the place and the language in which the negotiations will be carried out.

Each country will need to decide the number of members and the persons to be included as members of its negotiating team and, as a matter of courtesy, provide the other country with the names, title and contact details of each member of its team.

The host team should provide the other team with an invitation letter (for visa or other purposes), draft agenda, venue for negotiations, directions and relevant information to access the venue.

The visiting negotiators will need to arrange for travel authorizations (visas if necessary), travel and accommodation arrangements and notification to the local embassy if appropriate.

- See paragraphs 85 – 92 of the UN Manual
- Find a list of contact persons related to tax treaties (e.g. WP1, MLI or IF) for each country
- Find a Template agenda and list of participants for a tax treaty negotiation (Word) here
- Find a checklist of logistics aspects (PDF)

+ C.3. Defining the roles of each member of the team

The team should include a team leader (head of delegation) with authority to make important decisions, a technical adviser specialized in tax treaties and/or domestic tax legislation; and a note taker (for internal purposes) with enough experience to understand, select and summarize complex arguments or proposals.

In the preparations for the negotiations, as well as during them, it is important that all members of the negotiating team know which duties have been allocated to them, and what their roles will be.

- See paragraph 93 of the UN Manual

+ C.4. Consulting business and relevant ministries and agencies

Consultations with business could be useful to address problems they have met or are anticipating when engaging in cross-border activities. Consultations with relevant ministries and agencies could be useful to provide the team with important information on economic sectors or issues (including non-economic) that should be taken into account during the negotiations.

When preparing for negotiations with another country it is prudent to consult with business and relevant ministries and agencies and the embassy in the other country.

- See paragraph 94 of the UN Manual

+ C.5. Preparing the draft model used for a particular negotiation

This could be the country's standard model treaty or an adapted version that takes into account particular inputs such as previous negotiations or business submissions.

The team must prepare a draft text which they will use as the basis for the particular negotiation.

Before negotiations begin, and as early as possible, the two sides should exchange model texts. This may also be an opportunity for a country to point out and explain any unusual features of its model if they might be complex to present (e.g. any divergences from the provisions of the UN and OECD Models), and for the other side to understand them the first time in face to face talks. If applicable, it is advisable to be aware of each country's reservations and positions on the OECD Model.

- See paragraph 95 of the UN Manual
- Find a style guide on drafting treaty provisions (PDF)
- See OECD Members' reservations and non-Members' positions in the 2017 OECD Model

+ C.6. Preparing alternative provisions

Alternative provisions may be found in the commentaries of the UN and OECD Models, in a country's own treaty network, in the treaties of the other country with third parties or may be unique provisions intended to specifically address concerns expressed by the other country.

Where the draft text includes provisions that are likely to be controversial, it is advisable to prepare alternative provisions that may be acceptable to both countries.

- See paragraph 96 of the UN Manual
- Find the 2017 OECD Model (PDF)
- Find the 2017 UN Model (PDF)
- Find publicly available information on countries' treaty network
- Find other sources of information on countries' treaty network
- Find a style guide on drafting treaty provisions (PDF)

+ C.7. Non-negotiable provisions

These are provisions that reflect strongly held policy or technical positions that must be included in any treaty concluded by the country (see subsection B.1 above). A distinction should be made between provisions that are genuinely non-negotiable and provisions which merely reflect a strong preference but which, under certain circumstances, can be accepted.

In the preparation of the negotiations, it is also important to clarify internally which provisions are non-negotiable in accordance with the country's tax treaty policy framework. It would be advisable to communicate such provisions to the other negotiating team in advance of the negotiations so as to avoid spending time on negotiations that cannot reach a conclusion because of irreconcilable differences of views concerning such provisions. If applicable, it is advisable to be aware of each country's reservations and positions on the OECD Model.

- See paragraph 97 of the UN Manual
- Find information on OECD Members' reservations and non-Members' positions in the 2017 OECD Model
- Find information about commitments in the context of the Inclusive Framework on BEPS
- Find information about commitments in the context of the Global Forum on Transparency and Exchange of Information

+ C.8. Understanding the interaction between domestic legislation and treaty provisions

During the negotiations, a team will often be asked to explain features of its domestic tax legislation and how proposed provisions of the draft treaty would interact with that legislation.

It is strongly advisable for each team to research and understand the key features of the domestic tax legislation of the other country e.g. preferential regimes, residency and source definitions, type of entities and their tax treatment, etc.

Understanding how a treaty provision would affect the application of a country's tax legislation will also be necessary.

- See paragraph 98 of the UN Manual
- See Section III of the UN Manual for an introduction to different treaty provisions and their interaction with domestic law
- See some information on preferential regimes and BEPS Action 5
- Access the shared calendar for workshops, courses and seminars on tax treaties organized by the PCT Partners (forthcoming)

+ C.9. Transmitting a short written explanation of the domestic tax system and the model to the treaty partner

Many countries prepare a short written explanation of their domestic tax system, especially if there is something in the legislation that is likely to require clarification during the negotiations.

Brief explanations of the domestic tax legislation, legal entities and other relevant domestic law aspects, should be sent to the treaty partner well in advance of the meeting.

- See paragraph 99 of the UN Manual
- Find some short explanations of the domestic legal and tax systems of members of the Global Forum on Transparency and Exchange of Information in their peer review reports
- Find a sample of a brief explanation of a country's persons other than individuals
- Find a sample of a brief explanation of a country's pension systems

+ C.10. Preparing a comparison of the respective models

Many experienced negotiators find it helpful to compare the two models in a side-by-side document, with a column for comments.

Using different colors or texts in brackets simplifies the identification of the differences between the models. Where there is a divergence in the texts, it can be useful to note in the comment column whether one of the texts follows a model provision and whether there are precedents in other treaties.

Another part of the comparison between the two countries' draft texts involves the identification of provisions proposed by a country that deviate from provisions agreed to by that country in treaties with third countries, with a particular focus on more current treaties concluded with comparable third countries. The negotiating team should be aware of and ready to explain provisions that its country has accepted in negotiations with third parties.

- See paragraphs 100 and 101 of the UN Manual
- Find publicly available information on countries' treaty network
- Find other sources of information on countries' treaty network
- Find an example of a side-by-side document (using the 2017 versions of the UN Model and the OECD Model)

+ C.11. Studying the economy, culture and customs of the other country

Having some general information about the other country with which a tax treaty will be negotiated may be useful to understand its positions and also to avoid misunderstandings and embarrassing situations.

For instance, a negotiating team should have a general idea of that other country's economic situation, e.g. its population, gross national product (GNP), important industries and its relations with other countries. It should also be aware of local customs and sensitive issues, for example, regarding food, alcohol, religious beliefs and behaviors that may be considered offensive. Consultation with its embassy in the other country may be helpful in this regard.

- See paragraph 102 of the UN Manual
- Find some short explanations of the domestic legal and tax systems of members of the Global Forum on Transparency and Exchange of Information in their peer review reports
- Find some general information about some countries' economies

+ D. Conduct of negotiations

+ D.1. Opening of the meeting and working draft

At the beginning of the negotiation meeting, both leaders should introduce themselves and their team so that both delegations know who is present and the role of each team member. The leader from the host country will usually open discussions and there should be agreement on the agenda for the meeting.

The two teams will need to decide the practical issue of how to discuss and amend the two draft texts in order to produce the working document that will constitute the draft treaty.

Ideally, a common working draft in which all the differences between the two models would appear in square brackets and/or in different colors for the text proposed by each country, would be prepared in advance of the negotiation meeting and would be projected and amended during that meeting. If that cannot be done, one approach would be for the two teams to decide to use one of the two draft texts as the working draft.

- See paragraphs 103 - 105 of the UN Manual
- Find a Template blue/red draft treaty comparison (Word)
- Fin an example of treaty comparison using square brackets (PDF)

+ D.2. Negotiation style

The negotiation style adopted by each team can play a significant role in the way the negotiation meeting proceeds. Negotiating styles can vary from what could be called “soft” to “aggressive”:
– A “soft” negotiator seeks to reach agreement on all articles as soon as possible. This may lead to the negotiator making unnecessary concessions.
– An “aggressive” negotiator insists on his/her proposals and demands concessions. This style may result in the other side pushing back or even refusing to continue the negotiations.
– A negotiation style somewhere between these two extremes is obviously desirable.

Whatever approach is adopted, a negotiator must remember that his/her style should be adapted to the goal of the negotiations, which is to achieve a mutually beneficial treaty.

- See paragraphs 106 - 107 of the UN Manual
- Find examples of negotiation strategies (YouTube Video)
- Access the shared calendar for workshops, courses and seminars on tax treaties organized by the PCT Partners (forthcoming)

D.3. Trust

To achieve a productive atmosphere during the negotiation process, it is necessary to gain the trust of the other team. It is easier to lose than to gain credibility.

The explanations given by a team must be truthful, complete and correct.

If the teams are using a common working draft, any amendment to it should be tracked, consulted and/or communicated in a transparent way to the other team (e.g. the removal of square brackets). If it is not possible to use a common working draft, the text of each article should be read when the discussion of that article has been completed in order to ensure that both teams agree on what has been agreed and what remains to be discussed.

Unless the two teams agree to make the contents of the treaty public before its signature, the draft treaty should be treated as confidential until it is signed (see subsection E.1 below).

- See paragraph 108 of the UN Manual

D.4. Building a relationship

Some degree of formality is appropriate during a negotiation meeting even if the members of the two teams are known to each other. All interactions, however, play a part in the negotiations: informal discussions or contacts taking place during a break, or at lunches or dinners, may contribute to building a good relationship.

Be punctual, listen with respect (avoid interrupting or negative body language) and politely explain different opinions of preferred solutions.

- See paragraphs 109 - 112 of the UN Manual
- Find some examples of situations that may occur in a negotiation (YouTube Video)

D.5. Discussions

A tax treaty negotiation will normally require more than one round of meetings. For the first round of negotiations, it is usually desirable to work quickly through all articles one by one without lengthy discussions of difficult issues in order to resolve minor issues and identify difficult or important ones for further discussion. When all the articles have been worked through, it is time to concentrate on solving the remaining difficult issues. A team should be prepared to clearly lay out arguments in favor of its proposed approach, and be ready to respond to counter-arguments. A team should also stand ready to make counter-proposals instead of adamantly sticking to its original position. It may sometimes be found that the other team's own proposal or counter-proposal is more advantageous for the first team than the provision initially proposed.

Sometimes at the end of negotiations, a few technical issues remain outstanding. The current practice is to try to resolve these issues via conference calls or email. It is desirable to do this as soon as possible after negotiations have finished while the issues are still fresh in everyone's minds.

If a provision relates specifically to one of the countries, or is merely a clarification of the meaning of a provision, it is sometimes better to include that provision in a protocol rather than trying to include it in the treaty itself.
Some provisions that may be agreed in order to solve difficult issues—although countries may have different views on their advantages and disadvantages—are the following:
- a "most favored nation" (MFN) clause;
- a "sunset" clause;

- a "grandfathering" clause; and
- a deferred-effect clause.

The resulting draft treaty should be added to the agreed minutes after every round of negotiations and provided to both teams in paper and electronic form.

- See paragraphs 113 - 130 of the UN Manual
- Find some examples of MFN clauses (PDF)
- Find some examples of a sunset clause (PDF)
- Find some examples of a grandfathering clause (PDF)
- Find some examples of a deferred-effect provision (PDF)
- Find a Template Agreed Minute (Word)

+ D.6. Arguments

Arguments should be based on logic and sound tax policy, underpinned by precedents and supported by examples and explanations that address the substance and effect of the relevant provision.

Teams should be prepared to present relevant arguments to explain the provisions that they propose in the different articles of the working draft. This is true of all provisions, but is essential where the wording of a provision deviates from what is found in the UN and OECD Models.

- See paragraphs 131 - 132 of the UN Manual
- Find publicly available information on countries' treaty network
- Find some private databases with information on countries' treaty network
- Find information on OECD Members' reservations and non-Members' positions in the 2017 OECD Model.

+ D.7. Keeping an accurate record of what has been agreed to

It is important to keep a full and accurate record of what has been agreed to and of the provisions that remain to be discussed (see subsection D.3 above).

The working draft should ideally be amended to reflect the discussions and projected on a screen during the negotiation meeting. If it is not possible to do so, the text of each article should be read when the discussion of that article has been completed in order to ensure that both teams agree on what has been agreed to and what remains to be discussed.

When going through the working draft article by article, all wording that is not agreed upon should be put in square brackets. Both teams should have a printed version of the working draft as it stands at the end of each round of negotiation.

Countries are encouraged to follow the practice of producing "Agreed Minutes" to acknowledge that the meeting took place and to record the main outcomes, outstanding issues, agreed interpretations, next steps, etc.

After agreement has been reached on all the provisions of the working draft, which may happen at the end of the first or a subsequent round of negotiation, it is usual for the head of each delegation to initial each page the draft treaty. This simply means that the draft reflects the results of the negotiations.

- See paragraphs 133 - 135 of the UN Manual
- Find an example of how to reflect the discussions on a working draft during a negotiation (Word/YouTube video)
- Find an example/template Agreed Minutes (Word)

+ E. Post-negotiation activities

+ E.1. Preparing for signature

After the two heads of delegation have initialled the final draft treaty, the next step is to prepare it for signature.

Each country should know in advance which ministry will be responsible for the signing procedure. It is recommended that each country's procedures and estimated timeline for the approval of the signature be discussed during the negotiation of the treaty.

Preparing the proposed treaty text for signature includes conducting thorough proofreading of the text (and of the translations if appropriate). Editorial or substantive mistakes are often found at that stage or in the translation process.

In the two official versions of the treaty that will be signed (or more than two if the treaty is signed in more than one official language), each country should be mentioned first in the Title, Preamble and signature block of its own copy (or copies, if in more than one language). The other country should be mentioned first in its own copy (or copies). There should be no alternation in the rest of the text.

Unless the two teams agree to make the contents of the treaty public before its signature, the draft treaty should be treated as confidential until it is signed.

- See paragraphs 135 - 141 of the UN Manual
- Find a checklist for preparing for signature (PDF)

+ E.2. Translation and official texts

The terminal clause of the proposed treaty will indicate the languages in which the treaty will be signed and will normally indicate that each version is equally authentic or authoritative.

A treaty will often be negotiated in a foreign language, for example English, even if that language is not an official language of either country. In such cases, the countries will generally agree to sign the treaty in as many official languages as there are as well as in the language in which it was negotiated. These countries may then also agree to provide that the language in which the treaty was negotiated will prevail in case of divergences between the other versions.

A thorough proofreading of the texts by both countries should be done both before and after translation. Editorial or substantive mistakes are often found at that stage or in the translation process.

In particular, the translation should be checked to ensure that, as far as possible, it uses the same terminology as the official versions of the UN and OECD Models and of previously concluded treaties that have used similar wording.

- See paragraphs 142 - 148 of the UN Manual
- See some examples of terminal clause on languages (Word)

- Find some official and non-official versions of the UN and the OECD Models in different languages

+ E.3. Signing of the treaty

The next step is to seek the approval of each government for the signature of the treaty. The procedure for obtaining that approval varies from country to country. Tax treaties are typically signed by ministers of finance, ministers of foreign affairs or ambassadors.

Where the treaty is to be signed by the minister of finance, another minister, an ambassador or any other person, that person will generally be required to produce a written confirmation (usually from the minister of foreign affairs) that they have been given authority to sign (referred to in the Vienna Convention on the Law of Treaties as "full powers").

At least two original versions of the treaty will be signed, one for each state. Where the treaty is signed in more than one language, two versions of the treaty will be signed in each official language. Each country will receive a signed version of the treaty in each official language.

There are no set rules about where and when the signing ceremony should take place. It should be signed where and when it is most convenient for the two countries.

It is a good practice to publish the text of a treaty as soon as it has been signed and to post it on the website of the tax administration or of the ministry in charge of finance so that all interested parties are aware of its contents.

- See [paragraphs 149 - 154 of the UN Manual]
- Find the Vienna Convention on the Law of Treaties (PDF)
- Find a Template Full Powers document (Word)
- Find some examples/options for signing ceremonies or procedures (PDF)

+ E.4. From signature to entry into force

In almost all countries, the signed treaty has to be approved by the parliament or legislative assembly before it can be considered that the state has given its consent to be bound by the treaty.

The entry-into-force article of many treaties provides that each country agrees to notify the other, through diplomatic channels, when its internal requirements or procedures for the entry into force of the treaty have been satisfied.

In many countries, the ministry in charge of finance or the tax administration needs to prepare a technical explanation of the treaty for purposes of its parliamentary or legislative approval.

- See [paragraphs 155 - 162 of the UN Manual]
- Find a check list for ratification process (PDF)
- Find a Template Technical Explanation of a treaty for parliamentary or legislative approval (Word) here

+ E.5. After the entry into force

The date on which the provisions of a tax treaty start to have effect for the taxpayers and the tax administration of each country, which is the most important date as regards the practical application of the treaty, should not be confused with the date of signature or the date of entry into force of a tax treaty.

Following the entry into effect of its provisions, the treaty should become part of a regular exercise to track its effects in terms of investment and income flows. The process should allow for a regular assessment of whether the expected benefits were achieved, the costs associated with its adoption, and to help refine and inform the economic analysis of decisions to negotiate/renegotiate treaties.

It is a good practice to inform all interested parties when a new treaty enters into force and when its provisions will have effect. This may be done through a press release, notice in the official gazette or journal or on the website of the tax administration or of the ministry in charge of finance.

- See paragraphs 163 - 165 of the UN Manual
- Find some examples to illustrate differences between date of signature, date of entry into force and date of entry into effect (PDF)