Class #11 (March 26). Exchange of Information

Please read and consider:

1. Article 26 of the OECD Model Treaty (2012) and the UN Model Treaty (2011) (attached).

2. UN Report on Revision of Article 26 (McIntyre) (2007) (on website)

3. McIntyre, *Exchange of Information* (2002) (attached).

4. McIntyre, *United Nations Code of Conduct on Cooperation in Combating International Tax Evasion* (Final Report, 2008) (attached).

5. United Nations Code of Conduct on Cooperation in Combating International Tax Evasion (McIntyre Draft Resolution and Code, 2008) (on website).

6. United Nations Code of Conduct on Cooperation in Combating International Tax Evasion (as adopted, 2009) (on website).

7. McIntyre, *Identifying the New International Standard for Effective Information Exchange* (May 4, 2010) (on website).

8. The following Notes and Questions.

Notes and Questions

1. Article 26 of the OECD and UN Model Treaties provides for exchanges of information between the contracting states to assist in the enforcement of taxes covered by the treaty. In addition, as revised in 2005, the OECD treaty provides for an exchange of information with respect to all domestic taxes. A similar rule was adopted by the United Nations in 2008. Why would an exchange of information provision be extended to an exchange with respect to taxes not governed by the treaty? What are the costs and benefits of extending an exchange beyond the taxes covered?

2. Prior to the 2005 OECD revisions, a contracting state was required to provide the other contracting state with any information that is *necessary* to carry out the provisions of the treaty or the other state's domestic tax laws. The term "necessary" was defined broadly in the OECD and UN Commentaries. As amended in 2005, the requirement in the OECD treaty is to provide information that is "forseeably relevant". The UN was considering the even milder phrase, "may be relevant," although it ultimately caved to the OECD on this point. "May be relevant" is used in the U.S. Model Treaty. Which term do you prefer? Why?

3. A state is not expected to violate its own laws to obtain information for its treaty partner or to go beyond its ordinary administrative procedures in fulfilling a request for information. The general understanding is that it is required to conduct the same type of inquiry that it would undertake in comparable circumstances to enforce its own tax laws. In 2005, the OECD adopted an exception to the prior practice of allowing local law to prevent a contracting state from declining to exchange information held by banks and financial intermediaries on account of its

bank secrecy laws. A similar amendment was approved by the UN in October of 2008. Should the exchange of information obligation override local bank secrecy laws? How about confidentiality rules applicable to financial advisors? Accountants? Lawyers?

4. A contracting state is obligated to keep secret any information obtained from its treaty partner in response to a request for administrative assistance, although the information may be disclosed in judicial proceedings. The OECD treaty now allows disclosure to "oversight bodies". Why do you think this change was made? What country do you think pressed for this change? Is the change desirable? Should developing countries support such a change?

5. Some treaty partners arrange to provide each other with extensive information on a routine basis without any specific request. For example, some countries routinely exchange information on withholding taxes collected from residents of its treaty partner. Other countries use the information exchange provision sparingly, most typically in the case of high-profile tax evasion. What are the advantages of automatic exchanges? What conditions must be met for such exchanges to be useful to tax administrators?

6. A country may also provide a treaty partner with information pertinent to the enforcement of taxes governed by the treaty without receiving a specific request or having in place an arrangement for automatic exchange of certain types of information. This type of exchange of information is referred to as a spontaneous exchange. For example, if Country A discovers, in the course of its audit of BCo, a resident of Country B, that BCo has probably been evading taxes in Country B, it might provide Country B with the information about BCo pursuant to Article 26 of the treaty.

7. The UN treaty (but not the OECD treaty) provides that one of the purposes of information exchange is to prevent tax avoidance. Is preventing tax avoidance a proper objective of a tax treaty? Why (or why not)?

8. Country A conducts an audit of ACo, a domestic corporation. In the course of that audit, the tax authorities of Country A challenge some of the transfer prices used by ACo in its dealings with BCo, a wholly-owned subsidiary resident in Country B. To justify its prices, ACo discloses to the tax authorities of Country A some detailed information about how the prices were set. This information would be very useful to the competitors of ACo, and its public disclosure would be very harmful to ACo's business. Country B has a tax treaty with Country A based on the OECD Model Treaty. The tax authorities of Country B are aware that ACo has been subject to audit in Country A. They request detailed information on ACo's transfer prices in order to properly assess tax on BCo. Is Country A required to disclose this information to the tax authorities of Country B under Article 26 of their treaty? What steps, if any, can ACo take to prevent disclosure of the information?

9. ACo, a resident of Country A, owns valuable patent rights to an industrial process used for manufacturing halogen light bulbs. It licenses the patent to BCo, a wholly-owned subsidiary that is resident in Country B. The tax authorities of Country A believe that the royalty that ACo charges BCo for the license is inadequate, and they conduct an extensive audit of ACo. In the course of the audit, they require ACo to disclose details about the research activities that led to the development of the patented process. The patent office in Country B is aware of the audit. It

wishes to obtain information on the development of the patent, as it believes that the patent is not valid under the laws of Country B. Country B makes a request to the tax authorities of Country A for that information. Is Country A required to provide that information under its tax treaty with Country B, assuming that the treaty is based on the OECD Model Treaty? What steps, if any, can ACo and BCo take to prevent disclosure of the information to Country B?

10. The UN Commentary has the following discussion of Paragraph 3(b) of Article 26. Do you agree with the position taken in that Commentary, or do you favor the OECD approach, discussed in the UN Commentary? Why?

> 20. Subparagraph 3(b) allows a requested State to avoid an obligation otherwise imposed by paragraph 1 when it cannot obtain the requested items of information in the normal course of its administration or when the other Contracting State could not have obtained that information in the normal course of its administration. The purpose of this rule is to prevent the requesting State from imposing unreasonable burdens on the requested State.
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> 20.1. Information is deemed to be obtainable in the normal course of administration if the information is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons. For instance, if the requested State, as part of its audit policies, obtains information about the appropriateness of the transfer prices used by its taxpayers in dealings with associated companies, it is deemed to be able to obtain similar information about its taxpayers and associated companies on behalf of a requesting State.
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> 20.2. Unless otherwise agreed to by the Contracting States, it shall be assumed that the information requested by a Contracting State could be obtained by that State in a similar situation unless that State has informed the other Contracting State in writing to the contrary.
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> 20.3. It is often anticipated, when a convention is entered into between a developed country and a developing country, that the developed country will have a greater administrative capacity than the developing country. Such a difference in administrative capacity does not provide a basis under subparagraph 3(b) for either Contracting State to avoid an obligation to supply information under paragraph 1. That is, paragraph 3 does not require that each of the Contracting States receive reciprocal benefits under Article 26. In freely adopting a convention, the Contracting States presumably have concluded that the convention, viewed as a whole, provides each of them with reciprocal benefits. There is no necessary presumption that each of the articles, or each subparagraph of each article, provides a reciprocal benefit. On the contrary, it is commonplace for a Contracting State to give up some benefit in one article in order to obtain a benefit in another article.
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> 20.4. Although subparagraphs 3(a) and 3(b) do not explicitly provide for reciprocity in benefits, the OECD Commentary to Article 26 has taken the position that a reciprocity requirement can be inferred from the language of subparagraph 3(b), which, *inter alia*,

limits the obligation of a Contracting State to supply information obtainable in the normal course of administration of that other Contracting State. In effect, the OECD Commentary is reading the term "obtainable" to mean that the other Contracting State has the actual administrative capacity to obtain that information. The alternative reading is that "obtainable" means that the tax administration has the authority to obtain the information, whether or not it has the capacity to exercise that authority. Countries may wish to make clear in their treaty that the Contracting States are obligated to exchange information even if one of the Contracting States has a significantly less advanced capacity for obtaining information about taxpayers. To achieve that result, they might amend subparagraph (b) to read as follows as follows:

> (b) To supply information that cannot be obtained in the normal course of the administration of that Contracting State or is not obtainable under the laws of that Contracting State or of the other Contracting State;

11. What is the utility of the type of code of conduct adopted by the United Nations, given that the code would not have the force of law? Is it relevant that the OECD must act by consensus and often has proven incapable of making major changes in its model convention?

United Nations Model Tax Convention

Article 26 (2011)
EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. In particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes. The exchange of information is not restricted by articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State. However, if the information is originally regarded as secret in the transmitting State, it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

(a) To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial

institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

6. The competent authorities shall, through consultation, develop appropriate methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made.

Exchange of Information

Michael J. McIntyre (2002, 2010)

Virtually all U.S. income tax treaties provide for exchange of information between the tax authorities of the treaty countries.[1] Information may be exchanged on a routine basis, in response to a specific request, or spontaneously.[2] Some treaties provide for limited exchanges, and only for the purpose of guaranteeing the proper operation of the treaty.[3] Other treaties provide for extensive exchanges of information on a routine basis.[4] The United States has promoted an expansive exchange of information provision. It is willing to exchange information that is relevant to the enforcement of the taxes governed by the treaty, whether or not the information involves a resident of one of the Contracting States or otherwise implicates the treaty.[5] It is also willing to exchange information relating to taxes not covered by the treaty, such as excise taxes or the estate and gift tax.[6]

Switzerland, which is a long-standing member of the OECD, has traditionally opposed an expansive exchange of information article. In the face of pressure from the G-20 countries to eliminate bank secrecy, Switzerland has modified its position. In 2010, it removed its objection to Article 26 of the OECD model convention and has negotiated a number of tax treaties and tax information exchange agreements (TIEAs). It has agreed to a revision of its treaty with the United States to bring the treaty into conformity with Article 26 of the OECD model convention. The agreement, however, has not yet been ratified. Switzerland's current treaty with the United States did not authorize the United States to obtain information from the Swiss tax authorities that would be helpful or even necessary for the enforcement of the U.S. income tax unless the treaty itself is implicated in some way or there is evidence of fraud. For example, the United States could obtain information from the government of Switzerland that is necessary to determine whether a person claiming to be a Swiss resident is actually entitled to a reduced

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[1] See, e.g., U.S. Model Treaty, Art. 26. The U.S. treaty with the former Soviet Union did not included an exchange of information agreement. The terms of that treaty continue in effect with respect to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikstan, Turkmenistan, and Uzbekistan

[2] According to data for 1988 from the IRS Office of International Programs, the U.S. provided routine information to its treaty partners in 418,354 cases and received such information in 448,390 cases. Specific information was provided to the U.S. in 580 cases, and the U.S. provided treaty partners with specific information in 84 cases. Spontaneous exchanges resulted in the U.S. receiving information in 149 cases and in treaty partners receiving information from the U.S. in 52 cases. 2 *Tax Notes Int'l* 224 (March 1990).

[3] See, e.g., U.S./Switzerland treaty, Art. 26 (1997). Article 26(1) of that treaty provides that the Contracting States shall provide information "as is necessary for carrying out the provisions of the present Convention or for the prevention of tax fraud." This language is carried over from the 1951 treaty, except that the term "tax fraud" in the current treaty replaces the term "fraud" in the 1951 treaty.

[4] See, e.g., U.S./France treaty ("The competent authorities of the Contracting States shall exchange such information as is pertinent for carrying out the provisions of this Convention and of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation thereunder is not contrary to this Convention.").

[5] See Treasury Department, *Technical Explanation of U.S. Model Treaty* (2006).

[6] See, e.g., U.S./Canada treaty, Art. XXVII(4)(a), provided for an exchange of information with respect to "all taxes imposed by a Contracting State."

withholding rate on dividends received from a U.S. company. It could not obtain information about the Swiss bank account of a U.S. citizen as part of a routine audit unless the U.S. tax authorities had evidence suggesting tax fraud. The revised treaty, if approved, will allow for an exchange of information on specific request but will not provide for a automatic exchange of information.[7]

Information provided to another country under an exchange of information agreement generally must be kept confidential. It may be disclosed, however, to courts and administrative bodies concerned with the assessment, collection, enforcement, or prosecution of the taxes to which the information relates. According to the Treasury Department, the information may be disclosed for limited purposes to legislative bodies, such as the tax-writing committees of Congress and the General Accounting Office.[8] The information also may be disclosed in public court proceedings and judicial decisions.

A Contracting State is not required under the typical exchange of information article to carry out administrative measures that are at variance with the laws or administrative practice of either State.[9] The Contracting States are not required to provide information that would disclose trade secrets of their taxpayers. To avoid political difficulties, the Contracting States reserve the right not to disclose information if disclosure would be contrary to public policy.

The United States is prepared to exchange information with at least some countries relating to the enforcement of subnational taxes. Its tax treaty with Mexico provides that the provisions respecting exchange of information "shall apply . . . to all taxes imposed by a Contracting State, including taxes imposed by a state, municipality, or other political subdivision or local authority thereof."[10] The information exchange article of the U.S./Canada treaty is not as broad as the comparable article in the U.S./Mexico treaty, but it does extend to some information exchanges involving subnational taxes.[11] The U.S. Model Treaty (2006) does not provide explicitly for information exchanges relating to subnational taxes. The OECD and UN models do provide for such exchanges.

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[7] For a detailed criticism of the revised U.S./Switzerland treaty, see Michael J. McIntyre, "How to End the Charade of Information Exchange," 56 TAX NOTES INT'L 255-268 (October 26, 2009), reprinted in 125 TAX NOTES 695-707 (November 9, 2009).

[8] The OECD and UN tax conventions, as revised, respectively in 2005 and 2008, provide for sharing of information with "oversight bodies".

[9] See U.S. Model Treaty (2006), Art. 26(2)(a).

[10] See *Agreement Between the United States of America and the United Mexican States for the Exchange of Information with Respect to Taxes*, November 9, 1989, as amended by a TIEA Protocol signed on September 8, 1994. See also Joint Committee on Taxation, *Explanation of Proposed Additional Protocol to the Income Tax Treaty Between the United States and Mexico* (JCS-9-95), May 22, 1995; John Turro, "U.S. and Mexico Sign Two Protocols to Extend Tax Information Exchange to State and Local Level," 9 *Tax Notes Int'l* 7 869 (Sept. 1994).

[11] See U.S./Canada Treaty (1995), Article XXVII(1) (allowing the Contracting States to disclose to subnational tax officials the information received from a Contracting State under the treaty for the purpose of assessing or collecting "taxes imposed by a political subdivision or local authority of a Contracting State that are substantially similar to the taxes covered by the Convention under Article 11 (Taxes Covered)").

The United States has entered into a number of tax agreements, primarily with countries located in or near the Caribbean Sea, that provide solely for an exchange of information.[12] The agreements were initially intended to help the United States deal with laundering of drug-related money and to allow the Caribbean countries to act as tax havens with respect to a U.S. export incentive. The most important and interesting of the exchange-of-information agreements is the one between Mexico and the United States.[13] That Tax Information Exchange Agreement (TIEA) was precursor to the full income tax treaty entered into by Mexico and the United States in 1992. A 1995 protocol to the U.S./Mexico income tax treaty and an associated amendment to the TIEA provide for extensive information sharing between Mexico and the United States.[14] Recently, the

[12] See, e.g., U.S. exchange-of-information agreements with Bermuda, Barbados, Colombia, Costa Rica, Dominica, Dominican Republic, Grenada, Guyana, Honduras, Jamaica, Peru, St. Lucia, and Trinidad and Tobago. The United States has entered into full tax treaties with a few of these countries.

[13] See Kathleen Matthews, "U.S.-Mexico Exchange of Information Agreement Causes Concern Among Mexican Depositors in U.S. Banks," 2 *Tax Notes Int'l* 75 (January 1990). See also Michael J. McIntyre, "U.S.-Mexico Information Exchange Agreement," 2 *Tax Notes Int'l* 229 (March 1990).

[14] U.S./Mexico treaty, Art. 27(3) (1995).

United Nations Code of Conduct on Cooperation in Combating International Tax Evasion Final Report, April 4, 2008

by Michael J. McIntyre

I. Introduction

1. At the second session of the Committee of Experts on International Cooperation in Tax Matters Report (30 October-3 November 2006), I presented a report on the possible development of a code of conduct dealing with cooperation on controlling capital flight and international tax evasion and avoidance. According to the report (p. 10, para. 43) of that session,"the principle of such a code was generally agreed as being a useful tool to encourage a higher level of compliance by taxpayers and tax cooperation." The committee requested that I prepare a brief report for the third session that dealt with some procedural matters and gave some better idea of the scope of the proposed code of conduct and its relationship to other such codes. I presented that paper and received comments from members of the Committee and from country representatives and observers. I was asked to revise the report in light of those comments. This is that revised report.

II. Objectives of the Code of Conduct

2. Codes of conduct are sometimes referred to as "soft law" because they do not provide for any explicit methods of enforcement. These codes are aspirational rather than operational. They seek to mobilize public opinion, or at least the opinion of relevant government officials and private actors.

3. The United Nations code of conduct on Cooperation in Combating International Tax Evasion should have the following goals:

(1) To assist in the development of international norms that governments should follow to prevent international tax evasion and to avoid facilitating such evasion.

(2) To encourage governments to take practical steps to combat such evasion.

(3) To identify forms of aggressive tax avoidance that do not conform to an emerging international standard and to distinguish such practices from normal and legitimate tax planning.

(4) To give guidance to members of the private section, such as banks and accounting firms, that wish to conform to an emerging international standard of conduct.

(5) To give moral support to civil society organizations seeking to prevent international tax avoidance and evasion.

III. Other Codes of Conduct

4. The United Nations has promoted a large number of codes of conduct, in a variety of fields. It has also developed various framework documents that operate similar to a code of conduct. Here are a few examples of UN codes of conduct and framework documents that seek to establish international norms of conduct:

(1) UN International Code of Conduct for Public Officials, GA Res. 51/59 Annex (12 December 1996).

(2) Code of Conduct for Law Enforcement Officials, G.A. Res. 169, at 186, art. 5, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 17, 1979).

(3) Agenda 21, adopted by, United Nations Conference on Environment and Development, June 3-14, 1992, U.N. Dept. Econ. & Soc. Affairs (framework document).

(4) Code of Conduct for Responsible Fisheries, Food and Agricultural Association, Oct. 31, 1999.

(5) United Nations Global Compact (framework document for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, the environment and anti-corruption).

5. Codes of conduct and framework documents have been adopted by many organizations other than the United Nations and by governments. Here is a very short list of such efforts:

(1) A Code of Conduct for Taxation, October 2007, sponsored by the Association for Accountancy and Business Affairs, the Tax Justice Network, and Tax Research LLP (guiding taxpayers, tax agents, and governments).

(2) The MacBride Principles, December 1997 (providing a corporate code of conduct for doing business in Northern Ireland for multinationals to ensure nondiscrimination on the basis of religion).

(3) European Commission's Green Paper, 8 March 2006 (framework document aimed at developing a common, coherent European Energy Policy).

IV. Content of the Code of Conduct

6. The proposed United Nations Code of Conduct on Cooperation in Combating International Tax Evasion would set minimum standards that countries should meet with respect to cooperation on measures to combat capital flight and international tax evasion and avoidance. The detailed content of that code would be set by the Committee of Experts after due discussion and debate. As provided in the Proceedings of the 2007 Third Meeting of the Committee (Geneva), I have been requested to prepare a draft code of conduct for submission to the Subcommittee on Exchange of Information, chaired by Mr. Miguel Ferre Navarrete (Spain). The subcommittee is charged with the responsibility of presenting its version of the code of conduct to the Committee of Experts "as soon as possible".

7. A code of conduct dealing with international tax evasion and aggressive and unacceptable forms of tax avoidance might include the following elements:

(1) A requirement of transparency in financial matters that would, for example, limit formal and informal bank secrecy rules.

(2) An agreement to exchange information effectively on tax matters with other governments.

(3) A commitment to avoid the establishment of legal instruments that are intended to confound tax enforcement, such as trusts with undisclosed terms.

(4) Conformity with emerging standards with respect to "know your customer" rules for banks, trust companies, brokerage firms and other financial intermediaries ("Financial Intermediaries"), for attorneys, accountants and other tax advisers ("Tax Advisers"), and for corporate service providers, promoters, corporate administrators and trust administrators ("Service Providers").

(5) Conformity with emerging standards with respect to and "know your shareholder" rules for corporations, partnerships, limited liability companies, trusts, and other legal entities.

(6) A commitment to adopt and enforce reporting rules, such as rules on large cash transfers.

(7) A clear distinction between normal and acceptable tax planning activities and aggressive or abusive forms of tax avoidance that arguably could constitute tax evasion if all the relevant facts were known.

V. Avoiding Conflict with Other Initiatives

8. The proposed code of conduct does not conflict with other initiatives of the international community. That code would focus on tax evasion and fiscal fraud. It would seek to reduce capital flight from developing countries to the extent that such capital flight is accomplished through tax evasion or aggressive avoidance. Similarly, it would assist in combating money laundering when that practice is part of a scheme to avoid or evade taxes. In all of these areas, it would seek to influence government conduct and taxpayer attitudes. It would not be involved in enforcement activities. As a result, its agenda would not overlap the agendas of agencies, including United Nations agencies, involved in combating terrorism through various means, including the control of money laundering.

VI. Procedural Aspects

9. To have maximum impact, a code of conduct dealing with international tax evasion should be adopted by the General Assembly of the United Nations. For that adoption to occur, the Expert Group should draft its code and present it to its parent body, the United Nations Economic and Social Council (ECOSOC). That body might adopt the code, with whatever revisions it might wish to make, and send it to the General Assembly for consideration by that body. Alternatively,

ECOSOC might send the code directly to the General Assembly without adopting it on its own. It also could ask the Expert Committee to make revisions in the code.

10. Although approval and support by the United Nations General Assembly would maximize the impact of the code of conduct, it is not a necessary step for the promulgation of a useful code. The Committee of Experts could promulgate the code on its own authority. Alternatively, it could develop the code and send it to ECOSOC, which might decide to issue it under its own authority.

VII. Conclusion

11. The Committee of Experts on International Cooperation in Tax Matters contributes significantly to the avoidance of double taxation and the mitigation of international tax evasion through its work on the United National Model Tax Convention. Its charter, however, envisions a broader role for the committee. A useful step in exercising that broader role would be to develop a code of conduct for member states of the United Nations to follow in curtailing international tax evasion and aggressive forms of international tax avoidance. International tax evasion and avoidance have become increasingly important to developing and emerging countries as globalization has extended to all parts of the world.

12. The tools of tax evasion, abusive tax avoidance, and capital flight that have accompanied globalization are undermining the ability of developing and emerging countries to mobilize domestic resources for development and to create the "enabling domestic environment" called for in the Monterrey Consensus. In the 2005 World Summit Outcome document, the General Assembly repeated a pledge to "support efforts to reduce capital flight and measures to curb the illicit transfer of funds." The time has come for countries to act collectively to fight back against these abusive practices. The Committee of Experts, at its 2007 Third Session has expressed its willingness to play a major role in implementing the Monterrey Consensus by developing a sensible code of conduct that would bring moral pressure on governments not to facilitate international tax evasion and aggressive tax avoidance. A short-term goal of the committee should be to make significant progress toward the adoption of a code of conduct as part of its contribution to the Doha Conference (2008). That conference will assess the progress made in achieving the goals of the Monterrey Consensus (2002).

United Nations Code of Conduct on Cooperation in Combating International Tax Evasion August 5, 2008 McIntyre Draft (not adopted)

Resolution

THE COMMITTEE OF EXPERTS ON INTERNATIONAL COOPERATION IN TAX MATTERS,

Recognizing that international tax evasion and abusive forms of tax avoidance can undermine the ability of countries to effectively enforce their tax laws,

Recognizing also that some major financial institutions and accounting firms have been implicated in schemes to allow wealthy taxpayers to evade taxes through cross-border activities,

Concerned that the forces of globalization have increased substantially the opportunities for tax evasion and abusive tax avoidance and have reduced the transactional costs of evasion and avoidance to taxpayers,

Concerned also that many developing and emerging countries have found that the capital needed for domestic investment has fled to offshore tax havens and to various developed countries that offer tax-free investment opportunities for foreign capital,

Recalling that the Monterrey Consensus found that "an enabling domestic environment is vital for mobilizing domestic resources, increasing productivity, reducing capital flight, encouraging the private sector, and attracting and making effective use of international investment and assistance,"

Recalling also that the Heads of States of the United Nations have pledged through the Monterrey Consensus to help foster development in developing and transitional economies by helping those countries create and maintain the "enabling domestic environment" that is deemed essential for sustained economic development and poverty eradication,

Convinced that reduction of international tax evasion and abusive tax avoidance is a necessary step in fostering the "enabling domestic environment" contemplated by the Monterrey Consensus,

Convinced also that the Member States of the United Nations cannot be successful in controlling the rising tide of tax evasion and abusive tax avoidance unless they cooperate extensively on tax matters and work together to promote an international consensus that tax evasion and abusive tax avoidance are moral wrongs,

1. *Adopts* the United Nations Code of Conduct on Cooperation in Combating International Tax Evasion annexed to the present resolution, and recommends it to Member States of the United Nations as a tool to guide their efforts against international tax evasion and abusive tax avoidance;

2. *Requests* that the Economic and Social Council of the United Nations endorse this Code of Conduct and take appropriate action to promulgate it and obtain the support of Member States in implementing it;

3. *Further requests* the Economic and Social Council, in consultation with States, relevant intergovernmental and non-governmental organizations, as well as this Committee of Experts on International Cooperation in Tax Matters, to develop a broad implementation plan;

4. *Urges* Member States carefully to consider the problems posed by the international aspects of tax evasion and abusive tax avoidance, especially as regards international economic activities carried out by corporate entities, financial institutions, international accounting firms, and cross-border law firms, and to study appropriate domestic legislative and regulatory measures to ensure the transparency and integrity of cross-border financial transactions;

5. *Calls upon* Member States, relevant international organizations, relevant non-governmental organizations, and relevant private institutions engaged in cross-border financial activities to extend to the instrumentalities of the United Nations their full support and assistance in the implementation of the present resolution.

United Nations Code of Conduct on Cooperation in Combating International Tax Evasion

I. General Principles and Definitions

1. Member States of the United Nations shall make a political commitment to oppose and work to defeat international tax evasion and abusive tax avoidance. This political commitment shall not abridge the freedom of the Member States to design their own tax systems to achieve legitimate national goals. In pursuing those national goals, however, the Member States have committed themselves to abide by the internationally accepted standards settled in this Code of Conduct.

2. The term "tax evasion" should be understood as a wide concept that includes all activities that are illegal under the laws of the taxing state and that are intended to illegally reduce a taxpayer's lawful tax burdens or to assist others in illegally reducing their lawful tax burdens.

3. The term "abusive tax avoidance" should be understood to include activities that are intended to defeat a tax otherwise due or to assist others in avoiding such a tax and that are not undertaken to advance a legitimate business or investment purpose (aside from avoiding taxes) or that lack economic substance, that the taxpayer attempts to keep secret from the tax authorities, that are marketed by promoters as devices for reducing taxes, or that are reported in an inconsistent manner to the tax authorities of two or more countries. The term does not include "normal tax planning." The term "normal tax planning" should be understood to mean the structuring of legitimate and lawful business or investment activities in the hope of minimizing taxes, as long as the activities are transparent to all relevant taxing authorities, have economic substance, are intended to advance a significant business purpose, and could plausibly have been undertaken even if the reduction of taxes had not been an issue.

II. Scope

4. This Code of Conduct, although formally applicable only to Member States, is intended, nevertheless, to guide the conduct of the following states, individuals and entities:

   A. Governments and their agencies;

   B. Taxpayers, whether individuals, corporate bodies, or otherwise;

   C. Tax advisors, legal advisors, accountants, financial planners, financial intermediaries, and persons acting in an agency or a fiduciary capacity, whether they are undertaking tax planning or are assisting with tax compliance.

III. Goals

5. The Code of Conduct shall assist Member States and the international tax community in the development and adoption of international norms that governments should follow to control international tax evasion and abusive tax avoidance.

6. In addition, the Code of Conduct shall encourage governments to approve accounting norms regarding transparency and to adopt rules requiring the public availability of certain records. In particular, it shall promote the establishment of an obligation to record publicly the structure and the accounts of all taxable entities or any other entities that might be used by taxpayers to avoid or evade their taxes.

7. Furthermore, this Code of Conduct shall discourage Member States from providing a competitive advantage to domestic taxpayers or taxpayers from the same economic block, by, for example, cracking down only on the proscribed conduct of residents of selected countries, in the guise of controlling international tax evasion and abusive tax avoidance.

IV. Standards of Conduct

8. Member States shall require transparency in financial matters, restricting, for example, formal and informal bank secrecy rules when those rule would interfere with an effective enforcement of taxes.

9. Member States shall commit themselves not to introduce or maintain measures that provide tax benefits solely or almost exclusively to nonresidents or that grant tax benefits with respect to essentially formal transactions that lack economic substance.

10. Member States shall enter into agreements with other governments that promote an effective exchange of information on tax matters, including the routine and spontaneous exchange of information helpful in combating tax evasion and abusive tax avoidance.

11. Member States shall commit themselves to avoid the establishment of legal instruments that are intended to confound tax enforcement, such as trusts with undisclosed terms.

12. Member States shall conform their laws and administrative practices with emerging standards that require financial intermediaries, attorneys, accountants, and corporate service providers to know and disclose to the tax authorities the true identity of persons they serve and to know and disclose to the tax authorities the true beneficial owners of assets they manage.

13. Member States shall conform their laws and administrative practices to emerging standards that require corporations, partnerships, limited liability companies, trusts, and other legal entities to know and disclose to the tax authorities the beneficial owners of their stock or other instruments of ownership.

14. Member States shall adopt and enforce reporting rules intended to control tax evasion and avoidance and money laundering, such as rules requiring the reporting of large cash transfers.

V. Monitoring and Reviewing

15. The Committee of Experts on International Cooperation in Tax Matters shall maintain and promulgate a list of States that have agreed to conform their conduct to the requirements of this Code of Conduct.

16. Member States shall voluntarily submit themselves to annual appraisal of their conduct and in turn be reviewed by the Committee of Experts on International Cooperation in Tax Matters for their level of compliance with this Code of Conduct.

17. The various instrumentalities of the United Nations shall consider other measures to monitor compliance, including public reports on noncompliance by States and on the level of cooperation received from banks and other financial intermediaries and from international accounting firms, law firms, and other bodies acting in a fiduciary capacity.