International

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The UN Model Tax Convention as Compared with the OECD Model Tax Convention – Current Points of Difference and Recent Developments

This author, further to an earlier article introducing the UN Model Convention and the nature and work programme of the UN, details the main differences with the OECD Model Convention and the reason for the differences.

1. Introduction

In an article in the January/February 2008 issue of this journal (henceforth "the 2008 Article"),[1] I considered the history, current status, and possible future of, the United Nations (UN) tax work.

The 2008 Article noted the frequent differences between the UN and Organisation for Economic Development and Co-operation (OECD) Model Tax Conventions about where the balance of source country and residence country taxation should lie when avoiding double taxation. It noted that the central issue in tax treaty negotiations is generally whether and to what extent, in respect of particular income profits or gains, the source country (the host country of an investment) will relinquish its taxing rights. If it does, the residence country of the investor may fully tax the profits of the investor. If it does not relinquish these rights, the residence country must either give an exemption on the profits or give a credit for taxes payable in the host country – in effect it only taxes the resident on taxes to the extent that its taxes are greater than those imposed in the host country. The UN Model and its accompanying Manual and other relevant documents are available online at ww.un.org/esa/ffd/tax.

As the 2008 version of the OECD Model Convention has been released since the 2008 Article, and the UN Tax Committee[2] has also made further decisions about the shape of the next UN Model Convention during 2008, it is opportune to consider the main differences between the two Models in more detail. That consideration now follows.

1.1. Article 3 (Definitions)

There are definitions of "enterprise" and "business" in the OECD Model Convention, which do not exist in the UN Model Convention. They are included in the OECD Model as an attempt to ensure that, when Art. 14 (Independent Personal Services) was removed from the OECD Model Convention, all situations previously covered by it would be covered by Art. 5 (Permanent Establishment) in combination with Art. 7 (Business Profits). The UN Tax Committee recently decided to retain Art. 14, so the same situation does not apply for the UN Model Convention. However, it also agreed to have an alternative set of provisions and Commentary for those wanting to follow a similar course to that of the OECD Model Convention, in which case, some similar definitions would be likely.

1.2. Article 5 (Permanent Establishment)

In general, the UN Model Convention preserves greater source country taxation rights in Art. 5, which addresses the economic nexus required before source country taxing rights may be exercised under the tax treaty.

Building sites

Art. 5(3)(a) of the UN Model Convention has a six-month duration test for building sites (as compared to twelve months in the OECD Model Convention):

> 3. The term "permanent establishment" also encompasses:
> (a) A building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months;

The OECD has generally moved to shorter periods before presence is regarded as constituting a permanent establishment (PE) in its Commentary. See for example Para. 6:

> Whilst the practices followed by member countries have not been consistent in so far as time requirements are concerned, experience has shown that permanent establishments normally have not been considered to exist in situations where a business had been carried on in a country through a place of business that was maintained for less than six months (conversely, practice shows that there were many cases where a permanent establishment has been considered to exist where the place of business was maintained for a period longer than six months).

This approach has not been extended to building sites, however, where twelve months presence is still required. Why is this, it may be asked? Is it because a building site should not be considered to be a PE until a longer period

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1. Lennard, Michael, "The Purpose and Current Status of the United Nations Tax Work", 14 *Asia-Pacific Tax Bulletin* 1 (2008).
2. The UN Committee of Experts on International Cooperation in Tax Matters.

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has elapsed than for other PEs – twice as long? Or is it just because the Commentaries to the OECD Model Convention can recognize that states in practice now regard the time aspect of a PE as being met within a shorter period than previously, and can seek to interpret the more general concepts of the OECD Model Convention accordingly, while more specific wording in the Articles themselves cannot be so readily "adjusted" or "reinterpreted" by the Commentaries in line with current administration interpretations and views?

The latter explanation seems to be the correct one, so that respecting the terms of the Article (the twelve-month test) ultimately gives a concessional treatment to the construction industry over other industries in terms of source-based taxation, even though some would argue that modern building methods mean that the point where there is sufficient economic footprint to justify source country taxation in this industry occurs much sooner than in the past. Also, with tax treaty networks taking so long to change, and often requiring some concession in return for changes, the advantages of security for investors and their country of residence as treaty partners have to be weighed against the danger that rigid treaty rules will become outdated in the light of technological changes and developments in the way business is done.

Treatment of services

Art. 5(3)(b) of the UN Model Convention addresses so-called "services permanent establishments" in a way that forms a clear line of demarcation between the UN and OECD approaches. It states:

> (3) The term "permanent establishment" also encompasses:
> ...
> (b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than six months within any twelve-month period.

The OECD Model Convention has no special provisions for services, and recent OECD work has reiterated that under its Model Convention, services provision is treated in the same way as provision of goods. In other words, the same sort of economic presence in the territory is required to justify source country taxation, a presence having a certain degree of fixed physical presence in that country over a certain period of time.

Para. 42.11 of the Commentary on Art. 5 in the 2008 version of the OECD Model Convention states:

> ... [T]he provision of services should, as a general rule subject to a few exceptions for some types of service (e.g. those covered by Article 8 and 17), be treated the same way as other business activities and, therefore, the same permanent establishment threshold of taxation should apply to all business activities, including the provision of independent services.

If this is the case one asks why there are exceptions for Arts. 8 (Shipping, etc. and Air Transport) and 17 (Artistes and Sportspersons)? There seems, in fact, to be a particular analogy between often very highly paid entertainers who can perform a full economic cycle of activity within a country or city with only limited and often very internally mobile presence on the one hand, and other service providers on the other. Analogous treatment may be especially apt to often very highly paid service providers of other types.

The UN Model Convention perspective is that provision of services, as with Art. 17 situations, has relevantly special characteristics, and fairness (inter-nation equity) to source countries dictates that the normal "bricks and mortar" presence is not the right minimum economic footprint for taxation of services by the host country. Several OECD Member countries obviously follow this general approach, as noted below.

A side glance to the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) is illuminating when considering whether service provision is relevantly "special".[3] (See Table.)

Mode of supply	**Means of delivery**	**Presence?**
Mode 1: Cross-border supply	Service delivered within the territory of the Member, from the territory of another Member	Service supplier *not* present within the territory of the Member
Mode 2: Consumption abroad	Service delivered outside the territory of the Member, in the territory of another Member, to a service consumer of the Member	Service supplier *not* present within the territory of the Member
Mode 3: Commercial presence	Service delivered within the territory of the Member, through the commercial presence of the supplier	Service supplier present within the territory of the Member – *commercial presence*
Mode 4: Presence of a natural person	Service delivered within the territory of the Member, with supplier present as a natural person	Service supplier present within the territory of the Member, but *not through a commercial presence*

In the GATS context, physical presence of the supplier is not a differentiating characteristic in terms of whether services have been provided from one country to another. Services are different to goods in this respect, where trade involves the export of goods from one country into another, and perhaps this difference between the

3. Art. I(2) GATS.

provision of goods and services is insufficiently recognized in the OECD Model Convention.

The OECD Commentary at Para. 42.15, however, puts a view held by a number of OECD Member countries reluctant to adopt the principle of exclusive residence taxation of services that are not attributable to a PE situated in their territory but are performed in that territory:

> These States may consider that profits from services performed in a given state should be taxable in that state on the basis of the generally-accepted policy principles for determining when business profits should be considered to have their source within a jurisdiction. They consider that, from the exclusive angle of the pure policy question of where business profits originate, the State where services are performed should have a right to tax even when these services are not attributable to a permanent establishment as defined in Article 5. They would note that the domestic law of many countries provides for the taxation of services performed in these countries even in the absence of a permanent establishment (even though services performed over very short periods of time may not always be taxed in practice).

The OECD Commentary continues at Paras. 42.16 and 42.17:

> ... These States are concerned that some service businesses do not require a fixed place of business in their territory in order to carry on a substantial level of business activities therein and consider that these additional rights are therefore appropriate.
>
> 42.17 Also, these States consider that even if the taxation of profits of enterprises carried on by non-residents that are not attributable to a permanent establishment raises certain compliance and administrative difficulties, these difficulties do not justify exempting from tax the profits from all services performed on their territory by such enterprises.

Then again at Para. 42.18:

> It should be noted, however, that all member States agree that a State should not have source taxation rights on income derived from the provision of services performed by a non-resident outside that State. Under tax conventions, the profits from the sale of goods that are merely imported by a resident of a country and that are neither produced nor distributed through a permanent establishment in that country are not taxable therein and the same principle should apply in the case of services. ...

Incidentally, this is a position often *not* shared by non-OECD Member countries. See for example the Indian position on this aspect of the OECD Commentary,[4] reflecting Indian domestic law:

> [India] does not agree with the interpretation given in paragraphs 42.18 and 42.46, it is of the view that taxation rights may exist in a state even when services are furnished by the non-residents from outside that State. It is also of the view that the taxation principle applicable to the profits from sale of goods may not apply to the income from furnishing of services.

The OECD Commentary then provides a possible provision at Para. 42.23 for OECD Member countries not sharing the preferred or majority view reflected in that Commentary:

> Notwithstanding the provisions of paragraphs 1, 2 and 3, where an enterprise of a Contracting State performs services in the other Contracting State
>
> a) through an individual who is present in that other State for a period or periods exceeding in the aggregate 183 days in any twelve month period, and more than 50 per cent of the gross revenues attributable to active business activities of the enterprise during this period or periods are derived from the services performed in that other State through that individual, or
> b) for a period or periods exceeding in the aggregate 183 days in any twelve month period, and these services are performed for the same project or for connected projects through one or more individuals who are present and performing such services in that other State. ...
>
> ... the activities carried on in that other State in performing these services shall be deemed to be carried on through a permanent establishment of the enterprise situated in that other State, unless these services are limited to those mentioned in paragraph 4 which, if performed through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph. For the purposes of this paragraph, services performed by an individual on behalf of one enterprise shall not be considered to be performed by another enterprise through that individual unless that other enterprise supervises, directs or controls the manner in which these services are performed by the individual.

There are important questions for developing countries in evaluating this OECD provision, not just on the underlying policy but also as to how it can be administered effectively. These include whether a developing country is disadvantaged vis-à-vis developed countries and the taxpayers resident in those developed countries by not being able to ascertain the (effectively worldwide) gross revenues of such a person during a particular period. This would be necessary in order to determine whether more than 50% of the gross revenues attributable to active business activities of the enterprise during this period or periods are derived from the services performed in the host (i.e. non-residence) country through that individual. In the latest paper by the UN Tax Committee's subcommittee on the definition of PEs,[5] the OECD approach has been mentioned as a possibility, but is not the general approach favoured in the paper. The favoured approach effectively reflects the current UN services provision.

Delivery

Another difference between Art. 5 of the UN and OECD Model Conventions is that "delivery" has been omitted from Subparas. (a) and (b) of the Para. 4 list of preparatory and auxiliary activities in the UN Model Convention. In other words, delivery alone *is* an activity that can constitute sufficient economic nexus to the host country as will allow for source country taxation under the UN Model Convention, but not the OECD Model Convention. This difference reflects a view that the presence of a stock of goods for prompt delivery facilitates sales of the product and earning of profit in the host country and represents a continuous connection with the source country, and as such may constitute a PE and be subject to source country taxation.

In practice, the real effect of the difference may not be great, as there is then a need to determine the amount of income properly *attributable* to the PE (i.e. to the delivery

4. See page 389 of the OECD Model Convention, at Para. 36.
5. Paper E/C.18/2008/CRP.3, available at: www.un.org/esa/ffd/tax/fourthsession/EC18_2008_CRP3.pdf.

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business alone) and that may not yield much taxable income. The Commentary to the UN Model Convention recognises that only a small amount of income would normally be allocated to a PE whose only activity is delivery. Under either Model Convention, the inclusion of delivery where there is otherwise a PE would allow source country taxation of the income of the PE as a whole, including from delivery, so the real difference is where delivery is all that happens domestically.

Maintenance of stock

Under Art. 5(5)(b) of the UN Model Convention there can be, in contrast to the OECD Model Convention, a dependent agent situation if the agent maintains stock, even though that agent does not conclude contracts for the principal. Similarly as for the delivery exception, this is founded upon a view that the presence of stock, and the delivery of it by the agent, constitutes a sufficient economic nexus to the host country so as to justify taxation by the host country.

Insurance

Art. 5(6) of the UN Model Convention deals with some special characteristics of the insurance industry that were of concern to some countries, not only developing countries, when the UN Model Convention was developed. If an insurance agent was independent, it was considered that the profits would not be taxable to the enterprise in accordance with the provisions suggested in Art. 5(7), while if the agent was dependent, no tax could be imposed because insurance agents normally had no authority to conclude contracts as would be required under the provisions suggested in Subpara. 5(a).

Therefore a special provision was allowed to deem a PE to exist where an insurance enterprise "collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies". The special provision does not apply to reinsurance, where the risk has been transferred from one insurance company to another one, presumably because in that case the link is seen as too economically remote to the source country.

The special insurance provision in the UN Model Convention is founded on the view that taxation of insurance profits in the country where the premiums were being paid was desirable and should take place independently of the status of the agent. However, such taxation is based on the assumption that the person (employee or representative) through whom premiums are collected and risk insured is present in the country where the risk is located.

While some representatives involved in framing this exception were concerned about the difficulty of differentiating between agents of dependent and independent status, the case of representation through independent agents was eventually left to bilateral negotiations, which could take account of the methods used to sell insurance and other features of the insurance business in the countries concerned.

1.3. Article 7 (Business Profits)

The UN Model Convention's limited "force of attraction rule"

One significant feature of the UN Model Convention, as compared with the OECD Model Convention, is a limited "force of attraction rule" in Art. 7(1) of the former:

> If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment; (b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.

The rules differ from those in Art. 7 of the OECD Model Convention in that they allow taxation of certain profits not actually attributable under normal rules to the PE, but which relate to sales of similar goods or merchandise in the source country, as well as other business activities of the same or similar kind carried on by the enterprise in the source country.

The rule is limited to Art. 7 business profits – it is not extended to income from capital (dividends, interest and royalties) which is covered by other treaty provisions. Neither sales through independent commission agents nor purchase activities would become taxable to the principal under this rule.

The limited force of attraction rule is often not used in their bilateral treaties by countries otherwise following the UN Model Convention as they do not want to tax income from an activity unrelated to an establishment that is in itself not extensive enough to constitute a PE. They sometimes point to the uncertainty that such an approach creates for taxpayers, and the disincentive to investment that the rule could create.

On the other hand, those supporting such a rule point to various potential administrative benefits given that it is not necessary for source country taxation to *absolutely* determine whether particular activities are related to the PE or the income involved is attributable to it. That is, those favouring such a rule often prefer it not because they seek particularly broad taxing rights in this area, but because they want to ensure that difficulties of attribution do not prevent them from in practice exercising what may be well accepted and relatively conservative taxing rights.

Treatment of deductions in determining PE profits

Art. 7(3) of the UN Model Convention also provides some extra clarification of the treatment of deductions in determining PE profits, as compared to the OECD Model Convention.

1.4. Article 8 (Shipping, etc. and Air Transport)

The UN Model Convention's "Alternative A" in Art. 8 is the same as in the OECD Model Convention, so that

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profits from the operations of ships and aircraft in international traffic are taxable in the contracting state of effective management of the enterprise only. "Alternative B" of the UN Model Convention, however, provides for limited source country taxation of international shipping:

> 2. Profits from the operation of ships in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated unless the shipping activities arising from such operation in the other Contracting State are more than casual. If such activities are more than casual, such profits may be taxed in that other State. The profits to be taxed in that other State shall be determined on the basis of an appropriate allocation of the overall net profits derived by the enterprise from its shipping operations. The tax computed in accordance with such allocation shall then be reduced by ___ per cent. (The percentage is to be established through bilateral negotiations.)

The background to this alternative is that many developing countries lacked strong domestic shipping lines, and did not consider they should forego this revenue where the link to the economy was "more than casual". The Commentary to the UN Model Convention explains that the phrase "more than casual" means a scheduled or planned visit of a ship to a particular country to pick up freight or passengers.

1.5. Article 9 (Associated Enterprises)

Art. 9(3) of the UN Model Convention provides that the provisions of Para. 2 (providing for a "correlative adjustment" to be made by one country following adjustment by the treaty partner country, to avoid double taxation) "shall not apply where judicial, administrative or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under paragraph 1, one of the enterprises concerned is liable to penalty with respect to fraud, gross negligence or wilful default".

In other words, there may be in effect an additional penalty for such transactions, that of double taxation. Those adopting this approach point to the deterrent effect, and note that it only applies where there has been a final ruling of a serious default. Those opposing such a provision say the penalties for such activities should be as provided by law specifically, and double taxation should not be imposed *de facto* as an additional penalty.

1.6. Article 10 (Dividends), Article 11 (Interest) and Article 12 (Royalties)

In the UN Model Convention, the maximum dividend withholding tax rate allowed to the source country under Art. 10 (Dividends) is not specified, but is left subject to negotiation as between prospective treaty partners. This compares to a 5% maximum for foreign direct investment dividends and 15% maximum for portfolio investment dividends in the OECD Model Convention. Countries following the UN Model Convention (and indeed some OECD Member countries) generally have higher maximum rates than under the OECD Model Convention, i.e. they consider this is a fairer outcome for countries that tend to be net capital importers rather than exporters.

Perhaps somewhat contrary to expectations, the threshold to qualify for foreign direct investment (FDI), as opposed to portfolio investment (and therefore to be entitled to the lower maximum withholding tax rate) is lower under the UN Model Convention than under the OECD Model Convention (10% as compared with 25%). This is explained in the Commentary on the basis that in some developing countries non-residents are limited to a 50% share ownership, and 10% is seen as a significant enough portion of such permitted ownership to qualify for the FDI categorization.

Art. 11 (Interest) of the UN Model Convention does not provide particular withholding tax rates, for the same reasons as for dividends.

Art. 12 (Royalties) of the UN Model Convention provides for source country taxation of royalties. This is an approach not provided for in Art. 12 of the OECD Model Convention itself, but which is followed by about half of the OECD Member countries and is therefore addressed in the Commentary to the OECD Model Convention on this Article. Such an approach is premised upon the idea that the country of use of intellectual (including industrial) property has a right to tax profits from such use accruing to the intellectual property owner.

1.7. Article 13 (Capital Gains)

Art. 13(4) of the UN Model Convention preserves a source country taxing rate in cases where land in a country is not itself alienated, but an entity, including an offshore entity, which owns the land, and the principal property of which is land in that country (that is, it is a "land-rich" company) is alienated instead. This is designed to address tax avoidance possibilities raised by the separate legal entity status of such interposed entities. This is an instance where a UN Model Convention provision seeking to preserve taxing rights in such cases was later essentially adopted in the OECD Model Convention. The UN Model Convention is more detailed than in the OECD Model Convention. It covers not only source country taxation of sales of shares in land-rich companies, but also interests in partnerships, trusts, etc. (an option at least allowed for in the Commentary to the OECD Model Convention).

The UN Model Convention exception for land used in business, unless it is in the business of managing such land, does not appear in the OECD Model Convention. This is an instance where there is, in one respect, less possibility of source taxation under the UN Model Convention than under the OECD Model Convention.

In both the UN and OECD Model Conventions there is some "bluntness" in the "land-rich" companies (etc.) provision, because the whole of the alienation of shares or other interest may be taxed, not only the proportion of value in the entity related to local land. This bluntness relates to the anti-tax avoidance purpose of this provision, and recognizes some of the administrative difficul-

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ties in apportionment. However, a source country could limit the amount it taxed on that basis.

Art. 13(5) of the UN Model Convention also deals with alienation of the shares in other (i.e. non-land rich companies) in a provision that does not appear in the OECD Model Convention:

> Gains from the alienation of shares other than those mentioned in paragraph 4 representing a participation of ___ per cent (the percentage is to be established through bilateral negotiations) in a company which is a resident of a Contracting State may be taxed in that State.

This provision is limited to companies resident in the source country, whereas the land-rich companies provision applies wherever that company is resident, because the local link is provided not through the residence of the company but through the ownership of the local land. The Commentary suggests some concessional rate of taxation might be considered, however.

1.8. Article 14 (Independent Personal Services)

Art. 14 has been deleted from the OECD Model Convention, and cases it dealt with are now covered by a combination of Arts. 5 and 7 (with Art. 3 on definitions being potentially relevant also). In other words, the "fixed base" test in Art. 14 is replaced by the PE test in Art. 5 and business profits attributable to the PE (including other "extensions" where the normal attribution rules do not apply) based on Art. 7(1) of the OECD Model Convention may be taxed in the source country.

The UN Tax Committee recently decided to retain Art. 14, (with an alternative available for those wishing to delete it) so that the same situation does not apply for the UN Model Convention (see section 1.1. of this paper).

1.9. Article 16 (Directors' Fees, etc.)

The UN Model Convention, as compared to the OECD Model Convention, extends the scope of this Article by including both directors and "high level managers". This is based on the principle that where a top-level managerial position of a company resident in a contracting state is occupied by a resident of the other contracting state, the remuneration paid to that official should be subject to the same principle as directors' fees. The term "top-level managerial position" in this respect refers to a limited group of positions that involve primary responsibility for the general direction of the affairs of the company, apart from the activities of the directors.

1.10. Article 18 (Pensions)

Art. 18 of the UN Model Convention provides for two alternatives. Art. 18A, like Art. 18 of the OECD Model Convention, assigns to the country of residence the exclusive right to tax pensions and other similar remuneration, but it departs from the OECD Article by granting to the source country of the pension (the country from which it is paid) the exclusive right to tax when the payments involved are made within the framework of a public scheme which is part of the social security system of that country or a political subdivision or a local authority thereof.

The alternative provision in the UN Model Convention, i.e. Art. 18B, provides for a sharing between the country of residence and the country of source for the pension of the right to tax pensions and other similar remuneration when the payments involved are not made within the framework of a public scheme which is part of the social security system of a country or a political subdivision or a local authority thereof. In the case where payments *are* made within the framework of such a public scheme, the right to tax belongs only to the source country.

1.11. Article 21 (Other Income)

Art. 21(3) of the UN Model Convention provides for source country taxation of other income sourced in that country, as an exception to the general approach of allowing only residence country taxation of income not dealt with in other articles of the tax treaty (or else sufficiently related to a PE in the other country). This is an addition to Art. 21 of the OECD Model Convention. It is intended to permit the country in which the income arises to tax such income if its law so provides. Otherwise only the residence country could tax, even though income arises in its treaty partner.

1.12. Article 25 (Mutual Agreement Procedure)

The UN Model Convention specifies, in Para. 4, the Mutual Agreement Procedure (MAP) process with more detail than in the OECD Model Convention. The Commentary to the OECD Model Convention on this provision is, however, more detailed, and the text of the OECD Article introduced, in 2008, an optional arbitration provision at Para. 5. This, as well as other possible amendments to this Article and its Commentary, remains under discussion in the UN Tax Committee, but there appear to be some issues for developing countries that need to be considered. These include those of:

- *cost*: can many developing countries afford what could be the high costs of arbitration, as compared with the internalized and likely much lower costs of MAP?;
- *unequal resourcing capabilities*: will the process in effect belong to highly-paid advisers to taxpayers, who may have the resources to fully impress their points upon the arbitrator(s) even though the case for the developing country may be inherently stronger but cannot be put as effectively or at least not without great cost and recourse to their own consultants? Similar issues arise as between unequally resourced administrations; and
- *developing country voice and participation*: will there be sufficient numbers of developing country arbitrators or arbitrators familiar with developing country realities? Also, will arbitrators grounded in OECD approaches and its Model Convention sufficiently take into account differing interpretations of non-OECD Member countries and alternative models?

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Many who oppose an arbitration provision being introduced into the UN Model Convention, even as an alternative, take the view that developing countries did not formulate the underlying rules often applied in an area like transfer pricing, and are often only now coming to terms with what those rules mean and what their attitude to them should be. On this view, developing countries should not give up the fair latitude for interpretation that MAP gives them and leave those decisions entirely in the hands of others who may be unfamiliar with the background and the consequences of particular rulings in their context.

In effect, on this view, the fair latitude for interpretation is seen as a way of rendering acceptable and fairly applicable, in a developing country environment, rules that have been thrust upon them. Associated with this, such fair latitude should not be lightly given up unless and until there is sufficient developing country influence on how those rules and their replacements are shaped and interpreted globally.

1.13. Article 26 (Exchange of Information)

The OECD Model Convention's Art. 26 on Exchange of Information (EOI) was altered in 2005, in what purported to be a clarification rather than an extension of the Article. With some minor drafting differences, the OECD changes to this Article and revised Commentary have been adopted by the UN Tax Committee for the next version of the UN Model Convention, on the basis that it is suitable and potentially helpful for developing countries.

The importance of EOI for developing countries cannot be overestimated, although the whole EOI process in its practical application and effectiveness is something of a "black box", operating in the shadows more than the light. There is some concern among developing countries that developed countries will expect them to provide information, and will use their economic power to ensure this happens, whereas some developed countries will not be so forthcoming in providing information to allow other countries to protect their tax bases and reverse "encouragement" will not be possible. The issue of double standards in this and other areas of tax cooperation is likely to be an important one for international tax cooperation over the coming years, and to reaffirm the importance of the UN having an increasingly important role in international tax cooperation that benefits the less powerful as well as the more powerful.

1.14. Article 27 of the OECD Model Convention (Mutual Assistance)

Art. 27 of the OECD Model Convention on Mutual Assistance has no equivalent provision in the UN Model Convention. However, the UN Tax Committee has agreed to an identical provision for the next version of the UN Model Convention, with an almost identical Commentary, although recognizing more overtly that developing country administrations should not be overburdened in the implementation of this Article.

2. Recent Developments

The UN Tax Committee recently had its fourth Annual Session in Geneva (20-24 October 2008), and was responsive to considering new issues, including those going well beyond the revision of the UN Model Convention. As the current Committee Members' four-year terms all come to an end at the end of June 2009, it will ultimately be up to the new Tax Committee, or any replacement body that takes up its role, to determine the ongoing agenda, but it will at least have before it the suggestions of the Tax Committee as currently constituted.

Besides continuing work on updating the UN Model Convention and on a new version of the UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries, as well as continuing work towards a code of conduct on cooperation in combating international tax evasion, these suggestions include some focussed work on issues involved in developing countries offering tax incentives. Other suggestions include work on issues involved in the negotiation of tax treaties, including identifying possible treaty partners, setting up negotiation teams and conducting negotiations. The Tax Committee has also supported work on a proposed practical transfer pricing manual for developing countries.

There have also been calls for greater UN involvement in other issues of high relevance to international tax cooperation, within its broader framework of the promotion of development and poverty reduction, including amongst others, in relation to tax and climate change and the tax dimension of the current global financial crisis – including its impact on tax collections and the tax-related responses to it. These could, if adequately resourced, be properly pursued as part of the UN Tax Committee's broader mandate of the promotion of international tax cooperation and development.

While the breadth of even the current agenda will put pressure on the still very lightly resourced UN Tax Committee and its Secretariat, it is to be hoped that some focused and original work on what best responds to the needs and priorities of developing countries, can be achieved, and that the Committee can in this way start to narrow the gap between a wide mandate and an, until now, rather narrow agenda.

3. The Core Financing for Development Background

As noted in the 2008 Article, the work of the current UN Tax Committee and the place of tax work in the UN system both need to be properly understood in the context of the International Conference on Financing for Development held from 18-22 March 2002 in Monterrey, Mexico (the "Monterrey Conference").[6] The role of tax systems in driving domestic resource mobilization for development, and the importance of genuine developing

6. See the overview at www.un.org/esa/ffd/overview/.

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country voice and participation in setting the rules for international tax cooperation are themes in the Monterrey Conference outcome document (the "Monterrey Consensus") and central aspects of the UN tax work.

A major follow-up conference to the Monterrey Conference was held in Doha, Qatar from 29 November to 2 December 2008, with a view to reviewing the progress on financing for development since Monterrey. This involved further consideration as to how to improve international cooperation in tax matters to mobilize domestic resources, as well as how to ensure developing countries have sufficient input into international tax norms ultimately affecting them.

The possibility of enhancing the UN tax work to give it a wider coverage in terms of input and areas of work, including in helping developing countries combat tax evasion, was an objective for the Doha Conference frequently advocated in discussions forming part of the preparations for the Conference. Many supported the upgrading of the UN Tax Committee to become an intergovernmental Commission in these meetings (as a contrast to the current model, in which the Committee Members are experts nominated by governments but acting in their individual capacities).

Such an upgrade would have been a significant step within the UN system, as it would have reflected the perceived urgency for greater intergovernmental cooperation in the area of taxation, and the centrality of effective taxation systems (including policy and administration aspects) to the sustainable development of countries. Additionally, it may have encouraged a broader agenda for the Committee (with different experts available for different subjects, rather than with each participant on the Committee addressing with equal expertise and interest all tax matters – an unrealistic expectation in such a complex and wide-ranging area).

In the Doha Conference, although the importance of tax to development had a particularly high profile, no decision was taken to upgrade the Tax Committee. There was, however, an agreement to further examine its possible strengthening, which could ultimately take it along the same or a parallel path to assist it in meeting its broad mandate. In the final text of the Doha outcome document (the "Doha Declaration")[7] there are direct references to the tax cooperation issue, as follows at Para. 16:

> We will continue to undertake fiscal reform, including tax reform, which is key to enhancing macroeconomic policies and mobilizing domestic public resources. We will also continue to improve budgetary processes and to enhance the transparency of public financial management and the quality of expenditures. We will step up efforts to enhance tax revenues through modernized tax systems, more efficient tax collection, broadening the tax base and effectively combating tax evasion. We will undertake these efforts with an overarching view to make tax systems more pro-poor. While each country is responsible for its tax system, it is important to support national efforts in these areas by strengthening technical assistance and enhancing international cooperation and participation in addressing international tax matters, including in the area of double taxation. In this regard, we acknowledge the need to further promote international cooperation in tax matters, and request the Economic and Social Council to examine the strengthening of institutional arrangements, including the United Nations Committee of Experts on International Cooperation in Tax Matters.

This could form the basis for improving the ability of the UN Tax Committee to meet its mandate, although ultimately much will depend on how the Economic and Social Council (ECOSOC) of the UN approaches the issue. As ECOSOC is composed of Ministry of Foreign Affairs diplomats; how much input Ministries of Finance, tax administrations and other tax experts have in the process could be especially important to the outcomes. The willingness or otherwise to make recommendations that have budgetary implications may also be relevant in this process.

Another relevant provision in the Doha outcome document is found at Para. 25:

> ... It is important that bilateral investment treaties, as well as tax treaties and other tax measures to facilitate foreign investments, take into account regional and multilateral cooperation, including at the regional level. ... It is important to promote good tax practices and avoid inappropriate ones.

This is regarded by some as weaker than a proposal in the Conference to speak of "detrimental" tax practices, but if that is the case it does not seem drastically so. While some developed (OECD Member) countries may look to this paragraph as support for their efforts in countering so-called harmful tax practices, it is implicit in this paragraph that such practices can only fairly and comprehensively be dealt with by genuine partnership with non-OECD Member countries in the definition and identification of, assistance in avoiding, and global response to, "inappropriate" tax practices.

Although the Doha Declaration defers decision making on the tax cooperation issue pending further consideration, it has the virtue of specifically addressing the issue of evaluating the UN Tax Committee's ability to meet its mandate. It will keep justified pressure on all involved in the process, including ECOSOC, the UN Tax Committee and the UN Secretariat, to show that the UN is playing its proper role in enhancing tax cooperation, with a view to furthering sustainable development for the special benefit of developing countries.

In short, 2009 will be at least as busy a year as 2008 for the UN tax work, and may be the watershed year for its future direction. This work has strong proponents and strong opponents, but there is increasing recognition of the key role of international tax cooperation in future global development. There exists a clear, if obstacle-strewn, path ahead, well-lit by the principles of the Monterrey Consensus and the Doha Declaration, but with some careful footwork still required.

7. UN document A/CONF.212/L.1/Rev.1*, available at ww.un.org/esa/ffd/doha/.