



# **The Revised United Nations Model Tax Convention and Related Work**

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# Monterrey Consensus on FfD

- Aspects of ***Financing for Development***, where UN Tax Cooperation "sits":
  1. **Domestic resource mobilisation (DRM)** (important tax role in development – schools, hospitals, roads etc.. – it isn't *only* about avoiding double taxation, even though that's important – see 2).
  2. **Foreign direct investment (FDI)** (importance of investment to development, so ***not anti-business***).
  3. International trade
  4. Official development assistance (aid)
  5. External debt
  6. **"Systemic" issues** ("voice and participation" of developing countries in norm-setting – an important tax focus).

# UN Tax Committee

- Secretariat support to the **UN Committee of Experts on International Cooperation in Tax Matters** ("UN Tax Committee").
- A Subsidiary Body of The UN's Economic and Social Council ("**ECOSOC**").
- Committee is custodian of the UN Model.
- For more – see our website:  
<http://www.un.org/esa/ffd/tax/>

# Current Membership (2009-2013)

## "D'ing" country# experts (15)

Morocco

Egypt

South Africa

Nigeria

Ghana

Senegal

China

Malaysia

Republic of Korea\*

**India**

Pakistan

Barbados

Chile\*

Mexico\*

Brazil

## "D'ped" country# experts (10)

Belgium\*

Italy\*

Spain\*

Germany\*

Norway\*

Switzerland\*

United States\*

New Zealand\*

Japan\*

Bulgaria

# Though nominated by countries,  
Members serve in their own  
capacity

\* Denotes OECD Member

# Some Differences to the OECD Model

- The UN Model seeks to achieve a balance for developing countries between **a fair reservation of taxation rights and openness to investment.**
- But it is ultimately **up to each country** to determine its attitude to exertion of taxing rights and openness to investment.
- **Not necessarily a developing/ developed country divide** on every issue, e.g. Australia, Canada and New Zealand have traditionally taken some strong source country positions.
- **India** – mixed practice, but **UN Model has strongly influenced Indian treaties.**

# Continuing Relevance to India?

- India is a **Member of the UN**, but not the OECD, with a full seat at the decision-making table;
- Even among **OECD countries**, many have more **source State views in certain areas (e.g. capital gains, services, royalties etc.)**;
- Even in the area of services, India may legitimately take the **view that some source State taxation is appropriate** on a policy basis as part of **domestic resource mobilisation** - a matter of principle:
  - money in the hands of private taxpayers is not the same as **money used by the government for development purposes – public goods**, and
  - there may be **legitimate public expectations** that certain activities will be taxed whatever the broader flows;

# Continuing Relevance to India?

- Stocks and flows can change over time, though **treaties are built for the long haul**;
- And even if the position of India changes over time as to services, **it may stay the same on other source tax issues**. India will have its own Model;
- **India's experience** in development, from DRM and FDI aspects, is of great benefit to UN work, and **useful for India** to inject its **voice and perspectives** into the debate and the setting of what may become norms.

# Some Differences to the OECD Model

- **Article 5 (Permanent Establishment)**
  - level of **economic engagement/ footprint** required to justify source country taxation under treaties is generally lower under UN Model, e.g.:
    - Six-month duration test for building and **construction PEs**;
    - **Delivery; dependent agents; insurance; certain “independent agents”**;
    - **Special services provision.**

# Some Differences to the OECD Model

- OECD – no special provisions for **services** in Articles themselves – treat the same as for goods.
- **Minority view expressed in OECD Commentary at Para 42.16:**

**"... 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.**"**
- **Optional OECD provision in OECD **Commentary.****

# Some Differences to the OECD Model

- **OECD Commentary 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. ..."**

**– [NB Indian position at para 36 – p389]**

# Some Differences to the OECD Model

- OECD Commentary at para 42.19:  
"In the case of non-employment services (and subject to possible exceptions such as Article 17) only the profits derived from the services should be taxed. Thus, provisions that are sometimes included in bilateral conventions and that **allow a State to tax the gross amount of the fees paid for certain services if the payer of the fees is a resident of that State** do not seem to provide an appropriate way of taxing services."

# Some Differences to the OECD Model

- OECD Commentary at para 42.19:  
"First, because these provisions are not restricted to services performed in the State of source, they have the effect of **allowing a State to tax business activities that do not take place in that State.** Second, these rules allow taxation of the **gross payments** for services as opposed to the profits therefrom."

# Some Differences to the OECD Model

- **Article 7**
- OECD Model has changed– culmination of long **"attribution of profits"** project.
- What does it mean for developing countries?
  - **Requirement to give deductions** for notional interest and royalty flow between parts of the same entity.
  - **But no countervailing right to tax such "notional payments"**.
  - **Complex – but who bears the cost of that complexity?**
  - **Impact on source countries? How many OECD countries will follow it?**
- UN Model has **rejected** this – **another key "fork in the road" between the two Models.**

# Some Differences to the OECD Model

- **Article 11 (Interest)**

- Islamic financing issues addressed.
- Rate not specified.
- Loans will often specify a net return after WHT, so **is a high rate just crippling your own people's competitiveness?**
- But developmentally, **a benefit to individuals will not be a direct substitute for a benefit to the revenue** then applied to public goods.
- Some countries were concerned at forex outflows as well as revenue losses. Nowadays?
- Again, **each country must weigh up pros and cons.** Commentary addresses this.

# Some Differences to the OECD Model

- **Article 12 (Royalties).**
  - No major changes but **a different approach to the OECD Model** – although many OECD countries do not follow the general OECD approach of no source State taxation.
  - Pros of **transfer of technology?**
  - Right to return of IP owner – **recovering R&D?**
  - Benefits of **new markets?**
  - **Feeling** among many developing countries that the **technology they received had costs recovered already**; how true is it nowadays?
  - Importance of **WHT as an administrable tax** for developing countries.

# Some Differences to the OECD Model

- **Article 14 (Independent Personal Services)**
  - Deleted from OECD Model.
  - UN Tax Committee discussed possible deletion, while seeking to preserve source state taxing rights through Articles 5 and 7.
  - But a lot of support for **Article 14** as **differentiated from Art. 5** (e.g. fixed base vs. PE, Non Discrimination Article consequences?)
  - **It will stay, will be examined for possible improvements, and deletion will only be an *option*** addressed in Commentary.
  - **Services review** is the next big Committee project.

# Other Relationships to the OECD Model?

- **Art. 1 Commentary – Improper Use.**
- **Arbitration – New *Alternative* Art 25 B will include a mandatory arbitration option.**
- **Pros and cons** of mandatory arbitration for countries – requires close consideration in the light of your own circumstances.
- **Article 26 (Exchange of Information)** – Some minor drafting differences (e.g. – position of smaller administrations) but OECD changes **adopted** for inclusion in next version of UN Model as regarded as suitable for developing countries.
  - Issue of **automatic exchange** of information?
  - **Bilateral Exchange of Information Treaties – impact on sought-for comprehensive DTAs?**

# Other Relationships to the OECD Model?

- **Article 27** of OECD Model on Mutual Assistance **has been agreed for new version of Model**, because seen as potentially beneficial.
  - OECD/CoE Convention and developing countries?
- A lot of the 2011 changes pick up **aspects of the OECD Model** that have changed since 1997 but are **seen as helpful for developing countries – including in assisting source-based taxation.**
- Other parts not fully considered (eg Partnerships Report issues) are not picked up.
- Will there generally be **greater convergence or divergence between the UN and OECD Models?**
- **Illuminating recent debate on the Article 9 Commentary of the UN Model.**

# Paragraph 3 of the UN Model Commentary on Article 9

- **Used to say:**

- "3. With regard to transfer pricing of goods, technology, trademarks and services between associated enterprises and the methodologies which may be applied for determining correct prices where transfers have been made on other than arm's length terms, **the Contracting States will follow the OECD principles which are set out in the OECD Transfer Pricing Guidelines. These conclusions represent internationally agreed principles and the Group of Experts recommend that the Guidelines should be followed for the application of the arm's length principle which underlies the article.**"

# Paragraph 3 of the UN Model Commentary on Article 9

- **Now it will:**

- Put that **statement in context** as one made by the **former** UN Group of Experts;
- Note the issue has **not been fully considered by the current Committee;**
- Refer to the public **records of Committee's Annual Sessions** for the debate so far; and
- The records of the 2011 Annual Session of the Committee will note that the **recommendation may need to note that the Guidelines are for guidance only and that three Members have expressed reservations.**
- But acknowledge agreement on Arm's Length and
- Makes clear **no change to direction of UN Transfer Pricing Manual ...**

# Subcommittee on Transfer Pricing

## – Practical Issues

- **Mandate:**

- develop a practical manual on transfer pricing, based on the following principles:

- a) That it reflects the operation of Article 9 of the United Nations Model Tax Convention, and the Arm's Length Principle embodied in it, and is consistent with relevant Commentaries of the UN Model [i.e. "recommendation" of following the OECD Guidelines].**
- b) That it reflects the realities for developing countries, at their relevant stages of capacity development.**
- c) That special attention should be paid to the experience of other developing countries [i.e. South-South sharing of experiences]; and**
- d) That it draws upon the work being done in other fora.**

# Transfer Pricing Manual

- **Complete draft manual for adoption to the 2012 Tax Committee Annual Session (October 15-19).**
- **Integrated into renewed UN (and hopefully other) capacity building efforts.**
- **Working Drafts on our Website – comment welcome.**

# Transfer Pricing Manual

- **Areas of focus:**
  - What sort of approach might be **appropriate for a developing country at its particular stage of development**, in line with its own sovereign priorities?
  - **TP should be understood as a journey** – how should it be planned – a staged approach? initial focus areas?
  - **Integration with other aspects**, e.g. general investment promotion policy.
  - **Can arm's length pricing (ALP) approach be addressed in a way that better works for DCs** (especially by allowing focus of limited resources on areas of greatest concern at a point in time, and by reducing levels of data seeking and crunching required for each individual case) **and still be ALP?**
  - How do we most fairly deal with **the imprecision and complexity of ALP and distribute its burdens?**

# A Disconnect?

- At the **domestic level** we recognise:
  - **Importance of reducing complexity (including law simplification) and compliance burdens;**
  - **Special rules for small and medium taxpayers** – recognising in part their more limited resources and the cost to them of complexity and paperwork;
- Do we do the same at the **international level** for developing countries with **limited tax administration capabilities**?
  - Or do we tend to be more **resistant to departing from a single rule**:
    - *“One Ring to Rule them All ... and in the darkness bind them.”;*
  - **Not taking into account these factors may reduce a sense of international “ownership” in the rules and could in fact lead to dozens of roads rather than 2 or three highways of state practice.**

# Capacity Building

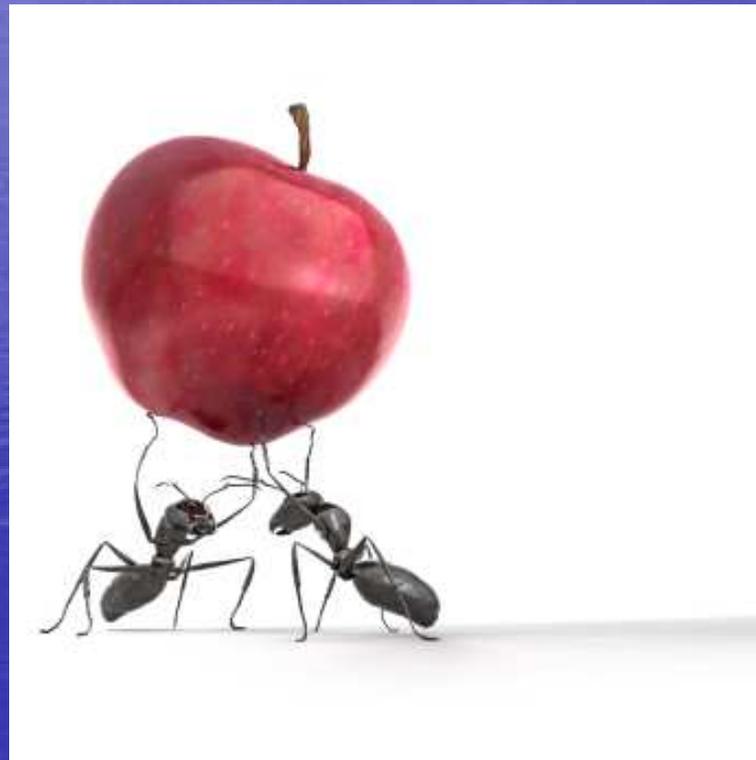
- **A central part of Mandate never fully met**, largely due to ongoing resource issues, but improving.
- **New Inter-Regional Advisor Position** focussed just on capacity building (last had such a position about 9 years ago – Mr. Suresh Shende of India).
- **More funding for events.**
- **More collaboration, but staying true to the UN goals.**

# India's Role?

- Vast **experience of development issues** (developing in some areas – very developed in others);
- Vast **experience of tax issues**, at gov't (including judicial) and private levels;
- **Experience and perspectives will benefit other countries, and Indian gov't and enterprises in dealing with such countries;**
- Gov't and private **support for UN's unique leadership role in int'l tax cooperation;** ensuring making sure the work is sufficiently **resourced and responsive.**

# The General Approach of the UN Tax Secretariat

- We are small, but:



- We can do the job.