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**Committee of Experts on International  
Cooperation in Tax Matters  
Fourteenth Session**

New York, 3-6 April 2017

Item 3 (b) (vii) of the provisional agenda

**Other matters for consideration, including suggestions for  
Committee procedures and future Committee work.**

**Secretariat note:**

This note is produced in response to the request from the Committee at its thirteenth session for a short secretariat note on some procedural issues where this Membership of the Committee may be able to inform consideration of such issues by the next Membership of the Committee. It is not intended to be exhaustive of possible matters for consideration and views represented are by no means intended to be exhaustive of views on the issues addressed.

## **Introduction – Purpose of this Note**

In its Report on the Twelfth and Thirteenth Sessions, the Committee of Experts on International Cooperation in Tax Matters (the Committee) noted that in the thirteenth session:<sup>1</sup>

27. The broader issue arose as to whether Committee Members should include minority views corresponding to the views expressed by their countries in relation to the OECD Model Convention (observations, reservations or positions). The secretariat was requested to prepare a short paper on the options for dealing with minority views, for the Committee's consideration at its fourteenth session, under an agenda item addressing "Other matters for consideration, including suggestions for Committee procedures and future Committee work". It was decided not to "date stamp" minority views as having been expressed at a particular session, at this stage.

28. On another related issue, it was decided that, for the purposes of the membership of the Committee at the time of the session, members not physically present would not be allowed to vote, though they could present their views for consideration. The secretariat was asked to address the issue in the paper on procedural issues and to record therein the discussions on the issue to date. The matter was not expected to be discussed further at the fourteenth session, but such a paper might be useful for the next membership of the Committee should it wish to reconsider the issues at the fifteenth session or on any subsequent occasion.

2. While these issues have been addressed for the purposes of this Membership of the Committee, the current note summarises some of the background and previous discussions on these and other procedural issues to help put this Membership of the Committee in the best position to help the next Membership, should it wish to further consider such issues.

## **Background**

3. The Committee appears to have considerable scope as to the procedural rules it follows. At its first session in 2005, the representative of the UN Secretary-General noted:<sup>2</sup>

8. Since there had been no change in legal status of the group into an intergovernmental body it was not subject to the formal rules of procedure normally applied to those bodies. Accordingly, for the conduct of its business the Committee had the option to either continue to use the practical or working arrangements of the former Ad Hoc Group of Experts or to establish new ones.

In fact, in several areas, such as the constitution of subcommittees, the procedural rules have evolved considerably over time.

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<sup>1</sup> E/2016/45

<sup>2</sup> E/2005/45

### **Treatment of Minority Views**

4. A representative history of the treatment of minority views in the Committee, as expressed in the UN Model and the Committee Reports, is annexed. As can be seen from that Annex, there has been ready acceptance of the need in general to reflect divergent views and there are numerous instances of such views being recorded, and even instances in the Model of single Member views being reflected.

5. There is no *intrinsic* reason why even a single Member's view should not be reflected (a view which seems to have received majority support at the thirteenth session where such a single Member view was agreed) and in a 25 Member representative group, there may be other important non-Member stakeholders relevantly taking that view, such as tax administrators from other countries.

6. If some restraint or scrutiny was sought on particular single Member views, there could be a process of "seconding" them by other Members, with the "seconded" not necessarily having to take that view his or herself, but acknowledging it as a respectable view that should be reflected in the Model and its Commentaries to recognise options and approaches legitimately available or likely to be encountered in practice, as a matter of candour and transparency.

7. Another option (not necessarily an alternative) would be that a supermajority of, for example 75% of Members present, could decide that a view by one or even a small number of Members – perhaps up to two or three, was not appropriate to be reflected in the Model and its Commentaries, such as because it represents a view contrary to accepted canons of interpretation. Such a "nuclear option" should be a matter of last resort, of course, even if provided for. A balanced technical committee of the Committee could also have an advisory role in "quality assurance", perhaps working with the secretariat on contentious views.

### **Date Stamping when Members Express Opinions and/ or Identifying the Members Taking Views**

8. It was discussed at the Committee's thirteenth session whether views of, in particular, a single Member or a small number of members, should be "date stamped" to help identify when that view was expressed (e.g. was it a view expressed ten years ago or as part of the process of the latest update. At present the only explicit "date stamping" used in the Model seems to be to indicate views of the former Group of Experts (i.e., the Ad Hoc Group of Experts that existed before the current Committee itself was formed and first met in 2005.)

9. The names of Members objecting to majority views have sometimes been mentioned in Committee Reports, but not in the Commentaries. If Members request to be identified this is in some respects easier to do than if they do not seek this, but if the majority seeks such identification of minority Members the matter becomes more difficult.

10. In the view of the secretariat, any general requirement of identifying Members taking different views as a general rule (even if appropriate) may be difficult in the Model

Commentaries themselves, without creating confusion among users about the nature of the Committee and its Member contributions. With the Committee being a continuing body of changing Membership there is no inherent hierarchy of current Member views over previous Member views, though of course expressions of views from the past should be kept under review to ensure they still remain relevant.

11. Issues of how to refer to views taken by one or two, or even three Members exist, and a more uniform usage may be useful – should there be references to views of "one Member" or "a few Members" or should the reference, for example be to "another view" (although that may not distinguish between Member and observer views without more), "some Members" or the like?

### **Views Corresponding to Country Positions on Quoted OECD Commentary**

12. In the thirteenth session, the question arose of whether Member views are appropriate on an interpretation in the OECD Model Commentaries that mirror observations or positions already officially made by countries on the OECD Model itself. At the thirteenth session it was agreed that, for the purposes of this Membership, there would be no such restriction, but the issue is open for the next Membership to reach a different view, of course.

13. One view on minority views, as put in the discussions at the thirteenth session is that, in essence:

- paragraph 22 of the Introduction to the Model already sufficiently incorporates by reference the existence of such views when it notes that:

In quoting the Articles and Commentaries of the OECD Model Convention it is noted that various OECD Member States have expressed “reservations” on certain Articles and have made “observations” on particular aspects of the Commentaries and that some non-OECD Member States have xiii Introduction expressed “positions” in relation to certain Articles and Commentaries. Such formal expressions of differences of view to those taken in the OECD Model Convention are contained in the text of the OECD Model Convention, as revised from time to time. The Committee has recognized in preparing this update to the United Nations Model Convention that such expressions of country views are a useful aspect of the OECD Model Convention in terms of understanding how it is interpreted and applied by the specific countries expressing those views, even though they have not been repeated in the text of the United Nations Model Convention for practical reasons.”;

- Members should not be free to have opinions on Commentary that derives from the OECD where such opinions are clearly not consistent with the view put in that Commentary – the OECD observations and positions are the place for such disagreements to be aired. The Model will become too unwieldy if Members repeat these points whenever a point of disagreement arises;

- the integrity and usefulness of the UN Model would be undermined by allowing a "free-for-all" approach to positions that amount to (using the OECD language) "observations" expressing differences to the interpretation in the Commentaries;
- there needs to be a greater discipline upon the quality of such "observations" than under an approach of letting any Member make such observations as they wish. This may not only give the "coverage" of the UN Tax Committee and the UN Model to a view that may be objectively unsustainable under prevalent Vienna Convention rules of interpretation, for example, but may detract from the status of the Committee guidance and the sense of its quality control more generally;
- when a small number of Members are expressed to hold a view, we do not know from the Commentaries (or even the Report, with a few exceptions) who put the view, when they put it, whether anyone else (still) holds the view at a particular time, what the jurisprudence in the person's own country is, whether it is a revenue practice, whether it is mere wishful thinking as to what a treaty could say – not what it does say, and so on. A review mechanism for such views would help in this regard, on this approach; and
- apart from these issues, there are other potential questions about what the significance of the expressed view is: what are we being told? How much weight do I attach to it? Will I encounter this view in a State in which I am thinking of engaging? How far does it depart from the orthodox view? Should I as a government consider changing my own views to conform?

14. The alternative view is that:

- Committee Members are chosen as experts expected to represent diverse experiences and realities and need the freedom to express their views as they see fit to fulfil their task properly. Obviously there may be a process of testing for example whether a claimed country practice is objectively evident and there may be some discussion about how the view is to be accurately reflected, including respecting the existence of alternative interpretations and the need for a balanced Model;
- Committee Members are chosen for their personal expertise and act in their personal capacity – on this view they must not feel constrained by the views of any countries (even the countries that nominated them) in expressing their opinions on interpretative matters – indeed to do so would be contrary to their role as Committee Members;
- to limit potential statements of the Member based on country positions put on the OECD Model could be seen as treating the Committee as an intergovernmental body, which it is not, and as entering into the political issue of the possible "upgrading" of the Committee into an intergovernmental body;
- in effect delegating the task of challenging OECD majority interpretations to the OECD and its Model neglects the many non-OECD Member countries in the UN Membership, most of whom do not have positions expressed on that Model;

- such an approach could also be seen as creating "ambulatory" difficulties since observations and positions on the OECD Model may change over time – will a view corresponding to a later expressed position on the OECD Model need to be removed from the UN Model Commentaries, and how might such removal be (mis)interpreted;
- the general reference to observations, reservations and positions on the OECD Model is useful to understanding that Model, and commentaries on it, but (unless perhaps all these were quoted as relate to quoted parts of the Commentary) they may legitimately need to be brought to the attention of readers of the UN Model, to accurately reflect its operation in practice, and help decide which observations and reservations have had special significance in the UN debate, and to make clear the limits of acceptance of the quoted OECD text as written;
- the UN Model should reflect at least a diverse a group of views as the OECD Model in the Commentaries themselves, especially as it lacks a similar system of formal observations, reservations and positions as the OECD Model has, and therefore the views and jurisprudence referred to should not be *de facto* limited by OECD coverage of a view;
- further, the reference to observations, reservations and positions in the introduction to the UN Model may not be interpreted as "picking up" all the observations and reservations as being agreed by the Committee as generally applicable, but as noting an awareness of them when dealing with countries making those observations and reservations. Some may be of special relevance to the UN Model and it is too much to expect parts of the OECD Model not even quoted in the UN Model (country positions) to limit the guidance provided by the Committee; and
- Questions about "what are we being told by a minority view? How much weight do I attach to it? Will I encounter this view in a State in which I am thinking of engaging? How far does it depart from the orthodox view? Should I as a government consider changing my own views to conform?" as raised above, and the like, may apply as well to majority as to minority views, since even a majority view of those present and voting in a particular Committee session does not necessarily show what is "orthodoxy" as opposed to "heterodoxy", and the orthodox may vary between countries in different positions or over time.

### **Absentee Voting?**

15. At the Committee's thirteenth session, it was decided not to allow absentee voting in the meetings of the current Membership of the Committee (i.e. up to and including the fourteenth session). Rule 60 of the ECOSOC Rules of Procedure notes that:

"Decisions of the Council shall be made by a majority of Members present and voting"

16. The decision at the thirteenth session of the Committee is therefore consistent with this, a common institutional rule. Those arguing against an absentee vote at the thirteenth session did so in particular on the basis that one needed to be present to hear the arguments before voting. It might also be that unless a specific vote was signalled before a Committee

session, it might be difficult, and time consuming, to match a view expressed in an email or letter with a question in the terms it is put to the Committee in Geneva or New York. Participation in sessions should also be encouraged as those chosen as Members have been chosen over other worthy candidates, and unsuccessful candidates and their nominating countries may be aggrieved at absentee voting.

17. The contrary argument is that, unlike ECOSOC representation, Membership in the Committee is on a personal rather than country basis, so that if one is prevented from travelling, the absence of a possible replacement Member for the meeting favours allowing votes to be cast in absentee to prevent a possibly distorted "majority" view. The view has also been expressed that often the issues are clear cut, having already been discussed, and it is therefore possible to have a considered and relevant view on such issues by the time of the meeting.

18. There may be cases where the specifics of a vote on a well-defined issue can be predicted before (or even during) a session, if already discussed for example. Whether a proxy vote by another Member could be allowed in such a case might be considered.

#### **Making the Views of Absent Members Known**

19. At the thirteenth session, while absentee *voting* was not allowed for the current Membership term, it was allowed that views on particular issues could be made known before a meeting by those Members unable to participate in person and they could be mentioned in the debate.

20. This has some advantages in ensuring that those Members who may be unexpectedly unable to travel can convey some of their views into the discussion. The support expressed for openness on this point at the thirteenth session appears easily justifiable. There is obviously some risk of misinterpretation and uncertainty about the views, with follow up questions not possible, but the risk of unsatisfactory consequences from this is less than in a voting procedure, because such views merely contribute to the debate, and will often be in effect supported by the views of Members present, in any case.

21. Even so, some protocols, such as a need to circulate directly or through the secretariat, to all Members in a written form, might be useful. Possibly they should be required before the Session commences, to ensure comments are not tendered after an item has been decided.

#### **Information provided to the Committee by non-Members**

22. Similarly, some protocols as to the receipt of information for the Committee but provided by non-Members for information may be useful.

#### **Composition of Subcommittees**

23. One issue for consideration may be the composition of Subcommittees. This has largely been left to Coordinators of subcommittees to determine, with some subcommittees composed of Committee Members only, some of governmental and intergovernmental officials only, and others broadly composed with industry, academic and civil society representatives as well.

24. There are trade-offs in whatever approach is taken, often between transparency and breadth of stakeholder input on the one hand, but a large and unwieldy group, and a small focussed group, perhaps with a governmental focus on the other hand. The experience of the present membership with the Subcommittee system, and in what makes for a successful subcommittee, may be especially valuable to the next Membership.

25. Traditionally Committee Members have been allowed to participate in any subcommittee they choose. Whether this is best in achieving balanced subcommittees, since financial ability to participate between Members exists, and what to do with inactive subcommittee members, including Committee members, may be worthy of at least considering, because such nominal participation may prevent the inclusion of a potentially more active subcommittee member.

### **Subcommittee balance**

26. One factor is how to ensure sufficient developing country, especially least developed country, input into subcommittees when, in an apparently balanced subcommittee the actual participation from developing countries is disproportionately low, because such participation is not funded. Holding meetings in venues most readily and cheaply accessed by developing countries is one approach taken, and telephone participation in subcommittees has sometimes worked well, but any solution needs to itself be funded and to not disfavour developing country participants, or other classes of Members.

### **Other Procedural Issues**

27. The discussion on procedural issues at the fourteenth session is not confined to the above topics, and other matters exist where the experience and views of the current Membership, but also other participants in the Committee work, may be useful for the next Membership of the Committee.

28. Time will be limited at the fourteenth session and such discussion will need to be very focussed, but is important in ensuring the Committee remains as informed, efficient and effective as possible. Some compilation of views before the end of this Memberships term, for transmission to the next Membership, may help balance the immediate needs of finalising text at the fourteenth session and of giving a solid foundation of experience to the next Membership.



## **APPENDIX: THE MODEL AND “MINORITY VIEWS”**

### **– A REPRESENTATIVE HISTORY**

#### **Use of the Term "Minority View"**

There seems no mention in the existing Model of “minority views” as such, one or two references to the view of the “majority” of members. “One Member” is used twice – once on an interpretational issue from some time ago. “Some Members” is used frequently and “some countries” as to country practice is also used frequently.

In 2015, however, at the eleventh session, the decision, as noted below in the context of “same or connected project” was to refer to minority views explicitly in the Commentary. As also noted below, the term “minority view” or minority position” is common in Committee reports.

**Some Relevant Parts of the Existing UN Model address minority views as follows:**

#### **Introduction to the Model**

**22. In quoting the Articles and Commentaries of the OECD Model Convention it is noted that various OECD Member States have expressed “reservations” on certain Articles and have made “observations” on particular aspects of the Commentaries and that some non-OECD Member States have expressed “positions” in relation to certain Articles and Commentaries. Such formal expressions of differences of view to those taken in the OECD Model Convention are contained in the text of the OECD Model Convention, as revised from time to time. The Committee has recognized in preparing this update to the United Nations Model Convention that such expressions of country views are a useful aspect of the OECD Model Convention in terms of understanding how it is interpreted and applied by the specific countries expressing those views, even though they have not been repeated in the text of the United Nations Model Convention for practical reasons.**

#### **2004 Report:**

73. The fourth sentence of paragraph 33 of the OECD Commentary refers to the negotiation of “all elements and details” of agreements by an agent. This raises the question of whether the negotiation of only the essential elements by an agent would still create a permanent

establishment. **Since such an interpretation could lead to abuse, two non-OECD countries in their observations on the OECD Commentary have taken the position** that a permanent establishment exists when an agent negotiates only essential parts of a contract.

#### **2006 Report:**

9. The Chairperson asked for nominations for Vice-Rapporteur. The group elected Bernell Arrindell as the Vice-Rapporteur. In accordance with the decision taken at the first session, Pascal Saint-Amans was Rapporteur for the second session. **It was also decided that the Rapporteur's reports at the beginning of each day should be concise, yet sufficiently reflect both majority and minority views.**

#### **2007 Report:**

34. The point was made by two countries that in citing (at proposed para. 73) paragraph 23 of the OECD Commentary on article 1 (addressing base companies through controlled foreign corporations (CFC) legislation), there must be some regard for the fact that they and other OECD countries had observations on that paragraph. **It was noted that the issue of minority views had arisen in the context of permanent establishments, with note 2 of paper E/C.18/2007/CRP.3<sup>3</sup> suggesting an approach to dealing with this issue. The issue was considered by the Committee and it was decided that relevant country positions should be included in the Manual rather than in the Commentaries themselves.**

#### **2011 Report:**

26. It was agreed that the quotation of paragraph 8.8 would be retained, and a new paragraph, **reflecting the minority view that there was a contradiction between paragraph 8.8 and paragraph 6 of the commentary on article 1, was approved for inclusion.** In that connection, it was also recalled that the content of paragraph 8.8 was not reflected in the commentary on article 1 owing to the fact that the Committee had not fully considered the issues raised in the 1999 OECD publication *The Application of the OECD Model Tax Convention to Partnerships*. It was agreed that the new paragraph, which would follow the quoted paragraph 8.8 of the OECD commentary, would read as follows: **Some members of the Committee of Experts did not agree** with the proposition in paragraph 8.8 of the OECD commentary extracted above that the partners of fiscally transparent partnerships can claim

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<sup>3</sup> *Secretariat 2016 Note* – the footnote read: “The subcommittee proposes that the next version of the UN Model should note in its introduction, words along the following lines: “In extensively quoting the Commentary to the OECD Model, it is noted that this has to be read together with the “observations” of OECD Member countries to obtain a full understanding of the acceptance or otherwise of certain parts of the Commentary by specific OECD countries in particular cases. The observations on the most recent version of the OECD Model (2005) are included at Appendix \*\* of this publication for convenience, along with relevant “positions” on the OECD Commentaries provided to the OECD by some non-members of the OECD”. The subcommittee notes that such an introductory paragraph would render it unnecessary to include a special comment along the same lines in the Commentaries of the UN Model on each specific Article. [Subcommittee footnote – not intended to be part of the revised Commentary]”

the benefits of the Convention. They were of the view that a special rule is required in a convention to provide such a result.

27. **Some members proposed the deletion of the second sentence in paragraph 24.1** quoted from the OECD commentary, which read as follows: “Some countries also consider that such a case-by-case approach is the best way to deal with the difficulties in determining the place of effective management of a legal person that may arise from the use of new communication technologies.” They were of the view that the inclusion of an alternative diverted focus away from the principal manner of establishing the place of effective management. In their view, it was preferable to offer clear guidance, and in case of conflict countries could use the mutual agreement procedure to resolve the issue.

28. **Other members** said that there was value in giving another option, and that that did not imply a recommendation of an approach. **Given that the United Nations Model Convention did not include country “observations” or similar individual country interpretations, giving another option was the only way to include alternatives. It was also pointed out that many developing countries already used the alternative option and that it had been adopted in some regional models. It was agreed to include the above-mentioned sentence, with a small revision inserted immediately before the quoted paragraph, reading: “In this respect, the OECD commentary refers to some relevant country practices:”**

...

47. It was noted that the consideration of article 12 was difficult for the purposes of the update, owing to the fundamental differences in approaches between the United Nations Model Convention and the OECD Model Convention with regard to the taxation of royalties. Nevertheless, article 12 had not been fully considered by the Committee, and it was agreed that it would be included in the catalogue of issues for future discussion. Concern was expressed about the last part of paragraph 11, which limited the relevant scope of information to that arising from previous experience. **A new sentence was drafted to reflect the minority view and adopted for inclusion immediately following quoted paragraph 11 of the commentary. A view was also expressed that payments referred to in quoted paragraphs 14, 14.1, 14.2, 14.4, 15, 16, 17.2 and 17.3 might constitute royalties. A new sentence was drafted to acknowledge that view and was adopted for inclusion.**

### **2015 Report:**

29. At previous sessions, the Committee had agreed that physical presence was required to support taxation under article 5 (3) (b) of the Model Convention. The Committee discussed the proposals contained in the above -mentioned paper and, after making further changes to them, agreed to include in the commentary on article 5 (3) a new paragraph (paragraph 12.1) providing that **the traditional interpretation of subparagraph (b) would require the physical presence in the source State of individuals**, being an employee or personnel of the enterprise furnishing services, in order for a permanent establishment to exist in that State,

while recognizing that some Committee members disagreed. The commentary would provide as follows to recognize the view of those members: **A minority view was that the requirement of physical presence is no longer relevant for article 5 (3) (b), as the business cycle may be completed without that physical presence.** While some of those concerns may be addressed by adopting the article on fees for technical services, such an article does not cover all services covered under article 5 (3) (b).

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40. The Committee accepted in principle the recommendations made by the Subcommittee on the inclusion of cruise shipping activities within the coverage of article 8 and requested it to propose updates to the commentary accordingly. **A minority view, that cruise activities were not within the scope of article 8, would also be noted. ...**

66. **Some changes had also been made to the draft commentary, including initial drafting to reflect the minority position on the article, which, as agreed at the tenth session, would be reflected in the commentary. Those taking the minority position had taken the lead in such drafting.**

67. Discussions mainly focused on the text of the article itself and the **expression of the minority position in the commentary.** There was initially some discussion of the relationship with other articles in the Model Convention, in terms of priority or otherwise. As a result, it was decided that paragraph 2 of the new article did not need to address its relationship with article 20 since there was no overlap between the two articles in practice. It was decided that it should be made clear in the wording that article 17 should be given priority over the new article.

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71. There was **some discussion on how to present the minority view on the article in a way that respected the divergent views of both the majority and the minority, recognizing the majority view in favour of such a provision — and accompanying guidance — for countries wishing to use it in their treaty negotiations, and in a manner that reflected the role of the Model Convention in assisting developing country treaty policy and practice, while preserving a fair balance between how the views are reflected in the commentary. The wording of the article and the minority view for the commentary on the new article were discussed in detail and agreed upon by the Committee. Committee members were invited to raise issues not yet discussed with the Subcommittee regarding the wording of the draft commentary.**

72. It was **also agreed that a minority approach of addressing the issue of fees for technical services by adding proposed wording to article 12 (Royalties), as an alternative, would be addressed in relevant commentaries.** It was further decided that the Subcommittee should draft, for possible inclusion in the commentary, an alternative, originally proposed as a possible compromise solution in the Subcommittee, which avoided reference to specific types of services and instead addressed taxation by a State of all services

performed in that State, as well as services performed outside that State by related parties. In this context, it was noted that the relationship with article 5 (3) (b) would need to be considered.

...

108. In 2014, at its tenth session, the Committee agreed to include in the next version of the Model Convention a new paragraph 4 to article 23 A corresponding to that in the OECD model. **Wording reflecting the minority view opposing such a paragraph was, as agreed at the tenth session, to be included in the commentary on article 23 A in the next version of the Model Convention. The text reflecting the minority view could not be agreed at the eleventh session and could, if required, again be discussed at the next session of the Committee, after reflection on the minority view.**

[Note that it will be now decided at the 14<sup>th</sup> session whether such a view needs to be expressed].