Distr.: General
12 March 2023

Original: English

Committee of Experts on International Cooperation in Tax Matters
Twenty-sixth session
New York, 27-30 March 2023
Item 3(i) of the provisional agenda
Taxation issues related to the digitalized and globalized economy

Co-Coordinators' Report

Summary

This paper is *for information, discussion and (in relation to Workstream C) decision,* and addresses the work of the Subcommittee on Taxation Issues Related to the Digitalized and Globalized Economy in relation to the workstreams agreed at the Twenty-fourth Session of the Committee being:

- ***Workstream* A** - considering options for a more multilateralized form of implementing Article 12B of the UN Model Tax Convention (Automated Digital Services) and perhaps also a limited number of other optional provisions (such as Article 12A of the UN Model, or a Subject to Tax Rule) as may be potentially relevant to taxing the digitalized and globalized economy; and
- ***Workstream B*** – considering the function and relevance or otherwise of physical presence tests (such as under "permanent establishment" rules) in the context of an increasingly digitalized and globalized economy.

Both workstreams are developing options for consideration by the Committee designed to provide guidance that will particularly, but not exclusively, assist developing countries in this area.

The note also addresses potential **Workstream C**, on cross-border taxation issues involving remote workers, and seeks Committee decisions on whether to proceed with this workstream and if so whether to do so independently of Workstream B, and with a particular focus.

The Subcommittee ***seeks the Committee's comments and guidance on the issues raised in this note, including the input notes in the Annexes****:*

a. from Philip Baker on a possible UN multilateralised instrument relevant to Workstream A (Annex A – at pp. 7-19 of this note) along with a first draft of a possible type of instrument with possible protocols addressing particular provisions of the UN Model Tax Convention (both at Annex B – at pp. 20-40 of this note);

b. from Aart Roelofsen on physical presence (as previously provided at the Twenty-fifth Session), relevant to Workstream B (Annex C – at pp. 41-43 of this note); and a note from Mr. Brian Arnold relating to the same Workstream (Annex D – at pp. 44-63 of this note).

c. from Brian Arnold on possible issues and responses, in relation to "remote" workers (Annex E – at pp. 64-94 of this note).

Background and Subcommittee Mandate

1. At the Twenty-third Session of the Committee in October 2021, the secretariat provided a paper on taxation in a digitalized and globalized economy (E/C.18/2021/CRP.28). That paper provided an outline of the work of the previous Subcommittee on Tax Challenges Related to the Digitalization of the Economy, including with regard to Article 12B on automated digital services and its Commentary, which now form part of the 2021 United Nations Model Tax Convention.

2. As noted in the Report of the Twenty-third Session, the Committee established a Subcommittee on Taxation Issues Related to the Digitalized and Globalized Economy, with Mathew Gbonjubola and Liselott Kana as Co-Coordinators. The Subcommittee is mandated:

- To identify priority taxation issues related to the digitalized and globalized economy where the Committee may most usefully assist developing countries in differing situations, in particular;
- To initially report to the Committee on such issues no later than its Twenty-fourth Session, in 2022, with recommendations for consideration and a proposed general programme of work.

The Subcommittee may consult broadly, taking into account relevant work by other bodies.

First Meeting of the Subcommittee

3. The **first meeting of the Subcommittee** was conducted virtually on 10-11 March 2022 to consider its composition and workplan. Not every Subcommittee participant agreed with every aspect of the approaches agreed in this and other meetings of the Subcommittee; recognizing diverse views remains an important part of the Subcommittee work going forward.

Composition of the Subcommittee

4. Nineteen Committee Members are currently participating in the Subcommittee. In view of the size of that participation and the diversity of backgrounds and perspectives involved, the Subcommittee decided that the regular participation of the Subcommittee should remain comprised of Committee Members only. The specialist expertise that exists among other participants in the UN Tax Committee work, including observers from Member States, business and their advisers, academics and civil society, and the value of their perspectives, was readily acknowledged. It was agreed that a focused outreach to such experts would be an important part of the Subcommittee work, including, for example, through ad hoc participation of non-Committee Member experts in Subcommittee meetings, calls for written inputs and specific dialogue meetings with experts.

5. In further refining its "outreach" strategy, which may vary across subject matters and at various stages of its work, the Subcommittee would welcome the views of Committee Members and Observers on modes of engagement.

6. The Subcommittee **met virtually for a second time on 22 June 2022** to address issues and possibilities for a fast-track instrument (FTI) under Workstream A and how to approach the issues of Workstream B (physical presence). At a **third meeting on 30-31 August 2022**, the Subcommittee considered these issues further, taking into account issues and options raised by Subcommittee experts and in Secretariat and Co-Coordinator Liselott Kana's initial discussions with some outside experts, Brian Arnold and Philip Baker.

7. The focus for the FTI was seen as providing options for like-minded countries wishing to facilitate a change they both agree on. It was also recognized that while consideration would be given to which UN Model Tax Convention provisions might be prime candidates for adoption in a FTI, the inclusion in the Model, often with perceived pros and cons addressed in the Commentary, meant that those substantive issues should not be re-opened as part of the FTI workstream. Compatibility issues raised by different formulations of treaty provisions, and how they could be addressed with the least complexity, would need to be considered. The point has been made in the Subcommittee discussions

that this instrument could also be envisaged as an instrument that over time helped countries to streamline negotiations,

8. The physical presence workstream was discussed at the August 2022 meeting, with the benefit of earlier versions of the input notes at Annexes B and C of the Twenty-fifth Session paper. It was evident that there were significant differences about the potential justifications for keeping or reducing/ discarding physical presence threshold tests for taxation by the state where the service is supplied. While there was a call to agree an underlying principle at the start of this workstream, the difficulty in identifying such a principle was recognized. The Subcommittee considered that, while further consideration would be given to those issues, the more immediate focus should be on commencing the FTI workstream in earnest.

9. The Subcommittee **met virtually, on 28 September 2022**. At that meeting the Subcommittee received the benefit of an input paper by Philip Baker, an earlier version of the note at Annex A to the Twenty-fifth Session Report and Annex A to this paper. The object of the paper and the intent of the discussion on it, in which Philip Baker and Brian Arnold were invited to participate, was to commence the discussion on key issues without limiting discussion on relevant points or pre-empting Subcommittee considerations or conclusions. In the same spirit, and with the same caveats, the Subcommittee decided to attach an updated version of Mr. Baker's paper to this report. *Neither the paper, nor the other notes included as Annexes to this paper, should be read as in any way limiting Subcommittee consideration or representing Subcommittee conclusions.*

10. At the Twenty-fifth Session of the Committee, the workstreams undertaken by the Subcommittee were expressed as:

(a) Workstream A, which was to facilitate the implementation in bilateral treaties of provisions introduced in the United Nations Model Double Taxation Convention between Developed and Developing Countries through the work of the Committee, such as article 12 (a) and 12 (b), subject-to-tax rules, capital gains (art. 13 (6) and (7)), permanent establishment and arbitration;

(b) Workstream B: a paper that addressed the function and relevance of physical presence tests;

(c) Potential workstream C, which would deal with cross-border taxation issues involving remote workers.

11. Annexes were included as a basis for discussion of Workstreams A and B. The Subcommittee, in its paper, had proposed prioritizing Workstream A over Workstream B but the Committee requested that they *both* be prioritized. The discussion at the Committee's Twenty-fifth Session and the outcomes are as reflected in the report of that session:

> 65. The Subcommittee, in its paper, had proposed prioritizing workstream A over workstream B. However, some members were of the view that the Committee should focus on workstream B, given the challenges in successfully initiating and completing workstream A, while workstream B could be considered a "low hanging fruit", especially relevant for harvest in the current landscape of the increasingly digitalized and globalized economy. Others saw workstream B as unlikely to add value to existing academic work and to be of less practical value for developing countries than work on a fast-track instrument, including in addressing taxation of the increasingly digitalized and globalized economy.
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> 66. With regard to workstream A, some members observed that the work would face significant challenges in achieving wide acceptance, especially in view of the need for a balanced outcome. It was opined that it might be important to determine the political support that the outcome of the work would have. The fast-track instrument that would emanate from

the workstream appeared to be complex and the process to full adoption and implementation would face substantial hurdles. Some of this included compatibility issues, development and approval of three separate agreements (instrument, protocols and bilateral agreements for each tax treaty), the need for bilateral negotiations, parliamentary approval and divergent law-making processes among the different jurisdictions. Some of those members questioned whether the instrument would speed up adoption, especially in view of the need to bilaterally negotiate some aspects of each provision for covered tax treaties, compatibility issues and variant wording among treaties.

67. Other members fully supported workstream A, noting the great significance that it held for developing countries that wanted to incorporate the changes introduced in the United Nations Model Double Taxation Convention between Developed and Developing Countries into their treaties by a quick and effective process. Members observed that political support or acceptance was not considered before embarking on other Committee workstreams and hence should not be a consideration for this one. The substantive provisions, rather than the general fast-track instrument architecture, would be the areas in which views would be expected to differ most, and this would involve provisions already in the Convention and therefore already signaled as suitable for negotiation. It was pointed out that the best approach would be to develop a document first, then address issues of political acceptance and other challenges such as compatibility when there was a draft to consider. One member noted that updated article 8 provisions could be another candidate for inclusion in fast-track instrument options.

68. Observers from countries and some international organizations also expressed their support for workstream A, noting that it was of great significance to countries and offered a solution that was efficient and effective, while some other country observers intervening did not hold that view.

69. Taking into account the views presented, the Committee decided that both workstreams A and B should be treated as priorities. The initial work might be undertaken by various groups within the Subcommittee to help to advance the work in that manner.

70. A new proposal to provide guidance for developing countries on remote worker/nomad issues was proposed, in view of changing work patterns. It was agreed that a paper would be developed by the Subcommittee and presented at the Twenty-sixth Session for consideration by the Committee. This could become workstream C, if approved.

12. The Subcommittee **met virtually on 24 November 2022** to consider the way forward on Workstreams A, B and C, and **on 4 January 2023**, considering papers and draft wording from Philip Baker on the issue of a streamlined or fast-track instrument and a paper from Brian Arnold on remote workers.

13. The Subcommittee **met virtually on 27 January 2023** to consider in particular an input note from Brian Arnold on the issue of the function and relevance of physical presence tests in the UN Model (Workstream B - the paper in its current form is at Annex D) and on 6 February, to particularly consider the remote workers issue (Workstream C – including an earlier version of the paper at Annex E). **It met on 27-28 February 2023** to consider the nature of this report to the Twenty-sixth Session and the Annexes relating to the three workstreams.

14. This paper reflects the outcomes of, and direction taken, in the Subcommittee meetings. The Annexes are intended to encourage Committee discussion on the various workstreams and seek to incorporate comments by Subcommittee participants; they should not be taken as representing concluded views of the Subcommittee at this stage.

The Committee Role in a Fast-track (or streamlined) Instrument

15. The initial focus of the Subcommittee has been largely on the substantive requirements for any

proposed instrument. The Secretariat advises that the Committee role at this stage should remain focused on suggesting an approach and text for any proposed instrument. Public international law advice will be sought through the Secretariat on the proposed text at an appropriate time, to ensure it could most easily be transformed by later processes into a treaty language text. It would then depend on UN Member States as to whether, and in what form, such approach was taken forward, such as through an *ad hoc* working group set up to finalize the text of any instrument.

16. As to the likely provisions that could be the initial focus for inclusion as protocols for like-minded states to adopt in a Fast Track Instrument, whether or not in the context of other agreed changes, the Co-Coordinators' report to the Twenty-fourth Session included: Article 12B on Automated Digital Services; Article 12A on Fees for Technical Services; and the proposed UN Model Subject to Tax Rule. Other possible provisions mentioned in Subcommittee discussions have included:

- Paragraphs 6 and 7 of Article 13 (Capital gains) added to the 2021 UN Model relating to taxation of gains on the direct transfer of some types of property that are inextricably linked to their territory as well as gains on so-called "offshore indirect transfers";
- The removal of the words "(for the same or a connected project)" in subparagraph (3)(b) of Article 5 (Permanent establishment) as in the 2017 version of the UN Model; and
- The UN Model arbitration provisions.

17. Annex B to this paper gives some examples of how such topics might be addressed in specific protocols to such an Instrument.

18. The instrument is envisaged to be of a more permanent or ambulatory nature, as new protocols are added over time, to update the Instrument in response to important new provisions of the Model. Views from Members are currently sought on the actual provisions that could be included at a first stage.

Options relating to the function and relevance of physical presence tests

19. In relation to Workstream B, the Subcommittee, with the help of Mr. Arnold, has identified a lack of consistency of physical presence tests in the UN Model and noted some possible options for change in the short term and the longer term. Annex D addresses in its Part 7 (paras 7.1 and following) some options for Committee consideration at this Session, and Mr. Roelofsen's note at Annex C (also put before the Committee at the last Session) proposes a way of considering the issues. *Neither Annex should be regarded as representing concluded Subcommittee views on those issues.* Work in this area would involve liaison with the Subcommittee responsible for updating the UN Model.

Relationship to the Sustainable Development Goals

20. As noted in the Report of the Committee's Twenty-third Session, held in October 2021, the Committee agreed:

(a) To continue to discuss taxation and the Sustainable Development Goals regularly during sessions, as a permanent agenda item;

(b) To request the secretariat to provide regular updates on taxation and the Sustainable Development Goals, at each session:

(i) To preserve the focus of the Committee's work in the area;

(ii) To identify any gaps in guidance;

(iii) To establish priorities for technical work to be carried out by the secretariat; and

(c) To have subcommittees reflect on the link between their work and the Goals.

21. In addressing paragraph (c) of that conclusion, the Subcommittee recognizes that, by promoting fair and effective tax systems, which support both revenue and trade and investment for development, through guidance products and through advising UN DESA on capacity building activities, the Committee's work contributes to achieving the interlinked SDGs as a totality.

22. More specifically, in relation to the work of the Subcommittee, an effective guidance effort in this area will promote the balance of revenue needs and the development-focused investment climate which many countries seek, by promoting whole-of-government, informed and practical real-world approaches to the issues involved. This builds greater certainty for all stakeholders in tax systems.

23. While contributing to achieving all the interlinked SDGs, this work will particularly contribute to SDG 16 (Peace, Justice and Strong Institutions) in terms of helping develop effective, accountable and transparent institutions at all levels and SDG 17 (Global Partnerships for the Goals), in terms of strengthening domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection.

Next Steps.

24. The Subcommittee intends to continue work on Workstreams A and B after this Twenty-sixth Session of the Committee, drawing upon the guidance of the Committee on general approaches and specific comments on the issues raised in this paper and its Annexes.

25. The Subcommittee seeks *the Committee's comments and guidance on the issues raised in this Report, including the Annexes, and it also seeks a decision about whether and how to proceed with Workstream C on remote workers*. If the Committee agrees to proceed with Workstream C, it is proposed that all three workstreams should have equal priority. The Subcommittee will report to the Committee on all agreed workstreams at the Twenty-seventh Session.

ANNEX A

Workstream A: Development of a Multilateral Fast Track Instrument

Further Input Note

Philip Baker KC

February 2023

Introduction

1. There was a very helpful discussion at the 25th Session of the Committee of Experts on the 20th October 2022 on the Input Note attached as Annex A to document E/C.18/2022/CRP.19. This Further Input Note seeks to summarise briefly some of the points made in that discussion, and, in particular, to record and respond to some of the concerns and issues raised in that discussion. This Further Input Note was also discussed at an online meeting of the Subcommittee on Taxation Issues Related to the Digitalized and Globalized Economy on 27th January 2023 and some members of the Subcommittee submitted written comments (for which I am very grateful). This revised draft takes account of those additional comments. A brief summary of the proposal in the original Input Note is appended to this Note.

2. In general, there was support from a number of members of the Committee of Experts for the idea of a fast-track instrument to amend or modify[1] existing double taxation conventions to take account of recent changes made to the UN Model by the Committee of Experts. There was support from the Committee to take the work on Workstream A forward at least to the point of examining a first draft of what a fast-track instrument ("FTI") might look like. This Further Input Note, together with the draft FTI and some draft protocols which accompany it, are intended to take this workstream forward as requested by the Committee.

3. Several members of the Committee of Experts expressed a wish to have a further discussion of the pros and cons of a fast-track instrument. Hopefully, this Further Input Note plus the drafts attached will assist in that process.

4. Several members of the Committee (primarily from developing countries) expressed the hope that the development of a fast-track instrument would have an impact on the take-up of some of the recent changes made to the UN Model by the Committee of Experts. In some senses, one will only know if that happens when and if an FTI is adopted. It is reasonable to predict, however, that pushing forward Workstream A will have at least some impact on the take-up of some of the recent changes to the UN Model.

[1] In this input note and in the draft FTI attached I have continued to make the distinction between the amendment of an existing DTC (which actually deletes existing wording and replaces it with new wording or adds new wording into the DTC) and modification (which leaves the existing text of the DTC unchanged but makes the modification by providing alternative wording which operates in place of the (unchanged) wording in the DTC).

5. A word of caution is appropriate with regard to the initial draft of the FTI and the draft protocols attached. These are very much initial drafts, and I am not a public international lawyer specialising in the drafting of international instruments. If it is decided to take this workstream further, then a further draft will clearly need input from legal draftsmen within the UN structure, and the final wording may well differ significantly from the drafts. I believe it is not the best approach, therefore, at this stage to focus on the wording of the initial draft FTI or the draft protocols and criticise the precise wording employed. Rather, the purpose of the initial draft is to give an indication of what such a document might look like and provide a basis for further discussion.

6. May I add a note on terminology. I have used the same terminology in this Further Input Note as in the first Input Note: that there would be a multilateral *instrument* together with a series of *protocols*[2] which are implemented by a series of *memoranda of agreement.* This may not be the preferred usage of terminology within the UN system (or within public international law generally). For example, it may not be appropriate to use the term protocol to refer to the additional documents, each of which sets out the terms of a specific change to the UN Model. It is possible that a better terminology might be: *multilateral convention; schedule; exchange of notes*. However, for the moment at least I have retained the terminology used in the original Input Note. This may need to be amended following advice from the UN Legal Services.

7. In terms of recommendations, if the working party decides to take this forward, it would seem that the next step is to obtain some guidance as to the established procedures within the UN system for developing the proposal of an expert committee into a formal proposal for a convention / legal instrument. This will not be the first time a proposal has come from a group of experts to develop a legal instrument. One suspects that this will involve the establishment of an ad hoc working group to take the proposal forward to the stage of a draft instrument. Some guidance on the procedures usually adopted in these circumstances would be helpful and would logically be the next step.

8. Bearing in mind the constitutional issues in their home countries (discussed below) raised by some members of the subcommittee, it would also be helpful – if this proposal or something similar is to be taken forward – to have some input from the legal affair departments of the foreign ministries of a few countries, particularly those where constitutional problems are understood to exist. These problems may exist only for a minority of countries, and it would be helpful to understand what approaches would be constitutionally possible in those countries. Presumably the members of the Committee from countries where these issues might present a problem would be able to facilitate some contact with the legal affairs department in their country to obtain their input.

9. Several members of the Committee have queried how much appetite there is amongst governments for a fast-track instrument. Specifically, some members of the Committee queried how much support there may be in developing countries for a fast-track instrument. Members of the Committee of Experts sit in their personal capacity and not as representatives of their governments. It would have advantages, therefore, if some steps were taken to gauge the degree of support from governments for a fast-track instrument. Clearly, it would only make sense to continue with this workstream if there is sufficient body of support among governments to take this forward. It is obviously not necessary that every government supports the proposal, (and even the governments of some members of the Committee may not support the proposal) but it would be helpful to know that there is at least a significant body of countries interested in taking this forward (without obviously committing themselves at this stage). In particular, if there is a significant body of developing countries in support of this proposal. A further recommendation would be for an approach to be made to member governments of the UN to gauge support for a fast-track instrument.

[2] Note: I have used the term *model bilateral protocol* for the new proposal that the output of the Conference of Parties of the FTI might also be model protocols to be concluded between bilateral pair of countries.

<u>Concerns and responses</u>

10. At the meeting on 20th October several members of the Committee of Experts expressed concerns, and even some skepticism, about Workstream A and the proposal for a fast-track instrument. The expression of these concerns was extremely helpful in identifying potential issues with a first-track instrument, and in getting a sense of what the reactions might be if Workstream A were taken further. It is appropriate, therefore, in this Further Input Note to record some of those concerns, and to suggest possible responses to some of those concerns or issues.

11. <u>Concern:</u> Some members of the Committee were skeptical as to whether a fast-track instrument would be supported by sufficient countries to get off the ground. Their concern was that the Committee should not expend further effort on this workstream if it was unlikely to be taken up by a sufficient number of countries. Some members contrasted this with the BEPS MLI where there was a political commitment to implement at least some of the changes brought about by that MLI before the document was drafted. Because the members of the Committee of Experts are acting in their personal capacity, and not formally as representatives of their governments, there is no necessary political commitment when a change is made to the UN Model.

12. <u>Response:</u> This is a concern that I entirely understand. It would be a waste of resources (and I would not wish to waste my time) if Workstream A were going nowhere. However, there was a sense at the meeting on 20th October that some procedure does need to be developed for the streamlined amendment or modification of existing DTCs. There also appeared to be some support for the concept of a "reusable" procedure which could take on board not only a number of amendments to the UN Model in recent years, but could also be used going forward to streamline the implementation of future changes to the UN Model.

13. It is also not necessary that every country signs up to this fast-track procedure at the outset (or ever). Even if the procedure is initially useful to a small group of countries (perhaps only to a group of developing countries) to update their tax treaties and adopt some of the recent UN changes, then the work on the Workstream will have been worthwhile. If, subsequently, the process attracts more widespread support, that will be a small triumph.

14. At the end of the day, the members of the Committee of Experts, together with the observers from Member States present at meetings of the Committee, are well placed to give an indication in the light of this Further Input Note, the drafts attached, and the further discussion to be held in the Committee, whether there would be adequate support amongst countries to take this workstream forward.

15. Additionally, as recommended above, it would be helpful if an approach were made to member countries of the UN to gauge how much support there would be for a fast-track procedure.

16. In this context, two points should be noted in particular.

17. First, it is not in any way suggested that the procedure to be established by a fast-track instrument would be an exclusive way of amending or modifying existing DTCs to take account of changes to the UN Model. It would always remain open to countries to negotiate an amending protocol in the traditional fashion: the underlying question is whether the procedure for streamlined amendment discussed here does achieve sufficient streamlining (and sufficient support from governments) to merit being taken forward. To that extent, it is not necessary to formulate the fast-track procedure as if it were the only way to make these changes, or to ensure that the procedure caters for every existing tax treaty and every form of wording currently in use. To an extent that is different from the BEPS MLI

which attempted, through the wording of options, compatibility clauses and reservations, to provide alternatives for a very wide range of different existing treaties.

18. Second, it is important to bear in mind that the proposal for a fast-track instrument is not tied in any way to any particular change to the UN Model; in particular, it is not tied to the adoption of Article 12B. As explained, it may be that the insertion of Article 12B might be *one of the purposes* for which the fast-track instrument is used, but obviously only between countries that accept Article 12B. However, Workstream A is much broader than that: and this is seen from some of the draft protocols attached to this Further Input Note. Whether a fast-track instrument would be accepted by a sufficient number of countries should not, therefore, be discussed solely in terms of whether a sufficient number of countries would ever be willing to adopt Article 12B.

19. Taking this point slightly further, the Introduction to the 2021 UN Model (at paragraph 24) identifies a number of changes to the Model that were made by the 2021 update. These include the following:

i) Changes to Articles 3, 4 and 29 in relation to pension funds
ii) Changes to Articles 1, 3, 4 and 29 in relation to collective investment vehicles.[3]
iii) The insertion of new paragraphs 6 and 7 to Article 13 relating to capital gains on natural resources and to offshore indirect transfers.
iv) Changes to paragraph 2 of Articles 10, 11 and 12 relating to the situation where an intermediary receives payments covered by those Articles.
v) The removal of the exception for partnerships in Article 10(2)(a).[4]
vi) The insertion of Article 12B on automated digital services, and consequential changes to Articles 23A, 24 and 29.

Additionally, other recent changes to the UN Model that have been considered as possible candidates for streamlined amendment would include the following:

vii) The inclusion of a UN-style arbitration provision in Article 25
viii) The removal of the words "same or connected purposes" in Article 5

Each of these changes might be reflected by a separate protocol, providing, in effect, a menu of possible amendments or modifications from which countries would select changes they wished to make.

20. Though this point is not taken further here, one issue that was raised in discussions was the possible future adoption of a "subject to tax rule" in the UN Model. This would be a development where a streamlined, fast-track process – already developed, tested and in operation – may prove exceptionally helpful.

21. Concern: Some members of the Committee expressed concern as to whether the procedure proposed would really streamline the amendment of DTCs, or at least achieve a sufficient streamlining that it was preferable to the existing process of negotiating amending protocols.

22. Response: Again, this is an understandable concern. In a sense, one will only know if this procedure does streamline the amendment of DTCs if it is implemented. However, at least in principle, the procedure proposed could streamline the process in several ways.

23. First, by isolating individual amendments or modifications into separate protocols and setting out in that protocol the revised wording to be adopted, this could limit the scope for negotiation. It would avoid the danger that the opening of negotiations for an amending protocol takes on a life of its own

[3] It is thought better to separate off provisions relating to pension funds from provisions relating to collective investment vehicles, not least because the wording in relation to pension funds has been included in the Model itself while the provisions relating to collective investment vehicles are in the Commentary and offer alternative versions.
[4] This change could in fact be included with the previous change to the wording of, inter alia, Article 10(2).

and becomes a general overhaul of the DTC, with a number of changes ultimately included in the same amending protocol.

24. Second, if a Conference of the Parties is called together, it may be possible at that conference for representatives of governments that are parties to the FTI to agree a large number of modifications or amendments at the same time, particularly if a number of those modifications or amendments are relatively non-controversial (but nevertheless helpful). One can envisage a situation where, assuming that four or five further amendments to the UN Model have been agreed by the Committee at a future session, and each of those amendments is encapsulated in a separate protocol, the representatives of governments attending a Conference of the Parties might at a single session agree several hundred memoranda of agreements making a large number of those changes at the same time. (This was discussed in the previous Input Note, but the appendix to this Note summarises how that might be done).

25. Third, the possibility that there may be identical amendments or modifications to several existing DTCs concluded by a particular country, and this may allow all of those identical amendments to be taken through the domestic or parliamentary procedure of the country in a single process, streamlining the domestic implementation process. If identical amendments are made to a number of existing treaties at the same time, it might be assumed that the time spent on explanation of the amendments and on debate would be reduced.

26. To take an example. Assume that State A is a developed country with a large network of DTCs, including some 20 DTCs with developing countries. Assume that State A is in principle supportive of the fast-track instrument process. Assume also that the eight recent changes to the UN model identified in paragraph 19 above are all encapsulated in separate protocols to the FTI. Assume finally that State A is in principle willing to agree the changes in Protocol 1 (pension funds), Protocol 3 (taxation of offshore indirect disposals) and Protocol 4 (the redrafting of paragraphs 2 of Articles 10, 11 and 12). At a Conference of the Parties, State A agrees to make those three changes in its DTCs with States P, Q, R and S. The result is 12 memoranda of agreement making those relevant changes with those four countries, all negotiated at a single session of the Conference of the Parties. Those 12 amendments are then taken through the parliamentary procedure in State A in a single process. This contrasts, of course, with negotiation of four separate amending protocols with each of States P, Q, R and S (though, of course, those four amending protocols might be taken through the parliamentary procedures at the same time, always assuming that they were all concluded at approximately the same time).

27. At the end of the day, the current alternative is to negotiate amending protocols separately with each treaty partner, and then take each of those protocols through the appropriate domestic or parliamentary processes. The issue is whether an FTI would a) encourage more prompt amendments to existing treaties to reflect changes in the UN Model; b) facilitate the amendment of more treaties by providing a setting for the negotiations of those amendments; and c) streamline the process of taking those amendments through domestic or parliamentary procedures. Whether this works may be something one will only know if it is tried.

28. <u>Concern:</u> Some members of the Committee were concerned that some recent amendments to the UN Model operate only for the benefit of one party to a bilateral DTC, generally a developing country party. The conclusion of a memorandum of agreement giving effect to a protocol that made only that change to an existing DTC would operate for the benefit of one party only. That one-sided change would be difficult to justify on policy grounds (unless it was being deliberately adopted as a form of development aid, in effect, to a developing country) and could upset the balance in the DTC. Some members of the Committee note that some of the recent changes to the UN Model (e.g. Arts 12A and 12B) could effect a significant shift towards source-country taxation and impact on the balance of the

existing DTCs. If such a change were being made through the established process of the negotiation of an amending protocol, counterbalancing changes might be required in order to cure this potential imbalance. Some of those members of the Committee may have had in mind a memorandum of agreement that gave effect only to Article 12B, and thought that it would be difficult on policy grounds to justify such a change by itself.

29. Response: This is clearly a real concern for some countries. However, not all changes to the UN Model in recent years are necessarily going to work in a one-sided fashion. Some of the recent changes mentioned in paragraph 19 above may benefit both contracting states. Other changes may in principle benefit one state more than the other, but the benefit achieved would not be so significant as to upset the overall balance of the DTC. Also, if the amendments or modifications were made even just in respect of some existing treaties between developing countries, the changes would be reciprocal and would not necessarily upset the overall balance.

30. This concern also reflects an approach of looking at each protocol individually. Let us assume that there are a number of different protocols to the fast-track instrument opened for signature at the same time, each making a particular modification or amendment to a bilateral DTC. It may well be possible, therefore, to achieve a balance by agreeing a package of protocols between two states, which are implemented at the same time. Suppose, for example, that State A is a developed country which is very keen to clarify the application of a bilateral tax treaty to pension funds and collective investment vehicles and also wishes to include a UN-style arbitration convention. Suppose that State B is a developing country which is very keen to include Article 12B (and that State A is not in principle implacably imposed to Article 12B). It may be possible for the two countries to agree to sign, at the same time, memoranda of agreement giving effects to three or four protocols which make all these changes and, as a package, could be seen as a balanced upgrading of the DTC to take account of recent developments.

31. It might be said that such a negotiation to create a package of protocols is no more streamlined than agreeing an amending protocol in the traditional fashion. However, while this is something that needs to be tested in practice, there is something of an advantage in two states looking at a limited menu (i.e. the protocols on offer at that time) and choosing a balanced approach, utilising the wording already contained in the protocols and the streamlined process of memoranda of agreement.

32. A final point might be made that, where there are certain changes that are so obviously one-sided that it is very unlikely that they would ever be adopted in the streamlined process, it is, of course, always open to countries to use the traditional approach of negotiating an amending protocol, or even negotiating a completely new DTC, if the parties wish to seek a new balance between them.

33. Concern: Some of the members of the Committee were concerned at the use of the concept of a "memorandum of agreement" which gives effect to the modification or amendment contained in a protocol between two or more contracting states. Some members were concerned that it could not enter into a memorandum of agreement, or that a memorandum of agreement could not be taken through parliamentary procedure. For some members this is related to the constitutional issues (discussed further below)

34. Response: As explained at the opening of this Note, some further work, possibly with the assistance of the UN Office of Legal Affairs, needs to be focused on this point with a view to adopting conventional terminology utilized within the UN system. However, it was not immediately clear exactly what was the issue in relation to the use of the term "memorandum of agreement", and whether the concern was merely terminological or more fundamental. For some countries this is a fundamental issue which relates to constitutional provisions (discussed below). If the issue were merely terminological, this should be capable of resolution. In principle, an agreement between states is binding in international law whether it is called a protocol, an exchange of letters, a memorandum of agreement, or any other title is given to it.

35. Some form of agreement between the contracting states to an existing DTC is necessary to give effect to the modifications or amendments, whatever that agreement is called. As explained, the proposal set out in the Input Note, (and taken further in this Further Input Note) involves three elements. (A Variant Procedure, perhaps more suitable to some countries, and involving only two elements, is discussed below).

36. The first element is the multilateral fast-track instrument, which is a legally binding instrument establishing the procedure for fast-track amendment of specific DTCs.

37. The second element is the individual protocols, each of which contains a specific change that has been made to the UN Model. As can be seen from the sample protocols attached, these protocols also contain any consequential amendments to the bilateral treaty concerned – for example consequential amendments to the provision on elimination of double taxation (Art 23A or 23B). The protocols are not of themselves binding instruments, and the signature by a state to a particular protocol is simply an indication of the willingness of that state to consider entering into discussions with the other party to an existing DTC with a view to reaching an agreement to give effect to that particular change.

38. The third element is the memorandum of agreement – whatever one calls it – which is the actual agreement between the two (or more) parties to a DTC under which they agree to make the particular change in the protocol. The memorandum also supplies the details (e.g., percentage rate of tax [if necessary]; article numbers; dates of taking effect; language versions) necessary to give effects to the change. Logically, this third stage of *an agreement* is essential if an existing bilateral treaty is to be amended.

39. If the difficulty for some states is merely the use of the term "memorandum of agreement", then that can easily be dealt with by providing that the agreement between the contracting states to the DTC should be contained in an "equivalent instrument" (which is equivalent to the memorandum of agreement, and contains the same details necessary to implement the change in the protocol). Thus, if it helps, the equivalent instrument could be called a protocol or an exchange of letters or simply an agreement, so long as it operated in an equivalent way to the memorandum of agreement. In the drafts attached, the concept of an equivalent instrument has been included.

40. Concern: Some members of the Committee were concerned as to how they would take the FTI, the protocols and any memoranda of agreement, through parliamentary procedures.

41. Linked with this is a broader concern that constitutional provisions in the countries of some members of the Committee would prevent adoption of the three-element approach set out in the Input Note and elaborated here.

42. Response: The procedure for streamlining the amendment or modification of existing DTCs is different from the established procedure of negotiating new treaties or amending protocols. To that extent, therefore, some modification of the existing domestic approval procedure or parliamentary procedure may be necessary. However, it is not thought that the streamlined procedure is fundamentally different from the established procedures. Since the domestic or parliamentary procedure varies from country to country, it will ultimately be a matter for each country to consider what (if any changes) are needed to these procedures to accommodate the streamlined procedure.

43. In principle, it should be possible to take the FTI, a series of protocols which are acceptable to that country, and a number of memoranda of agreement (or equivalent instruments) through the parliamentary procedure at the same time. Assume that State A accepts the streamlined procedure contained in the FTI, and signs and ratifies that instrument. Assume also that State A is willing in principle to agree to the changes in protocols 1, 3 and 5 (but not protocols 2, 4 and 6) with appropriate

countries (e.g. with developing countries, or with countries that are prepared to make reciprocal changes) and has signed those three protocols.[5] Assume, finally, that at a Conference of the Parties State A has concluded 12 memoranda of agreement (with States P, Q, R and S) applying the three protocols that exist in DTCs with those countries. It should not be an insurmountable process to present the FTI, the three protocols that have been signed, and the 12 memoranda (or equivalent instruments) through the domestic parliamentary procedure, ideally at the same time. Again, however, this will depend country by country and some modifications may need to be made.

44. To draw a parallel from the country that I know best. In the United Kingdom, DTCs are given effect through an Order in Council taking effect under provisions contained in primary legislation. Quite often that Order in Council contains the text of a DTC, a protocol that is attached to the DTC, and one or more exchanges of notes or letters that were exchanged at the time that the DTC was signed. All of those documents are contained in a single Order in Council. It should not be beyond the realm of possibility, therefore, for an Order in Council to be drafted which contains the text of the FTI, the text of the relevant protocols that have been signed by the UK, and the memoranda of agreement included with a number of countries, and to contain those all in a single Order in Council.[6]

45. If I have understood correctly, the constitutional concerns identified by some members of the Committee include the following:

a. It may not be constitutionally possible to sign and ratify the FTI alone as it does not amend any treaties but only provides a setting in which protocols and memoranda of agreement can be concluded;

b. It may not be possible to take an FTI protocol and memorandum/memoranda of agreement through parliament under existing procedures because detailed information has to be provided about the impact of the change to the treaty;[7]

c. A member of the Committee indicated that in her country it is only realistically possible to take amending protocols through parliament.

46. So far as constitutional issue “a)” is concerned, a member of the Committee has suggested this might be resolved by taking to parliament the FTI together with one or more protocols that the country has signed and one or more memoranda of agreement. Because these documents together result in the treaty amendments, they could satisfy the parliamentary requirements (subject to also satisfying issue “b)” as well).

[5] It is important to note that signing a protocol does not bind a country to make the change in that protocol with every country that comes along. It simply signals that the country is willing in principle to make that change with appropriate countries. It still remains for each country to decide with which other countries it will agree to make that change. The decision may turn on a range of factors: for example, a country may only be willing to make that change with developing countries, or only if the other country agrees certain other changes from the menu of protocols (e.g. an arbitration provision). There is nothing inherently problematic about a country signing a protocol, but only agreeing to make that change with certain countries, consistent with its national policy with regard to that change.

[6] I should add that this is my personal view. I have not checked this view with HMRC’s solicitors or the Foreign Office Legal Advisers. However, in principle, I see no reason why those documents should not be contained together in a single Order in Council. Alternatively, it might be more convenient in the UK to pass primary legislation giving effect to the FTI and those protocols which the UK is a signatory, and for subsequent Orders in Council to give effect to the memoranda of agreement with particular countries. Either way, although the domestic parliamentary procedure may have to be changed, such a change does not seem to be insurmountable.

[7] Some members of the Committee have explained that it is necessary to provide parliament with detailed information on each amending protocol – the budgetary implications; the impact on taxpayers; why is that change necessary in respect of that Contracting State; how is the impact to be evaluated; does the amendment realise any of the Sustainable Development Goals etc.

47. This is an area where some input from the legal affairs departments of ministries of foreign affairs could be helpful to indicate what would be the essential contents of the FTI for it to satisfy constitutional requirements in the country concerned.

48. So far as constitutional issue “b)” is concerned, I wonder if a small change to existing procedures might suffice to meet constitutional requirements. Since a protocol and a memorandum of agreement produce a change to an existing treaty, it is presumably possible to provide exactly the same information to parliament for that procedure as for an amending protocol. The overall effect of an FTI-protocol plus memorandum of agreement is the same as an amending protocol, so the information supplied should be the same.

49. The comment may then be made, that if the same information has to be supplied alongside a protocol-plus-memorandum-of-agreement, where is the streamlining? Why not simply have an amending protocol?

50. Perhaps three responses to this. First, that the information requirements are in national (constitutional) law - nothing we can do will change that. Second, this ignores the streamlining in terms of the negotiation of memoranda in the context of the setting created by the FTI. Third, there may be some scope for reducing the work involved in presenting information to parliament where multiple amendments all make the same change. For example, the same amendment made with respect to several countries is likely to have an equivalent impact in terms of fulfilling the SDGs with regard to each country. Similarly, the monitoring of the same amendment made with respect to several countries is surely going to be similar. Put another way, there may be streamlining in terms of using a common information template to present several, identical amendments to parliament at the same time.

51. So far as constitutional issue “c)” is concerned, if the only way that a change can be presented to parliament is in the form of an amending protocol, then it may be appropriate to offer some form of *model bilateral protocol* as a Variant Procedure until the FTI.

52. The proposal here is to include within the FTI that, in addition to the three-stage procedure (FTI – protocol – memorandum of agreement) there would also be included a two-stage procedure (FTI – model bilateral protocol). Under this Variant Procedure, it would fall to the Conference of the Parties to also produce the wording of model bilateral protocols that pairs of state could sign to effect a change to their treaty.

53. The draft FTI attached has a provision in it for this Variant Procedure.

54. Several questions about this Variant Procedure come to mind.

55. First, is it necessary and helpful? Treaty negotiators are perfectly capable of drafting an amending protocol – how does it help to have the Conference of the Parties draft a template? There are several answers to this. First, for some countries that are resource-constrained, having a template as a model could be very helpful. Second, model wording reduces the scope for variations in wording and for opening up a wider range of issues. Third, the existence of a model bilateral protocol may prompt countries to conclude amendments more rapidly, ideally in the context of meetings called by the Conference of Parties for exactly that purpose.

56. Secondly, is the three-element approach set out in the Input Note superior to this two-element approach in terms of streamlining? Should the three-element approach be dropped in favour of the two-element approach? I believe the three-element approach is superior, but I am open to persuasion to the contrary. The advantage of the three-element approach is that, under this approach, a protocol to the FTI is drafted which contains the amendment to be made. When a country signs that protocol, it is signaling that it is willing in principle to make that amendment with respect to appropriate treaty

partners: in a sense it is an invitation to negotiate. If two countries are willing to make that change, the memorandum attached to the protocol contains all the information needed to complete the agreement. There is no need to do more than fill in the details in the memorandum, and then take the resulting agreement through domestic procedures in each country. It seems to me that this is as simple and streamlined as one can make the process.

57. Thirdly, if the result of the Variant Process is simply an amending protocol, do we need the FTI at all? Why not simply stick to the old procedure that we are used to of amending DTCs? In a sense, this question answers itself. The old procedure means hundreds or thousands of amending protocols, negotiated over years, with many treaties not containing the most up-to-date provisions for years. The FTI creates a setting for bringing countries together to make updating amendments to existing treaties, and it establishes a process which can be replicated and reused each time there are changes made to the UN Model.

58. Concern: A rather specific concern that was expressed by some members of the Committee was whether it would be possible for a state to sign and ratify the FTI itself, even if at the time it did not sign any of the protocols or conclude any memoranda of agreement. (Note: this may be the same concern as constitutional issue "a)" above)

59. Response: In principle, the answer to this concern must be yes. The FTI would be a binding international agreement, binding its parties to participate in the fast-track procedure by participating, for example, in the Conference of Parties. A state that supported the concept of a fast-track procedure should be able to sign the FTI even if, at the time it did so, there were no existing protocols on the menu that this state wished to sign up to.

60. A further response would be that given to constitutional issue "a)" above.

61. Concern: Some members of the Committee raised the issue of the stages at which particular policy decisions would be taken with regard to the streamlined procedure. In particular, they raised the issue of how a policy decision could be taken in respect of a particular change in a protocol *in vaccuo*, without reference to the particular country and the balance in an amending protocol.

62. Response: Again this may need further study, and some clarification of the issue that is foreseen. In principle, at least, there are three separate policy decisions, though the decisions may well be taken at the same time.

63. The first decision for a state is whether in principle the state agrees with the idea of a streamlined process for amending appropriate DTCs having regard to changes to the UN Model. Signing up to that process involves signing the FTI and ratifying it, but does not commit the government any further other than to participate in the process (including, for example participating in the Conference of Parties).

64. Secondly, signing up to particular protocols is an indication that, at least in principle, a particular country is willing to consider applying the change that has been made to the UN Model with regard to one or more of its existing DTCs. So, for example, if a country was in principle willing to amend some of its DTCs to cover pension funds explicitly, it would sign up to the protocol dealing with pension funds. If a country was in principle willing (in appropriate circumstances) to agree to Article 12B, it would sign the protocol relating to Article 12B. If the country was implacably opposed to Article 12B, and would never agree to including it, it would not sign that protocol. So, a policy decision would need to be taken with regard to each protocol whether or not the country was willing to sign that protocol. Again, it should be emphasised that signing the protocol does not impose any legally binding obligation on the country concerned: it is simply an indication of willingness in principle to contemplate discussions with an appropriate party to an existing DTC to make that change.

65. Finally, there is a policy decision to be taken whether to agree to make any of the changes, contained in the protocols that the country has signed, with a specific, existing DTC counterparty. That is really no different than the policy decision that is taken when negotiating an amending protocol as

to whether to include in that amending protocol a particular change requested by the other party to the DTC.

66. Overall, therefore, there may be a slightly different policy process, but it does not appear to be fundamentally different from policy processes that are applicable to negotiating an amending protocol.

67. Concern: Some members of the Committee were concerned about the complexity of a multilateral instrument, and that the development of a fast-track instrument would involve similar complexities to the development of the BEPS MLI. In particular, reference was made to the complexity of the process of identifying covered tax agreements and the drafting of compatibility clauses and reservations in the BEPS MLI. Concerns were expressed that the development of the FTI, the protocols, and the memoranda of agreement would involve similar complexity.

68. Response: The proposed FTI is a very different type of instrument from the BEPS MLI. In thinking about the FTI and the procedure it introduces, specific thought has been given to avoiding most of the complexities that were involved in the BEPS MLI.

69. The BEPS MLI sought to make a significant number of changes to existing DTCs, by as large a number of countries as possible, in a single instrument. In some cases, the changes made by the BEPS MLI dealt with matters that were already covered in some existing DTCs, but in terms different from those in the MLI (for example, some existing DTCs contained anti-avoidance provisions, but they were not the same as the principal purpose test). It was this need to take account of the existing wording of DTCs, and to provide options so that as many countries as possible could be encouraged to sign up to the MLI, that led to some of the complexity involved in compatibility clauses and reservations. Also, an attempt was made to ensure that as many countries as possible signed up to the MLI for a large number of their existing treaties. Countries that initially indicated that they would include only a small number of their treaties as covered tax agreements (and instead make some of the BEPS changes by amending protocols) were encouraged to change their stance on this issue and to broaden their list of covered tax agreements.

70. The FTI is very different in many respects.

71. First, the FTI itself makes no changes to DTCs, but simply establishes the procedure for making changes.

72. Second, each of the proposed changes is contained in a separate protocol and countries are free to sign up to whatever protocols they are in principle willing to consider adopting in their DTCs. It is not necessary, therefore, to provide that a country may reserve for a particular article not to apply to its covered tax agreements.

73. Third, many of the changes reflect recent amendments to the UN Model where there is no equivalent wording in existing DTCs: no compatibility clauses are needed, therefore.

74. Fourth, where there is existing wording and a compatibility issue might arise, the FTI process does not seek to address that. Instead, and unlike the BEPS MLI, countries are left completely free to deal with that particular treaty by an amending protocol. In effect, a comprehensive approach (which the BEPS MLI adopted) is sacrificed in favour of greater simplicity.

75. This is clearly a matter for which further discussion is necessary in the light of the initial draft documentation which is attached. However, lessons have been learned from the BEPS MLI, and the aim is to achieve a simplified system of streamlined amendment.

Concluding comments

76. The sense of the discussion on 20th October was that members of the Committee wished to take Workstream A forward and consider further whether the approach proposed is viable. Hopefully, some of the responses above to the concerns voiced at that meeting will have been helpful. Additionally, the draft documents attached – even though they are very much initial drafts – may help move this workstream forward.

77. To reiterate two points made at the start of this document.

78. First, the focus of discussion would most helpfully be placed on the overall elements of the process, rather than the detailed wording of the drafts attached: these are very much preliminary drafts

79. Second, the next stage would appear to be:

a. to obtain some advice on the appropriate and established procedures within the UN system for developing the proposal of an expert group into a potential instrument, for example by establishing an ad hoc working group to take the matter forward;

b. to seek some input from the legal affairs departments of a small number of ministries of foreign affairs as to the feasibility of the proposed FTI and any constitutional issues that may need to be resolved;

c. to seek to gauge support from countries for a fast-track process, particularly among developing countries.

Appendix to Annex A: Summary of the FTI proposal

1. It may be helpful to summarise briefly the approach to a fast-track instrument that was contained in the initial Input Note.

2. The approach has three elements.

3. First, a multilateral fast track instrument (the "FTI") which is intended to be a binding multilateral instrument establishing a procedure for the streamlined amendment of multiple existing DTCs.

4. Second, a series of protocols to this FTI, each protocol containing the wording of a particular amendment or modification, and reflecting changes that have been adopted in recent years to the UN Model. Each protocol would be self-standing and contain only a single amendment (or a group of closely related amendments, such as the related amendments to Articles 10(2), 11(2) and 12(2)). The protocols are not binding international agreements of themselves: signing up to a protocol indicates only that a particular country is willing to enter into negotiations with appropriate counterparties to existing DTCs with a view to possibly making that amendment if the two countries agree.

5. Third, the conclusion of a memorandum of agreement (or equivalent instrument if a "memorandum of agreement" raises difficulties for a particular country concerned) in a form attached to each protocol. The memorandum of agreement (or equivalent instrument) would be a binding agreement between the two countries (or in the case of a multilateral convention, two or more countries) that have agreed to make the change contained in the particular protocol. The content of the memorandum of agreement would vary according to the particular change: some would require the parties to agree a percentage rate of tax where that is left open in the UN Model; some may provide options where there are different forms of wording that might be adopted in the change.

6. If one is looking for an analogy, then the FTI is the launch pad which can be reused on multiple occasions. The protocols are the individual rockets, each designed to carry a different type of payload. Finally, the memoranda of agreement (or equivalent instruments) are the actual payload itself, where two (or more, in the case of a multilateral convention) countries agree to put into orbit a particular satellite (representing the agreed change to the bilateral or multilateral DTC).

7. Hopefully, these three elements are a logical response to the desire to have a reusable but simplified procedure for the streamlined amendment of multiple existing DTCs to reflect both recent changes to the UN Model and to be available to reflect future changes to the Model as well.

8. Going forward, and assuming that a sufficient number of countries have signed up to the FTI that it comes into force, future changes to the UN Model could be implemented by the drafting of additional protocols to the FTI. Individual countries could then decide whether or not they wished to sign up to that protocol and then negotiate memoranda of agreement (or equivalent instruments) at a Conference of the Parties held for that purpose with a view to the rapid and streamlined amendment of a large number of existing DTCs at the same time.

ANNEX B

FTI (complete draft 21st January 2023)

Input Note

Philip Baker KC

February 2023

<u>Title of instrument:</u>

Multilateral Fast Track Instrument to Allow for the Streamlined Amendment and Modification of Bilateral and Multilateral Conventions for the Elimination of Double Taxation

<u>Preamble</u>

The Parties to this Fast Track Instrument

Desiring to establish a procedure for the streamlined amendment and modification of existing bilateral and multilateral conventions for the elimination of double taxation by States wishing to make such changes, and to do so in a fast and effective manner.

Intending that this procedure will be established to give effect to certain enumerated changes to the UN Model Double Taxation Convention between Developed and Developing Countries in the treaties between parties to this instrument.

Have agreed as follows:

<u>Part I: Purpose and Definitions</u>

<u>Article 1: Purpose</u>

(1) The purpose of this Instrument is to establish a procedure for the streamlined amendment and modification of bilateral and multilateral double taxation conventions (whether existing at the date of this Instrument or subsequently concluded).

(2) The amendments and modifications to be implemented by this Instrument reflect certain enumerated changes to the UN Model, including future changes which may be made to the UN Model by the Committee of Experts.

<u>Article 2: Definitions</u>

[This Article will contain a number of definitions including the following]

For the purposes of this Instrument and any Protocol concluded pursuant to this Instrument, the following definitions apply:

a) Party – The term "Party" means:

(i) A State for which this Instrument is in force pursuant to Article [ ] (Entry into Force); or

(ii) A jurisdiction or territory which has signed this Convention pursuant to Article [ ] (Signature and Ratification, Acceptance or Approval) and for which this Instrument is in force pursuant to Article [ ] (Entry into Force).

b) The term "Double Taxation Convention" means a bilateral or multilateral convention for the elimination of double taxation whether concluded prior to the date of entry into force of this Instrument or subsequently concluded

c) The "UN Model" means the United Nations Model Double Taxation Convention between Developed and Developing Countries as it is amended from time to time.

d) The term "Committee of Experts" means the United Nations Committee of Experts on International Cooperation in Tax Matters (or any successor body tasked with updating the UN Model).

e) The term "Memorandum of Agreement" means a memorandum of agreement concluded by two or more Parties to this Instrument in accordance with the terms of a Protocol to this Instrument and includes an Equivalent Instrument.

f) The term "Equivalent Instruments" means any document having the equivalent legal effect to a Memorandum of Agreement and containing the same information as required by a Memorandum of Agreement for the purposes of a Protocol to this Instrument.

g) The term "Signatory" means a State or jurisdiction or territory which has signed this Instrument but for which the Instrument is not yet in force.

Part II: The Procedure and its Operation

Article 3: The Procedure established by this Instrument.

(i) The procedure established by this Instrument for the amendment and modification of Double Taxation Conventions consists of three elements:

a) The framework for the implementation of amendments and modifications to Double Taxation Conventions, as provided for in this Instrument;

b) The specific amendments or modifications provided for in the Protocols to this Instrument; and

c) The Memoranda of Agreement in the form appended to each Protocol that are concluded between two or more Parties and that make reference to a Protocol to this Instrument.

Article 4: Operation of this Instrument

(i) Where two or more Parties to this Instrument conclude a Memorandum of Agreement in relation to a Protocol, the amendments or modifications to the Double Taxation Convention between those Parties (as identified in the Memorandum of Agreement) that are set out in the relevant Protocol shall take effect in accordance with the terms of the Protocol and the terms of the Memorandum of Agreement.

(ii) For the purposes of the procedure established by this Instrument:

a) Participation as a Party to this Instrument indicates the willingness of that Party to adopt the procedure set out in this Instrument. Such signature, ratification, acceptance or approval does not in any way restrict such Party from amending or modifying Double Taxation Conventions to which it is a party through other means or procedures as provided for in a Double Taxation Convention or as agreed between the parties to that Convention.

b) The signature of a Party to a Protocol indicates the willingness of that Party to consider making the amendments or modifications in that Protocol if that Party concludes a Memorandum of Agreement with another Party with respect to those amendments or modifications as provided in (ii) (c) below.

c) The amendments or modifications of a Double Taxation Convention between two or more Parties to give effect to the amendments of modifications provided for in a Protocol shall take effect only through the conclusion of a Memorandum of Agreement between those Parties.

<u>Article 5: Effects of Commentaries to the UN Model [optional]</u>

Where an amendment to the UN Model is accompanied by a change to the Commentary to that Model adopted by the Committee of Experts, the Parties who conclude a Memorandum of Agreement may specify in that Memorandum of Agreement that the amendment to the Commentary shall be taken into account, so far as appropriate, and in accordance with the relevant provisions of the Vienna Convention on the Law of Treaties, in interpreting the amendment or modification made by the Protocol to which the Memorandum of Agreement relates.

<u>Article 6: Alternative Procedure for Drafting Model Bilateral Amending Protocols</u>

The Conference of the Parties shall, at the request of no less than five Parties, draft one or more Model Bilateral Amending Protocols to give effect to amendments to the UN Model and shall make that draft available to all Parties to assist them in negotiating amending protocols to their Double Taxation Conventions.

<u>Part III: Final provisions</u>

<u>Article 7: Signature and Ratification, Acceptance or Approval</u>

(i) As of the [ ] day of [ ], this Instrument shall be open for signature by:

a) All States; and

b) Any other jurisdiction or territory authorised to become a Party by means of a decision by consensus of the Parties and Signatories.

(ii) This Instrument is subject to ratification, acceptance or approval.

<u>Article 8: Reservations</u>

(i) No reservations are permitted to this Instrument.

<u>Article 9: Notifications</u>

(i) Any Signatory or Party signing, ratifying, accepting or approving this Instrument shall notify the relevant document to the Depository

(ii) Any Party signing a Protocol shall notify that signature to the Depository and deposit a copy of the signed Protocol with the Depository.

(iii) Two or more Parties concluding a Memorandum of Agreement shall each notify that to the Depository and deposit a copy of the Memorandum of Agreement with the Depository.

Article 10: Domestic procedure to give effect to this Instrument

Each Signatory or Party to this Instrument shall undertake such procedure under its domestic or constitutional law as are required to give effect to this Instrument, to any Protocol to which that Party is a signatory, and to any Memorandum of Agreement concluded by that Party.

Article 11: Conference of the Parties

(i) The Parties may convene a Conference of the Parties for the purpose of taking any decisions or exercising any functions as may be required or appropriate under the provisions of this Instrument.

(ii) The Conference of the Parties shall be served by the Depository.

(iii) Any Party may request a Conference of the Parties by communicating a request to the Depository. The Depository shall inform all Parties of any request. Thereafter, the Depository shall convene a Conference of the Parties, provided that the request is supported by one third of the Parties within six calendar months of the communication by the Depository of the request.

Article 12: Amendment

(i) Any Party may propose an amendment to this Instrument or to a Protocol by submitting the proposed amendment to the Depository.

(ii) A Conference of the Parties may be convened to consider the proposed amendment in accordance with paragraph 3 of Article 11 (Conference of the Parties).

Article 13: Entry into force

(i) This Instrument shall enter into force on the first day of the month following the expiration of a period of three calendar months beginning on the date of deposit of the [fifth] instrument of ratification, acceptance or approval.

(ii) For each Signatory ratifying, accepting, or approving this Instrument after the deposit of the fifth instrument of ratification, acceptance or approval, the Instrument shall enter into force on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by such Signatory of its instrument of ratification, acceptance or approval.

Article 14: Entry into effect of a Memorandum of Agreement

(i) The amendment or modification to a Double Taxation Convention which is made by a Protocol shall have effect in each Party that has signed a Memorandum of Agreement on the dates specified in that Memorandum of Agreement.

Article 15: Withdrawal

(i) Any Party may, at any time, withdraw from this Instrument by means of a notification addressed to the Depository.

(ii) Withdrawal pursuant to paragraph 1 shall become effective on the date of the receipt of the notification by the Depository. In cases where this Instrument has entered into force with respect to all Parties to a Double Taxation Convention before the date on which a Party's withdrawal becomes effective, that Double Taxation Convention shall remain as amended or modified by this Instrument.

Article 16: Depository

(i) The Secretary-General of the United Nations shall be the Depository of this Instrument and any Protocol or Memorandum of Agreement.

(ii) The Depository shall notify the Parties and Signatories within one calendar month of:

a) Any signature pursuant to Article 6 (Signature and Ratification), Acceptance or Approval;

b) The deposit of any instrument of ratification, acceptance or approval pursuant to Article 6 (Signature and Ratification, Acceptance or Approval);

c) Any notification pursuant to Article 8 (Notifications);

d) Any proposed amendment to this Instrument or its Protocols pursuant to Article 12 (Amendment);

e) Any withdrawal from this Instrument pursuant to Article 15 (Withdrawal); and

f) Any other communication related to this Instrument.

(iii) The Depository shall maintain publicly available lists of Parties and notifications made by Parties.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed this Instrument.

Done at [ ], the day of , in [all official languages of the United Nations], all texts being equally authentic, in a single copy which shall be deposited in the archives of the United Nations.

First Protocol to the Multilateral Fast Track Instrument: *Pension Funds*

Desiring to give effect to the changes to the UN Model to include pension funds within the scope of their Double Taxation Conventions

The signatories to this Protocol intend that the Instrument and this Protocol shall have the effect as follows:

Article 1: Purpose of this Protocol

Where two or more Parties to the Instrument have signed this Protocol, they may give effect to the amendments and modifications contained in this Protocol by concluding a Memorandum of Agreement in accordance with the Schedule to this Protocol.

Article 2: The Effect of the Conclusion of a Memorandum of Agreement

The Double Taxation Convention between the Parties who have concluded a Memorandum of Agreement and that is identified in that Memorandum of Agreement ("the relevant Double Taxation Convention") shall be amended and modified in accordance with the following articles of this Protocol.

Article 3: modification of the General Definitions of the Relevant Double Taxation Convention

In the Article of the relevant Double Taxation Convention containing the General Definitions, the following wording shall be included at the end of the list of defined terms:

> "([8]) the term "recognized pension fund" of a Contracting State means an entity or arrangement established in that State that is treated as a separate person under the taxation laws of that State and:
>
> (i) that is established and operated exclusively or almost exclusively to administer or provide retirement benefits and ancillary or incidental benefits to individuals and that is regulated as such by that State or one of its political subdivisions or local authorities, or
>
> (ii) that is established and operated exclusively or almost exclusively to invest funds for the benefit of entities or arrangements to which subdivision (i) applies."

Article 4: Modification of the Definition of a Resident

In the relevant Double Taxation Convention, the definition of a Resident of a Contracting State shall be modified by the inclusion of the words "and a recognised pension fund of that State".

Article 5: Modification of the Provisions on Entitlement to Benefits

In the relevant Double Taxation Convention, the provisions relating to the Entitlement to Benefits shall be modified by the inclusion in the definition of "qualified persons" of "a recognised pension fund".

[8] Number or letter to be an accordance with the numbering or lettering of the paragraph into which this wording is inserted.

Article 6: Signature and Notifications

(i) The Depository shall maintain a list of signatories of this Protocol. Any Party to the Multilateral Fast Track Instrument may sign this Protocol.

(ii) The parties to a Memorandum of Agreement concluded in accordance with this Protocol shall notify each other of the conclusion of all procedures necessary to bring the Memorandum of Agreement and the amendments and modifications in this Protocol into force in the territory of that Party. They shall also notify the Depository accordingly.

THIS PROTOCOL shall be open for signature by Parties to the Instrument from the [ ] day of [ ].

Schedule: Contents of the Memorandum of Agreement

The parties to this Memorandum of Agreement have agreed that the amendments and modifications set out in the First Protocol to the Multilateral Fast Track Instrument shall have effect in accordance with the terms of this Memorandum of Agreement.

1. Details of the relevant Double Taxation Convention: [example: the double taxation convention between Erewhon and Ruritania concluded on the 14th July 1955].
2. The date of taking effect in State A: [example: the 1st January 2024].
3. The date of taking effect in State B: [example: the 1st July 2024].
4. The language version (or versions) of the amendments or modifications (if a language other than an official UN language is adopted, the text of the amendments or modifications shall be appended): [example – English and Ruritanian – the Ruritanian text of the amendments or modifications is appended].
5. Whether or not the Commentary to the UN Model shall be taken into account, so far as appropriate, in interpreting the amendments or modifications made by this Protocol: [example: yes].

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Memorandum of Agreement.

Done at [ ], the day of , in [ ] in two copies.

Second Protocol to the Multilateral Fast Track Instrument: ***Gains in relation to Natural Resources and Offshore Indirect Capital Gains***

Desiring to give effect to the changes to the UN Model in respect to the taxation of capital gains in relation to natural resources and to indirect disposals within the scope of their Double Taxation Conventions

The signatories to this Protocol intend that the Instrument and this Protocol shall have the effect as follows:

Article 1: Purpose of this Protocol

Where two or more Parties to the Instrument have signed this Protocol, they may give effect to the amendments and modifications contained in this Protocol by concluding a Memorandum of Agreement in accordance with the Schedule to this Protocol.

Article 2: The Effect of the Conclusion of a Memorandum of Agreement

The Double Taxation Convention between the Parties who have concluded a Memorandum of Agreement and that is identified in that Memorandum of Agreement ("the relevant Double Taxation Convention") shall be amended and modified in accordance with the following articles of this Protocol.

Article 3: Amendment of the Capital Gains Article of the Relevant Double Taxation Convention in respect of the Taxation of Natural Resources

In the Article of the relevant Double Taxation Convention relating to the taxation of Capital Gains, the following wording shall be inserted:

> "([9]). Gains derived by a resident of a Contracting State from the alienation of a right granted under the law of the other Contracting State which allows the use of resources that are naturally present in that other State and that are under the jurisdiction of that other State, may be taxed in that other State."

Article 4: Amendment of the Capital Gains Article of the Relevant Double Taxation Convention in respect of the Taxation of Indirect Disposals

In the Article of the relevant Double Taxation Convention relating to the taxation of Capital Gains, the following wording shall be inserted :

[9] Number or letter to be an accordance with the numbering or lettering of the paragraph into which this wording is inserted.

"([10]). Subject to paragraphs [[11]] and [[12]], gains derived by a resident of a Contracting State from the alienation of shares of a company, or comparable interests of an entity, such as interests in a partnership or trust, may be taxed in the other Contracting State if

(*a*) the alienator, at any time during the 365 days preceding such alienation, held directly or indirectly at least ___[13] per cent *[the percentage is to be established through bilateral negotiations]* of the capital of that company or entity; and

(*b*) at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from

(i) a property any gain from which would have been taxable in that other State in accordance with the preceding provisions of this Article if that gain had been derived by a resident of the first-mentioned State from the alienation of that property at that time, or

(ii) any combination of property referred to in subdivision (i).

<u>Article 5: Adjustment to the Numbering of Provision in the Relevant Double Taxation Convention</u>

Any provision of the relevant Double Taxation Convention to the effect that gains other than those contained in specified paragraphs of the Capital Gains Article shall be taxable only in the State of residence of the alienator shall be amended so that the paragraphs specified shall be those identified in the Memorandum of Agreement.

<u>Article 6: Signature and Notifications</u>

(iii) The Depository shall maintain a list of signatories of this Protocol. Any Party to the Multilateral Fast Track Instrument may sign this Protocol.

(iv) The parties to a Memorandum of Agreement concluded in accordance with this Protocol shall notify each other of the conclusion of all procedures necessary to bring the Memorandum of Agreement and the amendments and modifications in this Protocol into force in the territory of that Party. They shall also notify the Depository accordingly.

THIS PROTOCOL shall be open for signature by Parties to the Instrument from the [ ] day of [ ].

<u>Schedule: Contents of the Memorandum of Agreement</u>

The parties to this Memorandum of Agreement have agreed that the amendments and modifications set out in the Second Protocol to the Multilateral Fast Track Instrument shall have effect in accordance with the terms of this Memorandum of Agreement.

1. Details of the relevant Double Taxation Convention: [Example: the double taxation convention between Erewhon and Ruritania concluded on the 14th July 1955].
2. Whether the parties to this Memorandum of Agreement have agreed to apply the amendments contained in Article 3 (capital gains in respect of natural resources) or Article 4 (indirect disposals) or both Articles: [Example: both Articles]
3. Paragraph numbers to be inserted into the amendment made by Article 4: [Example: paragraph numbers 4 and 5]

[10] Number or letter to be an accordance with the numbering or lettering of the paragraph into which this wording is inserted.

[11] Number to be agreed between the parties and included in the Memorandum of Agreement.

[12] Number to be agreed between the parties and included in the Memorandum of Agreement.

[13] Percentage to be agreed between the parties and included in the Memorandum of Agreement.

4. Percentage to be inserted into the amendment made by Article 4: [Example: 50%]
5. Paragraph numbers to be inserted into the amendment made by Article 5: [Example: paragraphs 1 to 7]
6. The date of taking effect in State A: [example: the 1st January 2024].
7. The date of taking effect in State B: [example: the 1st July 2024].
8. The language version (or versions) of the amendments or modifications (if a language other than an official UN language is adopted, the text of the amendments or modifications shall be appended): [example – English and Ruritanian – the Ruritanian text of the amendments or modifications is appended].
9. Whether or not the Commentary to the UN Model shall be taken into account, so far as appropriate, in interpreting the amendments or modifications made by this Protocol: [example: yes].

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Memorandum of Agreement.

Done at [ ], the day of , in [ ] in two copies.

Third Protocol to the Multilateral Fast Track Instrument: *Fees for Technical Services*

Desiring to give effect to the changes to the UN Model in respect to the taxation of fees for technical services within the scope of their Double Taxation Conventions

The signatories to this Protocol intend that the Instrument and this Protocol shall have the effect as follows:

<u>Article 1: Purpose of this Protocol</u>

Where two or more Parties to the Instrument have signed this Protocol, they may give effect to the amendments and modifications contained in this Protocol by concluding a Memorandum of Agreement in accordance with the Schedule to this Protocol.

<u>Article 2: The Effect of the Conclusion of a Memorandum of Agreement</u>

The Double Taxation Convention between the Parties who have concluded a Memorandum of Agreement and that is identified in that Memorandum of Agreement ("the relevant Double Taxation Convention") shall be amended and modified in accordance with the following articles of this Protocol.

<u>Article 3: Amendment of the Relevant Double Taxation Convention in respect of Fees for Technical Services</u>

The relevant Double Taxation Convention shall be amended by the insertion of the following wording in accordance with the Memorandum of Agreement:

"Article [ ] [14]

FEES FOR TECHNICAL SERVICES

1. Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, notwithstanding the provisions of Article [[15]] and subject to the provisions of Articles [[16]], fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed ___ per cent *[the percentage is to be established through bilateral negotiations]* of the gross amount of the fees.

3. The term "fees for technical services" as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made:

(a) to an employee of the person making the payment;

(b) for teaching in an educational institution or for teaching by an educational institution; or

[14] Number to be agreed between the parties and included in the Memorandum of Agreement.
[15] Number to be agreed between the parties and included in the Memorandum of Agreement.
[16] Number to be agreed between the parties and included in the Memorandum of Agreement.

(c) by an individual for services for the personal use of an individual.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment situated in that other State, or performs in the other Contracting State independent personal services from a fixed base situated in that other State, and the fees for technical services are effectively connected with:

(*a*) such permanent establishment or fixed base, or

(*b*) business activities referred to in (*c*) of paragraph 1 of Article [[17]] .

In such cases the provisions of Article [[18]] or Article [[19]], as the case may be, shall apply.

5. For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the fees was incurred, and such fees are borne by the permanent establishment or fixed base.

6. For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State through a permanent establishment situated in that other State or performs independent personal services through a fixed base situated in that other State and such fees are borne by that permanent establishment or fixed base.

7. Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other person, the amount of the fees, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

Article 4: Alternative Wording

Where the relevant Double Taxation Convention does not contain provisions relating to a fixed base and the Memorandum of Agreement so specifies, the amendment made by Article 3 shall take effect with the exclusion of all reference to a fixed base.

Article 5: Consequential Amendments

The relevant Double Taxation Convention shall be further amended as a consequence of the insertion of the Article on the Taxation of Automated Digital Services as follows (but only in so far as the relevant Double Taxation Convention contains the Articles referred to in the following paragraphs):

[17] Number to be agreed between the parties and included in the Memorandum of Agreement.
[18] Number to be agreed between the parties and included in the Memorandum of Agreement.
[19] Number to be agreed between the parties and included in the Memorandum of Agreement.

(a) In the Article of the relevant Double Taxation Convention relating to Elimination of Double Taxation by Exemption,[20] the number of the Article inserted by this Protocol shall be added to the numerical list of Articles in paragraphs (2) and (4);
(b) In the Article of the relevant Double Taxation Convention relating to Non-Discrimination,[21] the wording “or paragraph 7 of Article [[22]]” and “fees for technical services” shall be inserted into the paragraph relating to deductions[23];
(c) In the Article of the relevant Double Taxation Convention relating to Entitlement to Benefits,[24] the number of the Article inserted by this Protocol shall be added to the numerical list of Articles in the definition of “equivalent beneficiary”[25].

Article 6: Signature and Notifications

(v) The Depository shall maintain a list of signatories of this Protocol. Any Party to the Multilateral Fast Track Instrument may sign this Protocol.
(vi) The parties to a Memorandum of Agreement concluded in accordance with this Protocol shall notify each other of the conclusion of all procedures necessary to bring the Memorandum of Agreement and the amendments and modifications in this Protocol into force in the territory of that Party. They shall also notify the Depository accordingly.

THIS PROTOCOL shall be open for signature by Parties to the Instrument from the [ ] day of [ ].

Schedule: Contents of the Memorandum of Agreement

The parties to this Memorandum of Agreement have agreed that the amendments and modifications set out in the Third Protocol to the Multilateral Fast Track Instrument shall have effect in accordance with the terms of this Memorandum of Agreement.

1. Details of the relevant Double Taxation Convention: [Example: the double taxation convention between Erewhon and Ruritania concluded on the 14th July 1955].
2. Article number to be assigned to the new Article on the Taxation of Fees for Technical Services as inserted by the amendment made by Article 3 of the Protocol: [Example: Article 12A].
3. Article numbers to be inserted into the amendment made by Article 3, paragraph 2: [Example: Article numbers 14 and 8, 16 and 17 respectively].
4. Percentage to be inserted into the amendment made by Article 3, paragraph 2: [Example: 3%]
5. Article numbers to be inserted into the amendment made by Article 3, paragraph 4: [Example: Article numbers 7 and 14].
6. Whether the relevant Double Taxation Convention includes references to a fixed base: [Example: yes]
7. The date of taking effect in State A: [Example: 1st January 2024].
8. The date of taking effect in State B: [Example: 1st July 2024].

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[20] The equivalent of Article 23A of the UN Model.
[21] The equivalent of Article 24 of the UN Model.
[22] The number of the Article inserted by this Protocol.
[23] The equivalent of Article 24(4) of the UN Model; the additional wording shall be inserted in the equivalent positions to that paragraph in the UN Model.
[24] The equivalent of Article 29 of the UN Model.
[25] The equivalent of Article 29(7)(e)(1)(B)(1) of the UN Model.

9. The language version (or versions) of the amendments or modifications (if a language other than an official UN language is adopted, the text of the amendments or modifications shall be appended): [example – English and Ruritanian – the Ruritanian text of the amendments or modifications is appended].
10. Whether or not the Commentary to the UN Model shall be taken into account, so far as appropriate, in interpreting the amendments or modifications made by this Protocol: [example: yes].

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Memorandum of Agreement.

Done at [ ], the day of , in [ ] in two copies.

Fourth Protocol to the Multilateral Fast Track Instrument: *Income from Automated Digital Services*

Desiring to give effect to the changes to the UN Model in respect to the taxation of income from automated digital services within the scope of their Double Taxation Conventions

The signatories to this Protocol intend that the Instrument and this Protocol shall have the effect as follows:

Article 1: Purpose of this Protocol

Where two or more Parties to the Instrument have signed this Protocol, they may give effect to the amendments and modifications contained in this Protocol by concluding a Memorandum of Agreement in accordance with the Schedule to this Protocol.

Article 2: The Effect of the Conclusion of a Memorandum of Agreement

The Double Taxation Convention between the Parties who have concluded a Memorandum of Agreement and that is identified in that Memorandum of Agreement ("the relevant Double Taxation Convention") shall be amended and modified in accordance with the following articles of this Protocol.

Article 3: Amendment of the Relevant Double Taxation Convention in respect of the Taxation of Automated Digital Services

The relevant Double Taxation Convention shall be amended by the insertion of the following wording in accordance with the Memorandum of Agreement:

"Article [ ][26]

INCOME FROM AUTOMATED DIGITAL SERVICES

1. Income from automated digital services arising in a Contracting State, underlying payments for which are made to a resident of the other Contracting State, may be taxed in that other State.

2. However, subject to the provisions of Article [[27]] and notwithstanding the provisions of Article [[28]], income from automated digital services arising in a Contracting State may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the income is a resident of the other Contracting State, the tax so charged shall not exceed ___[29] per cent *[the percentage is to be established through bilateral negotiations]* of the gross amount of the payments underlying the income from automated digital services.

3. The provisions of paragraph 2 shall not apply if the beneficial owner of the income from automated digital services, being a resident of a Contracting State, requests the other Contracting State where such income arises, to subject its qualified profits from automated digital services for the fiscal year concerned to taxation at the tax rate provided for in the domestic laws of that State. If the beneficial owner so requests, subject to the provisions of Article [[30]] and notwithstanding the provisions of Article [[31]], the taxation by that Contracting State shall be carried out accordingly. For the purposes

[26] Number to be agreed between the parties and included in the Memorandum of Agreement.
[27] Number to be agreed between the parties and included in the Memorandum of Agreement.
[28] Number to be agreed between the parties and included in the Memorandum of Agreement.
[29] Percentage to be agreed between the parties and included in the Memorandum of Agreement.
[30] Number to be agreed between the parties and included in the Memorandum of Agreement.
[31] Number to be agreed between the parties and included in the Memorandum of Agreement.

of this paragraph, the qualified profits shall be 30 per cent of the amount resulting from applying the profitability ratio of that beneficial owner's automated digital services business segment to the gross annual revenue from automated digital services derived from the Contracting State where such income arises. Where segmental accounts are not maintained by the beneficial owner, the overall profitability ratio of the beneficial owner will be applied to determine qualified profits. However, where the beneficial owner belongs to a multinational enterprise group, the profitability ratio to be applied shall be that of the business segment of the group relating to the income covered by this Article, or of the group as a whole in case segmental accounts are not maintained by the group, provided such profitability ratio of the multinational enterprise group is higher than the aforesaid profitability ratio of the beneficial owner. Where the segmental profitability ratio or, as the case may be, the overall profitability ratio of the multinational enterprise group to which the beneficial owner belongs is not available to the Contracting State in which the income from automated digital services arises, the provisions of this paragraph shall not apply; in such a case, the provisions of paragraph 2 shall apply.

4. For the purposes of paragraph 3, "multinational enterprise group" means any "group" that includes two or more enterprises, the tax residence for which is in different jurisdictions. Further, for the purposes of paragraph 3, the term "group" means a collection of enterprises related through ownership or control such that it is either required to prepare Consolidated Financial Statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public stock exchange.

5. The term "automated digital services" as used in this Article means any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider.

6. The term "automated digital services" includes especially:

(*a*) online advertising services;

(*b*) supply of user data;

(*c*) online search engines;

(*d*) online intermediation platform services;

(*e*) social media platforms;

(*f*) digital content services;

(*g*) online gaming;

(*h*) cloud computing services; and

(*i*) standardized online teaching services.

7. The provisions of this Article shall not apply if the payments underlying the income from automated digital services qualify as "royalties" or "fees for technical services" under Article [[32]] or Article [[33]] as the case may be.

8. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the income from automated digital services, being a resident of a Contracting State, carries on business in the other Contracting State in which the income from automated digital services arises through a permanent

[32] Number to be agreed between the parties and included in the Memorandum of Agreement.
[33] Number to be agreed between the parties and included in the Memorandum of Agreement.

establishment situated in that other State, or performs in the other Contracting State independent personal services from a fixed base situated in that other State, and the income from automated digital services is effectively connected with:

(*a*) such permanent establishment or fixed base, or

(*b*) business activities referred to in subparagraph (*c*) of paragraph 1 of Article [[34]].

In such cases the provisions of Article [[35]] or Article [[36]], as the case may be, shall apply.

9. For the purposes of this Article and subject to paragraph 10, income from automated digital services shall be deemed to arise in a Contracting State if the underlying payments for the income from automated digital services are made by a resident of that State or if the person making the underlying payments for the automated digital services, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to make the payments was incurred, and such payments are borne by the permanent establishment or fixed base.

10. For the purposes of this Article, income from automated digital services shall be deemed not to arise in a Contracting State if the underlying payments for the income from automated digital services are made by a resident of that State which carries on business in the other Contracting State through a permanent establishment situated in that other State or performs independent personal services through a fixed base situated in that other State and such underlying payments towards automated digital services are borne by that permanent establishment or fixed base.

11. Where, by reason of a special relationship between the payer and the beneficial owner of the income from automated digital services or between both of them and some other person, the amount of the payments underlying such income, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments underlying such income from automated digital services shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

Article 4: Alternative Wording

Where the relevant Double Taxation Convention does not contain provisions relating to either

(a) Fees for technical services; or
(b) A fixed base

and the Memorandum of Agreement so specifies, the amendment made by Article 3 shall take effect with the exclusion of all reference to fees for technical services or to a fixed base or both.

Article 5: Consequential Amendments

The relevant Double Taxation Convention shall be further amended as a consequence of the insertion of the Article on the Taxation of Automated Digital Services as follows (but only in so far as the relevant Double Taxation Convention contains the Articles referred to in the following paragraphs):

(d) In the Article of the relevant Double Taxation Convention relating to Elimination of Double Taxation by Exemption,[37] the number of the Article inserted by this Protocol shall be added to the numerical list of Articles in paragraphs (2) and (4);

[34] Number to be agreed between the parties and included in the Memorandum of Agreement.
[35] Number to be agreed between the parties and included in the Memorandum of Agreement.
[36] Number to be agreed between the parties and included in the Memorandum of Agreement.
[37] The equivalent of Article 23A of the UN Model.

(e) In the Article of the relevant Double Taxation Convention relating to Non-Discrimination,[38] the wording "or paragraph 11 of Article [[39]]" and "payments underlying income from automated digital services" shall be inserted into the paragraph relating to deductions[40];
(f) In the Article of the relevant Double Taxation Convention relating to Entitlement to Benefits,[41] the number of the Article inserted by this Protocol shall be added to the numerical list of Articles in the definition of "equivalent beneficiary"[42].

Article 6: Signature and Notifications

(vii) The Depository shall maintain a list of signatories of this Protocol. Any Party to the Multilateral Fast Track Instrument may sign this Protocol.
(viii) The parties to a Memorandum of Agreement concluded in accordance with this Protocol shall notify each other of the conclusion of all procedures necessary to bring the Memorandum of Agreement and the amendments and modifications in this Protocol into force in the territory of that Party. They shall also notify the Depository accordingly.

THIS PROTOCOL shall be open for signature by Parties to the Instrument from the [ ] day of [ ].

Schedule: Contents of the Memorandum of Agreement

The parties to this Memorandum of Agreement have agreed that the amendments and modifications set out in the Third Protocol to the Multilateral Fast Track Instrument shall have effect in accordance with the terms of this Memorandum of Agreement.

1. Details of the relevant Double Taxation Convention: [Example: the double taxation convention between Erewhon and Ruritania concluded on the 14th July 1955].
2. Article number to be assigned to the new Article on the Taxation of Income from Automated Digital Services as inserted by the amendment made by Article 3 of the Protocol: [Example: Article 12B].
3. Article numbers to be inserted into the amendment made by Article 3, paragraphs 2, 3 and 8: [Example: Article numbers 7 and 14].
4. Percentage to be inserted into the amendment made by Article 3, paragraph 2: [Example: 3%]
5. Article numbers to be inserted into the amendment made by Article 3, paragraph 7: [Example: Article numbers 12 and 12A].
6. Whether the relevant Double Taxation Convention contains provisions relating to (a) fees for technical services; or (b) fixed base; or both: [Example; contains both]
7. The date of taking effect in State A: [Example: 1st January 2024].
8. The date of taking effect in State B: [Example: 1st July 2024].

[38] The equivalent of Article 24 of the UN Model.
[39] The number of the Article inserted by this Protocol.
[40] The equivalent of Article 24(4) of the UN Model; the additional wording shall be inserted in the equivalent positions to that paragraph in the UN Model.
[41] The equivalent of Article 29 of the UN Model.
[42] The equivalent of Article 29(7)(e)(1)(B)(1) of the UN Model.

9. The language version (or versions) of the amendments or modifications (if a language other than an official UN language is adopted, the text of the amendments or modifications shall be appended): [example – English and Ruritanian – the Ruritanian text of the amendments or modifications is appended].
10. Whether or not the Commentary to the UN Model shall be taken into account, so far as appropriate, in interpreting the amendments or modifications made by this Protocol: [example: yes].

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Memorandum of Agreement.

Done at [ ], the day of , in [ ] in two copies.

Fifth Protocol to the Multilateral Fast Track Instrument: *Arbitration*

Desiring to give effect to the changes to the UN Model to include provision for the arbitration of disputes under the mutual agreement procedure provided for in their Double Taxation Conventions

The signatories to this Protocol intend that the Instrument and this Protocol shall have the effect as follows:

Article 1: Purpose of this Protocol

Where two or more Parties to the Instrument have signed this Protocol, they may give effect to the amendments and modifications contained in this Protocol by concluding a Memorandum of Agreement in accordance with the Schedule to this Protocol.

Article 2: The Effect of the Conclusion of a Memorandum of Agreement

The Double Taxation Convention between the Parties who have concluded a Memorandum of Agreement and that is identified in that Memorandum of Agreement ("the relevant Double Taxation Convention") shall be amended and modified in accordance with the following articles of this Protocol.

Article 3: Inclusion of Provision for Arbitration of Disputes Within the Relevant Double Taxation Convention

In the Article of the relevant Double Taxation Convention relating to Mutual Agreement Procedure, the following paragraph shall be included at the end of the Article:

> [[43]]. Where,
>
> (*a*) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and
> (*b*) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within three years from the presentation of the case to the competent authority of the other Contracting State,
>
> any unresolved issues arising from the case shall be submitted to arbitration if either competent authority so requests. The person who has presented the case shall be notified of the request. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. The arbitration decision shall be binding on both States and shall be implemented notwithstanding any time limits in the domestic laws of these States unless both competent authorities agree on a different solution within six months after the decision has been communicated to them or unless person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

[43] Number to be inserted according to the consecutive numbering of the paragraphs of this Article.

Article 4: Signature and Notifications

(ix) The Depository shall maintain a list of signatories of this Protocol. Any Party to the Multilateral Fast Track Instrument may sign this Protocol.

(x) The parties to a Memorandum of Agreement concluded in accordance with this Protocol shall notify each other of the conclusion of all procedures necessary to bring the Memorandum of Agreement and the amendments and modifications in this Protocol into force in the territory of that Party. They shall also notify the Depository accordingly.

THIS PROTOCOL shall be open for signature by Parties to the Instrument from the [ ] day of [ ].

Schedule: Contents of the Memorandum of Agreement

The parties to this Memorandum of Agreement have agreed that the amendments and modifications set out in the Fifth Protocol to the Multilateral Fast Track Instrument shall have effect in accordance with the terms of this Memorandum of Agreement.

1. Details of the relevant Double Taxation Convention: [example: the double taxation convention between Erewhon and Ruritania concluded on the 14th July 1955].
2. The date of taking effect in State A: [example: the 1st January 2024].
3. The date of taking effect in State B: [example: the 1st July 2024].
4. The language version (or versions) of the amendments or modifications (if a language other than an official UN language is adopted, the text of the amendments or modifications shall be appended): [example – English and Ruritanian – the Ruritanian text of the amendments or modifications is appended].
5. Whether or not the Commentary to the UN Model shall be taken into account, so far as appropriate, in interpreting the amendments or modifications made by this Protocol: [example: yes].

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Memorandum of Agreement.

Done at [ ], the day of , in [ ] in two copies.

ANNEX C

Note on Physical Presence

Input Note by Aart Roelofsen (Committee Member)

Starting up the discussion in Subcommittee on Digitalization and Globalization of the Economy and in UN Tax Committee

1. During the first session of the current membership of the UN Tax Committee, a Subcommittee on Taxation Issues Related to the Digitalized and Globalized was established.

2. The mandate is as follows:

The Subcommittee is mandated:

- *To identify priority taxation issues related to the digitalized and globalized economy where the Committee may most usefully assist developing countries in differing situations, in particular*

- *To initially report to the Committee on such issues no later than its Twenty-fourth Session, in 2022, with recommendations for consideration and a proposed general programme of work*

The Subcommittee may consult broadly, taking into account relevant work by other bodies.

3. During the first meeting(s) of that Subcommittee two workstreams were agreed. The first one relates to the possible development of a Multilateral Instrument.

4. Under the second workstream the Subcommittee would consider the function and relevance or otherwise of physical presence tests (such as under "permanent establishment" rules) in the context of an increasingly digitalized and globalized economy.

5. E/C.18/2022/CRP.6 reflects the first discussion on this item as follows:

Workstream B –

14. The Subcommittee considers that an open consideration of physical presence-based tests to trigger taxing rights in source countries and its continued relevance or otherwise in an increasingly digitalized and globalized economy would be a valuable contribution well adapted to the Committee's diverse character and broad network of observers.

15. While the Subcommittee does not consider that this work should hold up Workstream A above (with the work being done in parallel) it does feel that a first level consideration of the purpose of the permanent establishment rule's focus on physical presence, its operation in the digitalized and globalized world and the relevance or otherwise of options for moving away from it in certain circumstances, as has already happened in Articles 12A and 12B, might be important for the *work of the Committee (and perhaps others) in this area. This will also help longer-term consideration of the issues at stake and the best options to address them*

16. If at any stage, the subcommittee feels that it needs to propose changes to the Model Convention, it will liaise with the Subcommittee on the UN Model Tax Convention between Developed and Developing Countries, in view of the relevant expertise in that group. The strong cross-participation between the two Subcommittees should assist in this liaison and any necessary work together.

17. As well as the two workstreams, the Subcommittee Members look forward to the opportunity to provide comments that will assist UN DESA in its capacity building in this area, which we understand will be designed to help developing countries analyze available options in this area and their practical pros and cons and reach their own considered views on the best options for them and how to take forward those options in practice.

6. This note is meant as a starting point for the considerations with a view to the broader and longer-term importance of this discussion as referred to in paragraph 15 above. The note is structured around four questions summarized as “Why”, “What”, “Who” and “How”.

Why?

7. The first question we have to answer is why we are having this discussion. Why do we challenge the relevance of physical presence to trigger taxing rights? In itself, the fact that digitalized business models do no longer require a significant physical presence in the state where it’s consumer are located does not seem to justify that challenge. There could be a justification if physical presence was always meant as a proxy for something, such as economic engagement in a state to a level more than just a toe in the water, and if that something can now be established by virtual presence. The fact that states where these digital businesses are less, active, may be a concern to them, but if the physical presence test is still considered justified, the consequences are equally justified.

8. Another argument often heard is that disparities in treatment favouring digital over bricks and mortar presences is something that may need consideration, especially as it may impact more on local businesses and jobs. In that consideration the question whether it is only an apparent favorable treatment in only the host state or really an overall favorable treatment considering tax world wide should be taken into account.

9. We should therefore determine whether we are facing an issue of principles (taxing rights are based on the wrong criteria) or a practical problem (some states are losing the ability to exercise taxing rights and we want to counter that effect).

10. If we see a principled issue, and if we consider that physical presence is not relevant (anymore), we should, firstly, determine and justify better criteria and, secondly apply them to ***all*** situations. That means that we should also analyze the consequences of a possible new principle or approach to situations where taxpayers do have a significant physical presence in a state.

11. Equally if we consider physical presence relevant as a threshold we have to justify why that is relevant in an increasingly digitalized world.

12. If, on the other hand, we are merely trying to solve a practical (budgetary) problem, we might have to take a closer look at which countries are affected. Is it really only or mainly developing countries who are only losing the ability to tax? What is the effect on services provided between developing countries? Which business sectors raise concerns?

What?

13. Based on the answers to the “why”-question we should decide on which items of income we want to

redefine taxing rights. Are we only concerned with business income. And if so, are we only aiming at residual profits (and do we want to continue to apply the arm's length principle) or do we want to redraft rules for the full business profit. Apart from the evident consequences for PE issues, what would be the consequence for profits from international transport? And do we also want to discuss taxation of employment income, sportspersons and artists, pensions? Or do we adopt a staged approach?

14. At least with regard to business income we should be aware that the re-attribution of taxing rights will be a multinational issue in which more than one state will lose taxing rights for the benefit of the state that complies best to the new criteria.

15. Additionally, we should consider how taxes that many states currently exercise on certain payment leaving their country (most importantly on royalties and technical services, but possibly also dividends and interest) fit into the new approach.

16. We might also want to discuss problems that might arise from the transition from one system to the other.

17. Finally we should take a broader view and take into account possible consequences on investment decisions by business and how that would affect our conclusions, probably recognizing that businesses making profits should expect to pay taxes on them somewhere. Here also a balance between financial interest and administrability should receive attention.

Who?

18, The question who we want to tax under the new attribution rules will mainly follow from the answers to why we want to redefine that attribution and on which items. One key question will be to which business sectors we want to apply the new rules. Are we only aiming at so called digital businesses and can we properly define and ringfence them? If under "why" we take a principled position, what is the justification for exemption of commodities, extractives, financial services or other sectors? In this section we could also review the reasons for construction, aviation etc. under the PE rules

How?

19, Finally, once agreed on who we want to tax and on which items of income, we must make suggestions on how to tax those items. That would include both an advice on domestic provisions and on treaty provisions and ways to amend them.

ANNEX D

Note on Workstream B for the United Nations Subcommittee on Taxation Issues Related to the Digitalized and Globalized Economy

Input Note
Brian J Arnold
Revised Draft,
February 2023,

1. Introduction

1.1 In general, Workstream B, as approved by the United Nations Committee of Experts in Tax Matters (the Committee) at its 25th Session in Geneva in October 2022, examines the relevance and function of the concept of physical presence in the UN Model Convention as a basis for allocating taxing rights between contracting states. As I understand it, the mandate for Workstream B is very broad and could include Workstream C dealing with remote workers. Further, no agreement has been reached as to whether the concept of physical presence as a requirement for taxation by a country should be extended, minimized or maintained as it is currently.

1.2 A clear difference of views was expressed at the 25th Session on the feasibility of achieving any practical results from pursuing Workstream B. In the end, at the 25th session, the Committee decided that both Workstream A and Workstream B should be treated as priority projects.

1.3 To start the discussion on Workstream B, Aart Roelofsen, a member of the Committee, provided a paper that posed four fundamental questions to be dealt with:

- Why is the physical presence test being discussed as part of Workstream B: because a different principle or principles are more appropriate for allocating taxing rights, or because some countries are experiencing severe revenue shortages as a result of the digitalization of the economy?
- What items of income should be the focus of any attempt to reallocate taxing rights: only business profits or a broader range of income items?
- What should the potential changes in taxing rights be primarily focused on: large multinationals engaged in digital businesses or all businesses?
- How should any changes be implemented into the provisions of domestic law and tax treaties?

1.4 At the meeting of the Subcommittee on Taxation Issues Related to the Digitalized and Globalized Economy (the Subcommittee) on November 25, 2022, the Subcommittee agreed to my offer to prepare a brief paper to set the stage for further possible work on Workstream

B (also including Workstream C). That paper was discussed extensively at a meeting of the Subcommittee on January 4, 2023 and it was decided that I should revise the paper in light of the discussions for presentation to the Committee at the 26th Session in March 2023.

1.5 This revised paper is intended to assist the Subcommittee and the Committee in deciding how to carry forward the work on Workstream B. The paper is not intended to be a high-level theoretical study of the concept of physical presence for tax treaty purposes although, I hope, it may be useful in answering some of the fundamental questions raised by Aart Roelofsen's paper. Nor does the paper make any recommendations with respect to extending or reducing the use of physical presence as a condition for taxation by a country. Instead, the paper attempts to do four things:

- survey the existing provisions of the UN Model Convention that use physical presence as a condition for taxation in order to identify the nature of the physical presence required, the time period, and other relevant aspects of those provisions related to physical presence;
- identify the principles underlying the use of physical presence in the existing provisions of the UN Model Convention;
- identify options for revising the provisions of the UN Model Convention, either to increase or decrease reliance on physical presence as a condition for source country taxation or to alter the nature of physical presence required for source country taxation; and
- identify options for clarifying the Commentary with respect to the existing provisions of the UN Model Convention that use physical presence in order to provide guidance to tax officials and taxpayers.

1.6 This paper does not deal in detail with how source countries are entitled to tax various types of income depending on the nature and duration of a taxpayer's physical presence. However, the paper notes whether source country taxation of items of income under the provisions of the UN Model Convention is limited or unlimited and whether such taxation is based on net income or gross revenue. That said, it does not appear that the method of taxation of income, including the application of transfer pricing rules, by a source country under the provisions of the UN Model Convention is significantly affected by a taxpayer's physical presence (or lack of physical presence) in a country or the duration of that physical presence.

1.7 Workstream B, dealing with physical presence tests in the UN Model Convention and Workstream C, dealing with the taxation of remote workers under the provisions of the UN Model Convention, are closely related. However, the taxation of remote workers is not dealt with explicitly in this paper but in a separate paper, "The Taxation of Remote Workers Under the Provisions of the United Nations Model Convention," January 22, 2023.

2. What is physical presence for purposes of the UN Model Convention?

2.1 The concept of physical presence used for the purposes of Workstream B and this note is not defined in the UN Model Convention or elsewhere. For the purposes of this note, I have interpreted the term "physical presence" as meaning a taxpayer's presence in a country that is in some sense tangible; thus, virtual presence is not discussed, although it is raised as a possible basis for extending source country taxation where physical presence is lacking. In general, presence means that the relevant person, property or activity is physically located in a country.

2.2 With respect to individuals, physical presence may seem to be straightforward. An individual is either present in a country or not, since an individual can be present in only one place at a particular time. The same point applies to tangible (movable and immovable) property. However, some of the provisions of the UN Model Convention require that an individual must perform certain activities in a country and/or must perform certain activities in a particular legal capacity (i.e., as an employee or independent contractor, as an entertainer or athlete, etc.). Under these provisions, the presence of an individual in a country is implicitly required: the individual must be present in a country in order to perform the necessary activities in the country. However, individuals can also be physically present in another country through the presence of other individuals (employees and independent contractors) and legal entities acting on their behalf, and through property located in another country, as discussed below.

2.3 With respect to legal entities, physical presence is more complex. Since legal entities are legal fictions without any tangible existence, they can be considered to have a physical presence in a country only to the extent that they act through individuals – officers, directors, employees or independent contractors – or own or lease tangible assets in the country. Because a legal entity can act through multiple individuals at the same time or own or lease tangible property in multiple countries at the same time, unlike an individual, it can be considered to be physically present in multiple places at the same time.

2.4 Physical presence through the location of property in a country raises several issues. The nature of intangible property precludes it from being considered to be physically present anywhere. Given the importance of intangible property for modern business models, this may reflect a serious deficiency in the use of physical presence tests for purposes of tax treaties. With respect to tangible property, although the legal rights in particular property may be held by persons in different countries (owner in one country, lessee in another country and sublessee in a third country, etc.), the property must be physically situated in only one place. Income from tangible property may result from the ownership of the property, the use of the property or the sale of the property. Income-earning activities, such as the sale of property or the provision of services, may take place in a country without the taxpayer having any physical presence in that country, other than the delivery of the goods or the use or consumption of the services.

2.5 The concept of physical presence inevitably raises additional issues for purposes of the provisions of the UN Model Convention: the nature of a person's physical presence in a country, the duration of their physical presence, and the consequences of a person's physical presence with respect to the taxing rights of the source country in which the relevant physical presence is located.

2.6 The question also arises whether individuals or legal entities resident in one country can be considered to have a physical presence in another country in the form of a related person in the other country. Under the existing provisions of the UN and OECD Model Conventions, the concept of a "closely related person" is relevant with respect to the exception for independent agents acting in the ordinary course of business under article 5(7) and the anti-fragmentation rule in Article 5(4.1). An agent acting exclusively or almost exclusively for a closely related person cannot qualify for the independent agent exception. The exception for preparatory or auxiliary activities is not available where the taxpayer and a closely related enterprise carry on business at the same permanent establishment (PE) or a different place in the source country that constitutes a PE and the combined activities at those places go beyond preparatory or auxiliary activities. In addition, the concept of "connected person" and the term "associated persons" are used in the limitation-on-benefits provision in Article 29(1)-(8) and Article 9 respectively of both Model Conventions. Also, the concept of a "special relationship" between the payer and the recipient of payments is relevant under Articles 10, 11, 12, 12A, and 12B in determining the amount of the relevant payment subject to source country tax.

2.7 These uses of the concept of related persons are quite narrow; however, they raise the possibility of the broader use of such concepts for purposes of the allocation of taxing rights to source countries. See, for example, the alternative provision in the Commentary on Article 12A, which would allow a source country to tax fees for technical services performed in the country and such fees paid to closely related persons for services performed outside the country. However, extending the use of the concept of related persons may conflict with Article 5(8), which provides that a subsidiary company controlled by a parent company is not considered to be a PE of the parent company or vice versa simply because of that control.

2.8 This note focusses on the use of physical presence as a basis for a country to exercise its taxing rights with respect to various types of income under the provisions of the UN Model Convention. It does not deal with the provisions of the OECD Model Convention. It is worth noting that physical presence is also used to determine whether a person is a resident of a contracting state for purposes of the UN Model Convention. Not surprisingly, although the types of physical presence used for these two purposes may differ, they sometimes overlap.

2.9 It is also worth noting that physical presence is sometimes relevant under the provisions of the UN Model Convention for purposes of determining the source of items of income. In this regard, the physical presence of a taxpayer is never sufficient by itself to determine that the source of income derived by that taxpayer arises or is sourced where the taxpayer is present. Instead, income is generally considered to arise or be sourced where the income-earning activities (for example, a business or employment) take place or the income-earning property is located.

3. Survey of the Provisions of the UN Model Convention That Use Physical Presence

3.1 The following survey of the use of physical presence tests for purposes of the distributive provisions of the UN Model Convention is intended to be comprehensive. It is not limited to certain articles or types of income, such as business profits, which may be considered to be more important than other income items. In evaluating physical presence tests as a basis for allocating income or taxing rights between residence and source countries, it is important to understand how physical presence tests are used in all of the provisions of the UN Model Convention. The following chart identifies for each distributive article of the UN Model Convention the type of physical presence, if any, that is relevant, the duration of the required physical presence, and the consequences for source country taxing rights where the physical presence test is satisfied. Exclusions from the physical presence tests used in the provisions of the UN Model Convention are not shown separately, although such exclusions are implicitly included in the column describing the nature of the physical presence. The chart does not include any of the alternative provisions in the Commentary on the UN Model Convention, although some of the most relevant alternative provisions could be added, if necessary.

3.2 Although the following survey is intended to be comprehensive in the sense of covering all the physical presence tests in the distributive provisions of the UN Model Convention, it does not attempt to provide a detailed analysis of those physical presence tests.

Article	Nature of Physical Presence	Ownership, use of property, or activity?	Duration of Physical Presence	Consequences
Art. 6	Immovable property situated in country	Ownership or use to earn income	None, but unlikely to be temporary in most situations	Source country has unlimited right to tax
Art. 5 and 7	PE: 1. Fixed place of business other than place used for preparatory or auxiliary activities 2. Dependent agent acting in country other than performing preparatory or auxiliary activities	Owned, leased, or at the taxpayer's disposal	6 months minimum	Right to tax profits attributable to the PE, generally on a net basis
Art. 5 and 7	Building site, construction project or supervisory activities in country	Activities	6 months	Right to tax profits attributable to the PE, generally on a net basis
Art. 5(3)(b)	Furnishing services in country through employees or other personnel	Activities	More than 183 days in 12-month period	Right to tax profits attributable to deemed PE

Article	Nature of Physical Presence	Ownership, use of property, or activity?	Duration of Physical Presence	Consequences
Art. 5(6)	Collection of premiums or insurance of risks in a country (no physical presence required)	Activity is not required to take place in the source country	None	Right to tax profits attributable to deemed PE
Art. 8	Operation of ship or aircraft solely in country by nonresident (i.e., not international traffic)	Activities	None	Unlimited right of source country to tax profits
Art. 8B	More than casual shipping activities in a country	Activities	None	Allocation of overall net profits from shipping
Art. 10	No physical presence required (payer company resident in the country)	n/a	None	Limited right of source country to tax gross payment at agreed rate
Arts.11, 12, 12A, and 12B	No physical presence required (payer resident in source country or nonresident with PE or fixed base in source country)	n/a	None	Limited right of source country to tax gross payment at agreed rate
Art. 13(1)	Immovable property located in country	Ownership	None	Unlimited right of source country to tax

Article	Nature of Physical Presence	Ownership, use of property, or activity?	Duration of Physical Presence	Consequences
Art. 13(2)	Movable property of PE or fixed base in country	Ownership	None, but time limits for PE and fixed base	Unlimited right of source country to tax
Art. 13(3)	Ships or aircraft or related movable property used in international traffic	Ownership	None	No source country tax allowed
Art. 13(4)	Interests in land-rich entities with immovable property in country	Ownership	None	Unlimited right of source country to tax
Art. 13(5)	Substantial interests in company, partnership or trust resident in country	Ownership	None	Unlimited right of source country to tax
Art. 14	Fixed base or stay in source country for 183 days or more	Ownership, lease or use as long as regularly available to the taxpayer, or physical presence	Time probably similar to PE (6 months); otherwise, 183 days minimum presence	Income attributable to fixed base or to activities performed in country in case of Art. 14(1)(b)
Art. 15(1)	Employment exercised in country	Activities of employment in country	None	Unlimited right of source country to tax

Article	Nature of Physical Presence	Ownership, use of property, or activity?	Duration of Physical Presence	Consequences
Art. 15(2)	Employed in country by nonresident employer with no PE in country that bears salary and employee is present in country for more than 183 days	Activities of employment and physical presence of employee	Presence for more than 183 days	Unlimited right of source country to tax
Art. 16	No physical presence required (director or top-level official of resident company)	n/a	None	Unlimited right of source country to tax
Art. 17	Personal activities as entertainer or sportsperson exercised in a country	Activities as entertainer or sportsperson in the country	None	Unlimited right of source country to tax
Art. 18A and B	Public pensions and social security payments by a country	Payments by a country	Past employment (no minimum duration)	Unlimited right of source country to tax
Art. 18B	Pension paid by resident or PE of nonresident in a country	Past employment in the country	Past employment (no minimum duration)	Unlimited right of source country to tax
Art. 19	No physical presence required (salary and pensions paid to individual by government of a country)	Employment by government	None	Unlimited right of source country to tax
Art. 19(1)(b)	Salary and pensions paid to individual by government where individual is resident and national of that country and services are rendered in that country	Services rendered in the country	None	Unlimited right of source country to tax

Article	Nature of Physical Presence	Ownership, use of property, or activity?	Duration of Physical Presence	Consequences
Art. 20	Presence in a country for purpose of education or training	Activities in the country	None	Payments for maintenance, education or training not taxable if made from outside country
Art. 21	Other income arising in a country	Source of income in the country	Depends on nature of income	Unlimited right of source country to tax

4. Analysis of the Physical Presence Tests in the Provisions of the UN Model Convention

4.1 Several points emerge from the survey of the use of physical presence tests in the provisions of the UN Model Convention.

4.1.1 The simple physical presence of an individual in a country is seldom relevant (Article 15(2) is the exception) and never sufficient by itself with respect to source country taxing rights. Under Article 15(2), an individual must be present for more than 183 days but must also be employed in the country by a nonresident employer. Similarly, under Article 14(1)(b) an individual who “stays” in a country for the required period is taxable by that country but only on the income from the individual’s activities in that country.

4.1.2 The physical presence of property in a country is not sufficient by itself for source country taxation, except with respect to the taxation of income from immovable property located in a country and gains from the alienation, directly or indirectly, of such immovable property (i.e., Articles 13(4) and (5)).

4.1.3 Similarly, Articles 10 – 12 are implicitly based on a taxpayer’s ownership of property (a legal right to receive payments of dividends, interest, or royalties from residents of the other contracting state or nonresidents with a PE or fixed base in that state). However, under these provisions, the taxpayer’s property– shares, debt, intellectual property, and contractual rights – is intangible property, with the exception of scientific, industrial or commercial equipment used to earn royalties under Article 12. Therefore, with the exception of such equipment, there is no explicit or implicit requirement for any physical presence of a taxpayer in a country for that country to impose tax under Articles 10 – 12.

4.1.4 Article 5(6) dealing with insurance does not fit comfortably into any pattern with respect to physical presence. It applies if an insurance enterprise resident in one state insures risks in the other state, without any requirement for the enterprise to have any physical presence in the other state. It also applies if the enterprise collects premiums in the territory of the other state, which may implicitly suggest some physical presence in the other state for that purpose; however, physical presence is not required. Therefore, even if insurance premiums with respect to risks in a country are collected remotely without any physical presence of the insurer in that country, the insurer is deemed to have a PE in that country.

4.1.5 Similarly, Article 16 dealing with directors and top-level managerial officials of companies resident in a source country does not require a director or top-level managerial official to have any physical presence in the source country.

4.1.6 Fees for technical services under Article 12A and income from automated digital services under Article 12B are taxable by a source country without any requirement for the service provider to have any physical presence in the source country. It is sufficient for such services to be used or consumed by residents of the source country or by nonresidents with a PE or fixed base in the source country.

4.2 With the exception of the provisions mentioned in paragraphs 1 to 6 above, under the provisions of the UN Model Convention source country taxation requires physical presence in the form of some type of activity by a nonresident in the source country. For purposes of analysis, the activities can be broken down into three categories: business, employment and other.

Business Activities

4.2.1 With respect to business activities, there are several specific rules dealing with particular types of business activities (for example, services) and a general residual rule for business activities that are not covered by the specific provisions. The specific provisions are:

- carrying on business in a country through a dependent agent that habitually concludes contracts binding on its principal or plays the principal role leading to the conclusion of such contracts;
- construction, assembly, installation and supervisory activities in a country, which must continue for a 6-month period;
- entertainment or sports activities, income from which is subject to tax under Article 17 by the country where the activities take place, without any other conditions and no minimum time requirement and irrespective of whether the taxpayer is an employee or an independent contractor;
- the operation of ships and aircraft, other than in international traffic, or under Article 8B the "more than casual" operation of ships in a country that is within the definition of international traffic;
- furnishing services within a country for more than 183 days; and
- providing professional or other independent services through a fixed base or where the service provider stays in the country for 183 days or more.

4.2.2 The general or residual rule that applies where none of the specific rules applies is found in Articles 5 and 7, and also in Article 14(1)(a), assuming that the concept of a fixed base is equivalent to the concept of a PE. Under the general rule, profits of a business carried on by a resident of one state derived from the other state are taxable by the other state only if the business is carried on through a fixed place of business in the other state and only to the extent that the profits are attributable to that fixed place of business. Similarly, Article 14(1)(a) requires a nonresident service provider to have a fixed base in the source country that is regularly available to the service provider for the purpose of providing the professional or other independent services. Note, however, there is no explicit requirement in Article 14(1)(a) for the services to be provided through the fixed base, as there is in Article 5(1).

4.2.3 The exceptions to the requirement for some type of business activities to take place in a country as a condition for source country taxation are found in Articles 10, 11, 12, 12A and 12B. These provisions deserve special scrutiny in order to determine whether the absence of physical presence can be justified and to determine the underlying principle or principles that justify source country taxation without any physical presence of the nonresident taxpayer in the source country.

4.2.4 For convenience, the articles that do not require any physical presence can be divided into two categories for the purpose of the following analysis:

- Articles 10 (Dividends), 11 (Interest) and 12 (Royalties), since these provisions are often considered to deal with non-business or investment income; and
- Articles 12A (Fees for Technical Services) and 12B (Income from Automated Digital Services), which are controversial new additions to the UN Model Convention and

clearly deal with items of business income that, in the absence of Articles 12A and 12B, would be taxable by a source country in accordance with Article 7 or 14.

4.2.5 Dividends, interest and royalties may constitute payments generated by a business carried on by a resident of one country in another country. In some circumstances these payments may simply represent income from investments without any indicia of a business carried on by the recipient. Where the payments can be considered to be generated from a business carried on by the taxpayer but the taxpayer does not have any physical presence in the source country (in the form of tangible property, employees, independent contractors, or business activities), the gross amounts of the payments of dividends, interest and royalties are nevertheless subject to source country tax at the rate agreed in the treaty between the two countries. However, where the taxpayer carries on business through a PE or fixed base in the source country, Article 10, 11, or 12 ceases to apply and Article 7 or 14 applies, with the result that the relevant amount is subject to source country on a net basis but at a rate that is not limited by the treaty.

4.2.6 Fees for technical services and payments for automated digital services are subject to source country tax if the payer is a resident of the source country or a nonresident with a PE or fixed base in the source country; no physical presence of the service provider in the source country is required.

Employment Activities

4.2.7 With respect to employment, the general rule in Article 15(1) is that income from employment is taxable by the country in which the employment is exercised (i.e., the country in which the employee is present and performing the duties of employment). Under Article 17, the same rule applies to employees who perform entertainment or sports activities in a country. This physical presence test applies to employees of both resident and nonresident employers, although employees of nonresident employers may qualify for the exemption in Article 15(2). However, with respect to government employees, the general rule in Article 19 is that the payer government is entitled to tax the salary, etc. irrespective of where the employment is exercised, subject to an exception where the employee is a resident and national of the other state and the employment services are rendered in that state.

4.2.8 In the case of pensions, Article 18A provides for exclusive taxation by the residence country irrespective of where the past employment was exercised. However, Article 18B provides for taxation of pension payments by the country in which the payer is resident or has a PE. This country will often be the country in which the past employment was exercised, but there is no explicit or implicit physical presence requirement. Public pensions and social security payments made by a state are taxable exclusively by that state. Although there is no explicit physical presence requirement in this regard, it seems implicit that the individual receiving the public payments will have been resident or employed in the payer state and will have contributed to its public pension or social security scheme. Under Article 16, fees derived by nonresident directors and salaries of top-level managerial officials of companies resident in a source country are taxable by that country without any requirement for the directors or officials to be physically present in the country at all.

Other Activities

4.2.9 Under Article 20, individuals who are present in a country solely for the purpose of education or training are not taxable by that country on payments received from outside that country for the individual's maintenance, education or training. In this case, the physical presence of an individual for the limited activities of education or training precludes the country from taxing payments from outside the country received by the individual with respect to those activities.

4.2.10 Article 21 provides that a country is entitled to tax any income that arises in the country if the income is not covered by any of the other provisions of the UN Model Convention. The critical issue for purposes of Article 21 is whether an item of income arises or has its source in a country, which will likely be determined in accordance with that country's domestic law. It is unclear to what extent countries use physical presence to determine the source of income under their domestic law, but it seems likely that Article 21 will most often apply to payments made by residents of a country or nonresidents with a PE or fixed base in a country.

5. Summary: Is Physical Presence an Underlying Principle for the Source Country Taxation of Income Under the Provisions of the UN Model Convention?

5.1 The foregoing analysis of the existing distributive provisions of the UN Model Convention supports the conclusion that physical presence (in the broad sense described in section 2 above) is generally, but not always, a requirement for source country taxation with respect to business income, although the nature and duration of the physical presence required varies widely. The taxation of fees for technical services and payments for automated digital services are important exceptions. Physical presence is also an underlying principle with respect to the taxation of income from employment under Articles 15 and 17, although the taxation of directors' fees and salaries of top-level managerial officials, pensions and salaries of government employees under Articles 16, 18 and 19 are important exceptions.

5.2 The underlying principles that justify source taxation of fees for technical services under Article 12A and income from automated digital services under Article 12B are similar to the principles underlying source taxation of interest and royalties. These principles or arguments are set out in some detail in the Commentary on Article 12A and 12B of the UN Model Convention; however, it must be acknowledged that these principles or arguments were unacceptable to a significant minority, as shown in the Commentary on Article 12A and 12B. The arguments for and against Articles 12A and 12B can be summarized briefly as follows:

<u>Arguments For and Against Source Taxation Under Article 12A</u>

5.3 First, Articles 7, 12 and 14 of the UN Model Convention allow the taxation of fees for technical services in certain circumstances. However, countries interpret and apply these provisions differently, causing uncertainty for both taxpayers and tax authorities. Article 12A can be justified on the basis that it clarifies the circumstances in which fees for technical services are taxable, and are not taxable, by a country. It also seems clear that Article 12A was motivated by a desire to expand source country taxing rights with respect to fees for technical services, although this point is not made explicitly in the Commentary.

5.4 Second, the deduction by residents of a country of fees for technical services paid to residents of another country or by a nonresident with a PE or fixed base in a country to residents of another country are typically deductible in computing the income of the payer of the fees; in other words, such fees erode the tax base of the source country. As noted below, base erosion is arguably an underlying principle that justifies source country taxation with respect to other provisions of the UN Model Convention and is expressly mentioned in the Commentary of Article 12A as justification for Article 12A.

5.5 Third, the taxation of fees for technical services paid to nonresident service providers by a country serves to reduce or eliminate the competitive advantage that nonresident service providers have over domestic service providers where nonresident service providers are not taxable on the fees for technical services that they derive from the source country.

5.6 Thus, a majority of the members of the UN Committee rejected any requirement for a nonresident service provider to have any physical presence in the source country with respect to fees for technical services.

5.7 A minority of the members of the UN Committee rejected all of the justifications for source country taxation of fees for technical services where the services are not performed in the source country. They took the position that fees for technical services should be taxable by a country only where the services are performed in the country, the nonresident service provider has a PE or fixed base in the source country, and the fees are effectively connected to the PE or fixed base.

Arguments For and Against Source Taxation Under Article 12B

5.8 The arguments for and against source country taxation under Article 12B are essentially the same as the arguments with respect to Article 12A, with one important exception. In paragraph 7 of the Commentary on Article 12B, it is stated explicitly that:

modern methods for the delivery of services allow non-residents to render substantial services for customers in the other country with little or no presence in that country. This ability to derive income from a country with little or no physical presence in that country is considered by the Committee to justify source taxation of income from automated digital services.

5.9 Thus, unlike the taxation of fees for technical services under Article 12A, which is explicitly justified by a variety of considerations, including base erosion, Article 12B is explicitly justified solely on the basis that nonresident service providers can earn substantial amounts of income in a country without any physical presence in the country.

6. General Principles for Source Country Taxation of Income Under the UN Model Convention

6.1 This section identifies the principles that are relevant in determining whether a source country is entitled to tax items of income earned by a resident of the other country under the provisions of the UN Model Convention. These principles often conflict and, as a result, some principles are given more importance in some articles and less importance in other articles. No attempt is made here to suggest how these principles should be balanced with respect to any particular article of the UN Model Convention. These principles are not provided in any particular order.

6.2 This section of the paper does not identify or discuss the general principles that apply with respect to the manner in which a source country must impose tax in accordance with the provisions of the UN Model Convention.

6.3 The Country in Which Income Arises Has the Right to Tax that Income

6.3.1 Countries have the right to impose tax on any income that arises or has its source in their country. This fundamental principle seems to be widely recognized despite the lack of international agreement on the appropriate source rules for particular types of income. Moreover, this principle appears to be the implicit foundation for each and every limitation on source country taxation in the OECD and UN Model Conventions. In the absence of tax treaties, countries are generally considered to have the authority to tax any income derived by residents and nonresidents with few legal limitations; the crucial issue appears to be whether a source country's tax can be enforced effectively, as discussed below.

6.3.2 Article 12B of the UN Model Convention can be justified on the sole basis that a source country is entitled to tax income from automated digital services derived by a nonresident from the source country – no physical presence of the nonresident in the country is required and no threshold must be met in order for the country to impose tax on the income.

6.3.3 The source country's right to tax (except where the provisions of a tax treaty limit or prohibit such taxation) is explicitly recognized in the UN Model Convention (but not the OECD Model Convention) in Article 21(3), which authorizes a source country to tax other income if the income arises in the source country. In comparison, the parallel principle that residence countries have the right to tax their residents (except where the provisions of a tax treaty limit or prohibit such taxation) is explicitly recognized in Article 1(3).

6.4 Physical Presence

6.4.1 As this note indicates, some type of physical presence is a principle that is used as a condition for source country taxation under several provisions of the UN Model Convention. However, the nature of the physical presence required and the duration of the presence vary widely. It is important to note that the physical presence of a nonresident taxpayer in a source country by itself is never sufficient to justify source country taxation of any income derived by that taxpayer. The taxpayer must also engage in activities in the source country or own or use property in the source country.

6.5 Thresholds for Source Country Taxation

6.5.1 Under several provisions of the UN Model Convention, source country taxation is allowed only if a threshold is met. As discussed below, in some provisions, physical presence operates as a threshold for source country taxation. However, in other provisions no threshold for source country taxation (based on physical presence or any other criterion) is required. For example, no threshold for source country taxation is required with respect to dividends, interest, royalties, fees for technical services, income from automated digital services, salaries of government employees, and directors' fees and salaries of top-level managerial officials of companies resident in a source country.

6.5.2 Even with respect to the provisions of the UN Model Convention that use thresholds based on physical presence, it is difficult to discern any consistent pattern. For example, in some provisions, the threshold is based on the location of property in the source country. This is the case for Article 6 (immovable property), Article 5 (fixed place of business), Article 12 (scientific, industrial, or commercial equipment used in a country), and Article 14(1)(a) (fixed base).

6.5.3 In other provisions, the threshold is the physical presence of persons (individuals or legal entities) performing certain activities in the source country. This is the case for Article 5(5) (dependent agents concluding contracts on behalf of a nonresident or playing the principal role leading to the conclusion of such contracts), Article 5(3)(b) (nonresident furnishing services in a source country through employees or other personnel), Article 8 (operation of ships or aircraft solely inside a source country), Article 8B (more than casual shipping inside a source country), Article 17 (entertainment or sports activities by a nonresident in a source country), and Article 19(1)(b) (government employees who are resident in and nationals of a source country in which the employment services for the other government are performed).

6.5.4 The thresholds in Article 14(1)(b) and Article 15(2) are unusual in that they are based exclusively on a service provider's or employee's presence in a source country for more than 183 days. Unlike Article 5(3)(b), which is based on a nonresident providing services in a source country for more than 183 days, the threshold in Article 14(1)(b) is based simply on presence in the source country for more than 183 days. However, where a nonresident meets this presence threshold, the source country is limited to taxing only the income attributable to the nonresident's professional and other independent services performed in the source country. Thus, a nonresident that stays in a country for 183 days or more but works in the country for only two weeks would be subject to source country tax only on the income earned in those two weeks.

6.5.5 Similarly, under Article 15(2), a nonresident employee of a nonresident employer without a PE in the source country is subject to source country tax where the employee is present in the source country for more than 183 days; however, the employee is subject to source country tax only on the employee's income from employment exercised in the source country.

6.6 Base Erosion

6.6.1 In some articles, source countries appear to be allowed to tax income where payments are deductible against the source country's tax base. For example, according to the Commentary on Article 12A, base erosion was an important factor in justifying source country taxation of fees for technical services. The base-erosion principle may also be a factor underlying Article 12B, although base erosion is not a concern with respect to automated digital services provided to consumers. In addition, the base-erosion principle is an important factor underlying other provisions of the UN Model Convention. (See, for example, Article 15 with respect to a nonresident employee of a resident employer and Article 16 with respect to directors' fees.)

6.7 Enforcement

6.7.1 There is not much sense in allocating taxing rights to countries unless those countries can impose and collect the tax in a reasonably efficient manner. This does not mean that some developing countries that have limited capacity to administer and enforce income taxes should not be granted taxing rights in those situations. Instead, the better response is to take steps to improve the administrative capacity of those developing countries so that they have the ability to collect the taxes efficiently. Therefore, enforcement concerns should justify denying taxing rights to source countries only where it would be very difficult or impossible for source countries to impose and collect taxes on nonresidents (even in situations where they have the necessary administrative capacity to impose taxes on nonresidents effectively).

7. Options for Reform

7.1 The analysis in this note illustrates that there are no consistent principles, including physical presence, underlying all the provisions of the UN Model Convention that provide taxing rights to source countries. Instead, it appears that ad hoc decisions reflecting different principles (or a different balancing of principles) have been made with respect to the various types of income dealt with in the distributive provisions of the UN Model Convention.

7.2 It is important to emphasize that, in my opinion, there is no good reason to reject the use of all the physical presence tests in the existing provisions of the UN Model Convention. Those tests generally provide certainty for both taxpayers and tax authorities. For example, although the fixed place of business test in the definition of a PE in Article 5(1) and the fixed base test in Article 14(1)(a) may not deal adequately with digital business models, they do deal with many types of more traditional businesses. The Commentary on Article 5 has evolved over several decades to clarify many issues of interpretation about the fixed place of business requirement. The basic policy issue is whether the existing fixed place of business and fixed base tests should be deleted from Article 5(1) and Article 14(1)(a) and replaced by some type of broader substantial economic presence test or whether the existing fixed place of business and fixed base tests should be retained but supplemented with new rules to deal with digital business models.

7.3 Similar basic policy issues arise with many of the provisions of the UN Model Convention that use physical presence as a condition for source country taxation. For example, Article 5(3)(b), Article 14(1)(b), and Article 15(2) use physical presence of 183 days as a condition for source country tax, although in the case of Article 5(3)(b) the relevant days are days on which the taxpayer furnishes services in the source country. These physical presence tests are appropriate both intuitively and on the basis of the general principles for source country taxation. Where nonresident taxpayers are physically present in a country for the purpose of earning for a significant period of time, the source country should have the right to tax that income unless there are convincing reasons for it not to tax that income. In these circumstances, source country taxation is justified by reference to the general principles discussed above: the income arises or has its source in the source country, the threshold for source country tax is met, and the substantial physical presence of the nonresident in the source country provides an adequate opportunity for the source country to enforce its tax on the income. Further, to the extent that residents of the source country are deducting payments made to these types of nonresident service providers, the source country's tax base will be eroded. Of course, this base-erosion rationale does not apply with respect to the salary or wages of nonresident employees employed in a source country by a nonresident employer without a PE or fixed base in the source country.

7.4 The fundamental tax policy issues that must be considered concerning whether and how to reform the physical presence tests in the UN Model Convention are:

1) Should source countries be granted additional taxing rights based on criteria other than physical presence (i.e., whether the existing physical presence tests should be replaced or supplemented by alternative tests)?
2) Should the existing physical presence tests be modified to make them more consistent?
3) Should the existing physical presence tests be clarified to improve their certainty and provide additional guidance for taxpayers?

7.5 The reform options outlined below are divided into longer-term and shorter-term options. Longer-term options include changes that have far-reaching and perhaps unclear consequences, that are likely to be controversial, that are less clearly justified by reference to the underlying principles for source country taxation, and that cannot be developed in a relatively limited time. The list of reform options listed below is by no means a complete list of all the possibilities for reform. Depending on the general direction of reform that the Subcommittee and the Committee decide to take (i.e., to expand or reduce the use of physical presence tests) almost all of the distributive provisions of the UN Model Convention could be affected. The reform options listed below do not include the unwinding of any recent changes to the UN Model Convention, such as Articles 12A and 12B.

7.6 Longer-term options for reform might include:

- Review of the various thresholds for source country taxation in light of the general principles underlying source country taxation described in this note, including the use of income or other thresholds and the length and nature of physical presence in a country required for source country taxation. Any further work could be limited by considering, for example, only the provisions dealing with business profits or only income from services provided by individuals (employees and independent contractors, i.e., primarily Articles 14 and 15).
- Consider revising the definitions of PE and fixed base to include situations in which virtual presence in a country might justify source country taxation of a nonresident's income earned in the country. This option was originally proposed in the OECD/G20 BEPS Action 1 Report and has been adopted by some countries in their domestic law.
- Expand the use of net-basis elections (such as that in Article 12B) to allow nonresidents subject to source country tax under certain treaty provisions, such as Articles 6, 12, and 12A, to elect to pay tax on their net income from the source country.
- Consider expanding source country taxing rights by extending the use of the concept of "closely related person" or similar concepts in the UN Model Convention (i.e., treating

the presence of closely related persons in a country as a substitute for the physical presence of a nonresident in the country).

- Clarify the application of tax treaties to the digital services taxes levied by several countries (although this could be a separate project).

7.7.1 Shorter-term options for reform might include:

- Review the physical presence tests for employees and independent contractors in the UN Model Convention and consider modifications to make those provisions more consistent. For example, the test in Article 5(3)(b) requires more than 183 working days in a source country, whereas Article 14(1)(b) requires only presence in a source country of 183 days or more.
- Review the provisions of the UN Model Convention and Commentary dealing with remote workers and consider whether any changes are necessary or appropriate to deal with issues presented by remote workers. (See the separate paper dated February 2023 for Workstream C on the taxation of remote workers under the provisions of the UN Model Convention – Annex E.)
- Clarify the Commentary, where necessary, on all of the provisions of the UN Model Convention that use tests based on physical presence.

ANNEX E

THE TAXATION OF REMOTE WORKERS UNDER THE PROVISIONS OF THE UNITED NATIONS MODEL CONVENTION

Revised Draft,
February 2023
Brian J. Arnold

EXECUTIVE SUMMARY

This paper has been prepared in connection with consideration by the UN Tax Committee's Subcommittee on the Digitalized and Globalized Economy of proposed Workstream C dealing with the treatment of remote workers under the United Nations Model Convention. Cross-border remote working – an individual working in one country for an employer or client in another country – has increased recently in response to the Covid-19 pandemic, has proven popular with many in-demand workers, and may become a more widespread pattern of work in the future.

The paper takes a broad approach to the subject and deals with the treatment of both remote-working employees and independent contractors under the provisions of the United Nations Model Convention and the implications for employers and clients of remote workers. For purposes of the paper, a remote worker is defined as an employee or individual contractor working in a country other than the country in which the remote worker's employer or client is resident or has a permanent establishment or fixed base.

The paper identifies the major factors relevant for the taxation of remote workers and their employers or clients under the provisions of the United Nations Model Convention: the residence of the remote worker, the nature of the legal relationship between a remote worker and the person for whom the remote worker works (employer or client), the period of presence of a remote worker in the country in which the remote worker works, and the nature of the activities carried on by the remote worker. With respect to employers or clients of remote workers, the major factors are the countries in which they are resident and in which they have a permanent establishment or fixed base.

The paper describes the broad spectrum of fact situations involving remote workers and the tax consequences of those situations under the provisions of the United Nations Model Convention. Based on this survey, the paper identifies four principles or factors underlying the provisions of the United Nations Model Convention that are applicable to the taxation of remote workers: the country in which income from remote working is considered to arise or have its source, the threshold for the taxation of such income by the country in which it arises, the reduction or erosion of a country's tax base through the deduction of the remuneration paid to a remote worker, and the capacity of a country to administer and enforce a tax on the income of remote workers.

The paper then identifies several potential problems with respect to the taxation of remote workers and their employers or clients under the provisions of the United Nations Model Convention that might be the

subject of further analysis. These problems include broad policy issues such as the different treatment of employees and independent contractors, the appropriate allocation of taxing rights between the country where work is performed and the country where the payer for the work is resident or has a permanent establishment or fixed base that bears the payment, the risk that remote workers may create a permanent establishment or fixed base for their employers or clients in the country in which the remote workers work, and the taxation of digital nomads who may not be permanent residents of any country and never stay and work in any country for more than a few months.

The paper concludes by presenting – without any recommendations - a list of possible changes to the provisions of the United Nations Model Convention and Commentary to deal with the problems caused by remote workers. At a fundamental level, the UN Committee might consider whether it wants to encourage or facilitate remote working, which would likely require the countries in which remote workers work to give up some of their taxing rights. If the UN Committee decides that remote working is something that should be facilitated, it needs to decide whether this objective is best achieved through changes to the UN Model Convention or by changes to countries' domestic tax law or customized provisions in bilateral treaties between countries for which remote working is a serious concern. Otherwise, more modest changes to the Commentary are an option, to clarify the interpretation and application of the relevant provisions of the United Nations Model Convention in order to provide better guidance for remote workers and their employers or clients and for tax administrations.

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1. INTRODUCTION

1.1 This paper deals with the tax issues caused by so-called remote or nomad workers under the provisions of the United Nations Model Convention and is intended to provide assistance for the Subcommittee on Taxation Issues Related to the Digitalized and Globalized Economy and the United Nations Committee of Experts in making decisions about how to carry forward the work on this topic (referred to as Workstream C). One of the fundamental decisions that must be made as a preliminary matter is whether Workstream C on remote workers should be a stand-alone project or carried out as part of Workstream B dealing with the use of physical presence tests in the United Nations Model Convention.

1.2 This paper attempts to provide a practical basis for the Subcommittee to make decisions about Workstream C by:

1) identifying individuals who are remote workers;
2) identifying the factors that are relevant for the treatment of remote workers under the provisions of the United Nations Model Convention;
3) providing an analysis of the spectrum of factual situations that may arise involving remote workers and a brief description of the relevant provisions of the United Nations Model Convention with respect to both the taxation of remote workers and their clients or employers;
4) identifying the principles underlying the existing provisions of the United Nations Model Convention applicable to remote workers and their clients or employers;
5) highlighting the most important issues or problems with respect to the application of the provisions of the United Nations Model Convention to remote workers and their clients or employers; and
6) providing some selective options for dealing with the treaty issues raised by remote workers.

1.3 The paper does not deal with non-tax issues (such as immigration) involving remote workers or domestic income tax or VAT issues. It focuses exclusively on the tax consequences for remote workers and their clients or employers under the provisions of the United Nations Model Convention. Some issues, such as the tax residence of remote workers and their clients or employers, are not dealt with extensively but merely noted as a relevant factor in determining whether and how remote workers and their clients or employers are taxable by countries in accordance with the United Nations Model Convention. Similarly, the note does not deal in detail with the issues that may arise with respect to the calculation of the income derived by remote workers that is taxable by the country in which they work or the profits attributable to a PE or fixed base of an employer or client as a result of the activities of remote workers.

1.4 Note also that this paper does not deal with any alternative provisions of the United Nations Model Convention included in the Commentary that countries might choose to include in their bilateral tax treaties.

2. WHO ARE REMOTE WORKERS?

2.1 The secondary sources dealing with remote workers are limited to employees who are referred to variously as “digital nomads,” “teleworkers” or “telecommuting workers,” “remote workers, “hybrid workers,” and “distance workers.” (See, for example, the report of the UK Office of Tax Simplification on hybrid and distance working, which is summarized briefly in Appendix I to this note.) For purposes of this note, I have decided to use the neutral term “remote worker”[1] and to include in this term both employees and independent contractors. The inclusion of independent contractors is justified because, in principle, the treatment of employees and independent contractors should be similar, and because the legal distinction between employees and independent contractors is unclear, varies widely under countries’ domestic law, and can be manipulated for tax planning purposes. Any treaty benefits that are provided only to one type of remote worker will inevitably result in tax planning efforts by some workers to convert their work status into the favoured status.

2.2 The essential factor in identifying or defining remote workers for purposes of tax treaties is that the worker must be working in a country other than the country in which the worker’s employer or client(s) is resident or has a PE. This cross-border aspect of remote working is a necessary condition for any tax treaty issues to arise. Tax issues also arise with respect to purely domestic remote working, but those issues are not dealt with in this note.

2.3 This note deals with both the taxation of remote workers themselves and the tax issues caused by remote working for employers or persons paying independent contractors (referred to here for convenience as “clients”). The inclusion of employers and clients requires the consideration of situations where an employer or client resident in one country has a PE or fixed base in another country, for the simple reason that the amounts paid to the remote worker may be deductible in computing the profits attributable to the PE or fixed base.

2.4 For the purposes of this note, remote workers do not include legal entities. Situations where remote workers (employees or independent contractors) incorporate a company in the country where they are working remotely or in another country and provide their services through that company could be included in a comprehensive discussion of remote workers. However, where a remote worker incorporates a company to provide services, the company will usually be treated as a resident by the country in which it is incorporated. As a result, no remote worker issues arise in that situation because the company and the worker are both in the same country. Where the company owned by the remote worker is established in a country other than the country in which the remote worker is working, cross-border issues do arise and are

[1] For the purposes of this paper, digital nomads are considered to be a special subset of remote workers, as explained in paragraph 2.5 below.

covered in this note. However, any issues related to the remote worker's ownership or control of the company are not dealt with.

2.5 Some discussions of remote workers focus on so-called digital nomads, who are individuals, usually with specialized skills, who can work from almost anywhere with a laptop computer or tablet as long as there is a reliable Wi-Fi connection. These digital nomads may spend years roaming the globe while spending only a few months in any particular country. Alternatively, they may follow a regular pattern of spending a few months in 3 or 4 countries every year. Still others may have a permanent home in one country but spend significant periods of time during the year working in other countries. The special problems of taxing remote workers who are digital nomads are discussed in section 7.6 below.

3. FACTORS AFFECTING THE TAX TREATMENT OF REMOTE WORKERS AND THEIR EMPLOYERS OR CLIENTS UNDER THE UNITED NATIONS MODEL CONVENTION

3.1 The factors relevant to the taxation of remote workers under the provisions of the United Nations Model Convention are:

- Residence
    - The country in which the remote worker is resident will usually have the right to tax the remote worker on the worker's worldwide income, including any income derived from working in the country.
    - The country in which a remote worker is resident will determine which bilateral tax treaty is applicable.
    - If a remote worker spends considerable time in a country (many countries deem individuals to be residents if they are present for 183 days or more in the country) and/or has other economic or personal ties to the country, the worker may be considered to be a resident of the country for tax purposes. This could raise dual-residence issues and the application of the tie-breaker rules in a treaty. These residence issues are reasonably well understood and are not dealt with further in this note.
- The legal nature of the relationship between a remote worker and the person for whom the remote worker works
    - If the remote worker is an employee, the provisions of the United Nations Model Convention dealing with employment are applicable.
    - If the remote worker is an independent contractor, the provisions of the United Nations Model Convention dealing with business profits or independent personal services are generally applicable.
- The period of presence of a remote worker in a country
    - The period of presence of a remote worker in a country is relevant for determining where the worker is resident and which bilateral treaty applies.
    - The period of presence in a country of a remote worker who is an independent contractor is relevant for purposes of Article 14(1)(b).
    - The period of presence in a country of a remote worker who is an employee is relevant for purposes of Article 15(2).
- The nature of the activities carried on by the remote worker in a country

- The type of activities (and the duration of those activities) is relevant for several provisions of the United Nations Model Convention dealing with the taxation of remote workers.
- Article 5(3)(b) – furnishing services in a country for more than 183 days in any 12-month period.
- Article 5(4) – remote workers engaged in preparatory or auxiliary activities.
- Article 5(5) – remote workers concluding contracts or playing the principal role leading to the conclusion of contracts that are binding on the principal.
- Article 12A – remote workers providing managerial, technical or consultancy services.
- Article 12B – remote workers providing automated digital services [Article 12B may apply primarily to legal entities but literally it applies equally to individuals providing such services.]
- Article 14 – remote workers providing professional and other independent services.
- Article 15 – remote workers exercising the duties of their employment in a country.
- Article 15(3) – remote workers exercising employment aboard a ship or aircraft in international traffic are taxable exclusively by the country in which the employees are resident unless the ship or aircraft is operated solely in the other country.
- Article 16 – remote workers acting as directors of a company or as top-level managerial officials of a company. The remuneration of such directors and officials is taxable exclusively by the country in which the company is resident.
- Article 19 – remote workers providing services as government employees. Under Article 19(1)(a), salaries received by government employees, including nonresident employees working remotely, are taxable exclusively by the government that pays such employees. Under Article 19(1)(b) remote working is an issue, since an employee of a government of one contracting state is taxable exclusively by the other state where the services are rendered in the other state and the employee is a resident and a national of the other state (or even if not a national of the other state, did not become a resident of the other state for the purpose of performing the services). Remote working by independent contractors engaged by a government is a potential issue since independent contractors are not covered by Article 19.
- Note: Article 17 is not discussed extensively in this paper, although it potentially applies to remote-working situations involving both employees and independent contractors. Article 17 applies only where an individual resident in one state performs personal activities in another state as an entertainer or athlete. A country's right to tax income derived by an individual from personal activities as an entertainer or athlete performed in the country is not limited by the United Nations Model Convention even where the income derived from the individual's activities accrues to another person (Article 17(2)). As a result, remote working by entertainers or athletes does not appear to raise any serious issues that need to be dealt with.

3.2 The factors relevant to the taxation of the employers or clients of remote workers under the provisions of the United Nations Model Convention are:

- the country in which an employer or client of a remote worker is resident will determine which bilateral tax treaty is applicable.
- the country in which an employer or person paying an independent contractor has a PE or fixed base that bears the salary or compensation payable to remote workers

- o where remote workers work for a PE or fixed base of an enterprise, their salary or compensation will usually be deductible in computing the profits attributable to the PE or fixed base, which may justify that country taxing the remote worker's income.

3.3 Although the provisions of the United Nations Model Convention are not directly relevant, where an employer or client resident in one country pays an employee or independent contractor working in another country, the employer or client may be required to withhold tax and other amounts from the payments in accordance with the domestic law of the residence country. These withholding obligations may be affected by the provisions of an applicable tax treaty to the extent that those provisions provide an exemption from tax for the employee or independent contractor.

4. THE SPECTRUM OF FACTUAL SITUATIONS INVOLVING REMOTE WORKERS

4.1 The factors identified in the previous section mean that the spectrum of factual situations involving remote workers is very broad. Some of these situations may arise more frequently than others; nevertheless, it is useful to consider the entire spectrum to ensure that any solutions adopted to deal with issues or problems involving remote workers do not inadvertently open up tax planning opportunities or inconsistencies in the United Nations Model Convention.

4.2 Situations Involving Employees as Remote Workers

4.2.1 For purposes of analysis, the two core fact situations[2] involving employees who work remotely are:

1) An employer resident in State A pays an employee resident in State A or State B for employment services performed in State B.
2) An employer resident in State A but with a PE in State B (or in a third state, State C) pays an employee who is resident in State A (or State B or State C) and working in State B (or in State A or a third state where the remote worker is resident in State B, or in State A or State B where the remote worker is resident in State C).

4.2.2 The spectrum of factual situations involving the tax consequences for employees who are remote workers is summarized in Table 1. Note that Table 1 does not deal with the tax consequences for the employer.

[2] The core situations are limited to those involving the application of Article 15 of the United Nations Model Convention. Situations involving the application of special provisions, such as Articles 16 and 19, are not dealt with here.

TABLE 1

EMPLOYEE	EMPLOYER		
	Resident in State A	**Resident in State A with PE or Fixed Base in State B**	**Resident in State A with PE or Fixed Base in State C**
Resident in State A; working in State B	• taxable in State A • taxable in State B if employee is present in State B for more than 183 days	• taxable in State A • taxable in State B if salary borne by PE or fixed base or if employee present for more than 183 days	• taxable in State A • taxable in State B if employee present for more than 183 days • not taxable in State C
Resident in State B; working in State B	• taxable in State B • not taxable in State A	• taxable in State B • not taxable in State A	• taxable in State B • not taxable in State A or State C
Resident in State B; working in State A	• taxable in State B • taxable in State A	• taxable in State B • taxable in State A	• taxable in State B • taxable in State A
Resident in State C; working in State B	• taxable in State C • taxable in State B if employee is present for more than 183 days • not taxable in State A	• taxable in State C • taxable in State B if salary borne by PE or if employee present for more than 183 days • not taxable in State A	• taxable in State C • taxable in State B if employee present for more than 183 days • not taxable in State A
Resident in State C; working in State A	• taxable in State C • taxable in State A • not taxable in State B	• taxable in State C • taxable in State A • not taxable in State B	• taxable in State C • taxable in State A • not taxable in State B

4.3 Summary of the Tax Consequences for Remote-Working Employees

4.3.1 under the provisions of the United Nations Model Convention, the country in which a remote-working employee is resident always has the right to tax the employee's income, irrespective of where the employee works or where the employee's employer is resident or carries on business through a PE or fixed base (except for certain government employees under Article 19(1)(b)).

4.3.2 The country in which an employee is working but not resident is entitled to tax the employee's employment income derived in the source country where:

- The employer is not resident in the country in which the employee is working and does not have a PE or fixed base in that country, but only if the employee is present in the source country for more than 183 days (see Article 15(2)(a)).
- The employer is a resident of the country in which the employee is working and pays or bears the employee's salary, without the need for the employee to meet any minimum threshold (other than the performance of duties of employment in that country) (see Article 15(2)(b)).
- The employer has a PE or fixed base in the country in which the employee is working that bears the employee's salary, without the need for the employee to meet any minimum threshold (other than the performance of duties of employment in that country) (see Article 15(2)(c)).
- The employer has a PE or fixed base in the country in which the employee is working that does <u>not</u> bear the employee's salary, but only if the employee is present in the source country for more than 183 days (see Article 15(2)(c)).
- In all these cases, there is no limitation on the manner (taxation of the gross income of the employee is permitted) or rate of tax imposed by the country in which the employee is working.

4.3.3 The right to tax of the country in which the employee is working is not affected in these situations by the fact that the employee is working for an employer resident in a third country or a PE in a third country of the employer even where the employee's salary is borne by the employer and/or the PE. For example, assume an employee resident in State A and working in State B for an employer resident in State A with a PE or fixed base in State C, which bears the employee's salary. (This is the situation is Row 1, Column 4 of Table 1.) Under Article 15 of the treaty between State A and State B, State B is entitled to tax the employee's employment income earned in State B if the employee is present in State B for more than 183 days. In this case, Article 15(2) does not apply. However, where the employee is not present in State B for more than 183 days, Article 15(2) applies because the conditions in Article 15(2)(b) and (c) are not met. (The employer is not a resident of State B and does not have a PE in State B; the PE is situated in State C, not in State B.) Therefore, the employment income is taxable only in State A. Note that in this situation the treaties between State A and State C and between State B and State C are not relevant because there is no resident of State C. This result applies despite the fact that State A and State C will likely allow a deduction for the employee's salary for the period of employment in State B.

4.3.4 A similar result applies where an employee is resident in State C and working in State B for an employer resident in State A with a PE in State C. (This is the situation in Row 4, Column 4 of Table 1). Under Article 15 of the treaty between State C and State B, State B is entitled to tax the employee's employment income earned in State B if the employee is present in State B for more than 183 days. Article 15(2) does not apply. However, where the employee is not present in State B for more than 183 days, Article 15(2) applies and the employment income is taxable only in State C. (The employer is not a resident of State B and does not have a PE in State B.) The treaties between State A and State B and between State B and State C are not relevant because there is no resident of State B. This result applies despite the fact that State A and State C will likely allow a deduction for the employee's salary for the period of employment in State B.

4.3.5 To summarize, only countries in which an employee is resident or in which an employee exercises the duties of employment have the right under Article 15 of the UN Model Convention to tax income from the employee's employment. The right to tax of the country in which an employee works has priority over the right to tax of the country in which the employee is resident, and the country in which the employee is resident has an obligation to relieve any double taxation. The country in which an employee's employer is resident and the country in which the employer has a PE or fixed base that bears the employee's salary have no right to tax the income from employment of the employee unless the employment is exercised in their country. The possibility of granting the country in which the employee's employer is resident the right to tax the nonresident employee's income from employment exercised in the other country is examined in Appendix II.

4.4 Situations Involving Independent Contractors as Remote Workers

4.4.1 For purposes of analysis, the two core fact situations involving independent contractors who work remotely are:

1) A client resident in State A pays an independent contractor resident in State A or State B for independent services performed in State B.
2) A client resident in State A but with a PE in State B (or in a third state, State C) pays an independent contractor who is resident in State A (or State B or State C) and working in State B (or in State A or a third state where the remote worker is resident in State B, or in State A or State B where the remote worker is resident in State C).

4.4.2 The spectrum of factual situations involving independent contractors who are remote workers is described in Table 2. Note that Table 2 does not deal with the tax consequences for the clients of independent contractors.

TABLE 2

INDEPENDENT CONTRACTOR	**CLIENT**		
	Resident in State A	**Resident in State A with PE or Fixed Base in State B**	**Resident in State A with PE or Fixed Base in State C**
Resident in State A; working in State B	• taxable in State A • taxable in State B if the contractor has PE or fixed base there, if services provided for more than 183 days or if present for 183 days or more in State B	• taxable in State A • taxable in State B if the contractor has a PE or fixed base there, if services provided for more than 183 days or if present for 183 days or more in State B	• taxable in State A • taxable in State B if the contractor has PE or fixed base there, if services provided for more than 183 days or if present for 183 days or more in State B • not taxable in State C
Resident in State B; working in State B	• taxable in State B • not taxable in State A unless technical fees or income from automated digital services	• taxable in State B • not taxable in State A unless technical fees or income from automated digital services	• taxable in State B • not taxable in State A unless technical fees or income from automated digital services • not taxable in State C

INDEPENDENT CONTRACTOR	**CLIENT**		
	Resident in State A	**Resident in State A with PE or Fixed Base in State B**	**Resident in State A with PE or Fixed Base in State C**
Resident in State B; working in State A	• taxable in State B • taxable in State A if the contractor has PE or fixed base there, if services provided for more than 183 days, if present for 183 days or more in State A, or if technical fees or income from automated digital services	• taxable in State B • taxable in State A if the contractor has a PE or fixed base there, if services provided for more than 183 days, if present for 183 days or more in State A, or if technical fees or income from automated digital services	• taxable in State B • taxable in State A if the contractor has PE or fixed base there, if services provided for more than 183 days or if present for 183 days or more, or if technical fees or income from automated digital services • not taxable in State C
Resident in State C; working in State B	• taxable in State C • taxable in State B if contractor has PE or fixed base there, if services provided for more than 183 days, if present for 183 days or more in State B, or if technical fees or income from automated digital services	• taxable in State C • taxable in State B if the contractor has a PE or fixed base there, if services provided for more than 183 days, if present for 183 days or more in State B, or if technical fees or income from automated digital services	• taxable in State C • taxable in State B if the contractor has PE or fixed base there, if services provided for more than 183 days, if present for 183 days or more in State B, or if technical fees or income from automated digital services • not taxable in State A

4.5 Summary of the Tax Consequences for Remote-Working Independent Contractors

4.5.1 The country in which a remote-working independent contractor is resident always has the right to tax the contractor's income, irrespective of where the contractor works or where the contractor's client is resident or carries on business through a PE.

4.5.2 The country in which an independent contractor is working but not resident is entitled to tax the contractor's income from that work where the independent contractor:

- has a PE or fixed base regularly available in the country;
- furnishes services in a country for more than 183 days; or
- stays in a country for 183 days or more in the case of an independent contractor providing professional or other independent services.

4.5.3 The country in which a resident pays fees for technical services or makes payments for automated digital services to a nonresident service provider, or in which a nonresident has a PE or fixed base that bears such fees or payments, is entitled to tax the gross amount of those fees at an agreed rate in accordance with Article 12A or Article 12B respectively. In these situations, the country in which the independent contractor is resident has an obligation to provide relief from double taxation of the contractor under Article 23 of the United Nations Model Convention.

5. PRINCIPLES FOR THE TAXATION OF THE INCOME OF REMOTE WORKERS UNDER THE PROVISIONS OF THE UNITED NATIONS MODEL CONVENTION

5.1 This section attempts to identify the major principles or factors that are relevant in determining whether a country (i.e., the country in which an individual is working) is entitled to tax the income earned by remote workers resident in the other contracting state. These principles may conflict and, as a result, some principles are given more importance in some articles and less importance in other articles. No attempt is made here to suggest how these principles should be balanced with respect to any particular article of the United Nations Model Convention, and the principles are not listed in any particular order.

5.2 This discussion of the underlying principles for the taxation of remote workers is limited to the principles that govern the allocation of taxing rights between the contracting states; it does not include the treaty rules that govern how countries can tax the income of remote workers (i.e., net or gross income and limited or unlimited rate of tax).

5.3 The Country in Which Income Arises Has the Right to Tax that Income

5.3.1 Countries have a fundamental right to impose tax on any income that arises in, is derived from, or has its source in their country. This principle is widely recognized despite the lack of international agreement on the appropriate rules to determine the source of particular types of income. Moreover, this principle appears to be the implicit foundation for each and every limitation on the taxing rights of countries (other than limitations on countries to tax residents) in the OECD and United Nations Model Conventions. In the absence of tax treaties, a country is generally considered to have the authority to tax any income derived in or from the country by residents and nonresidents, with few legal limitations; the crucial issues appear to be whether any particular item of income is taxable under a country's domestic tax law and whether the tax can be enforced effectively.

5.3.2 A country's right to tax income that arises in, is derived from, or has its source in the country (except where the provisions of a tax treaty limit or prohibit such taxation) is explicitly recognized in the United Nations Model Convention (but not in the OECD Model Convention) in Article 21(3), which authorizes a country to tax income that is not covered by any other article of the Convention if the income arises in that country.

5.3.3 In general, under most countries' domestic law and under the provisions of the United Nations Model Convention, income from employment is considered to arise in, to be derived from, or to have its source in the country in which the employment is exercised (i.e., the duties of employment are performed), not the country where the employer is resident. Similarly, income from services is generally considered to arise in, to be derived from, or to have its source in the country where the services are performed, although there are exceptions (for example, Articles 12A, 12B, and 16).

5.3.4 With respect to remote workers, the country in which the work is done (i.e., the duties of employment are exercised or the services of an independent contractor are performed or rendered) is entitled to tax the income. However, in some situations, that country gives up its right to tax the income of remote workers because the minimum threshold for taxation is not met, as discussed in section 5.4 below. In some circumstances, payments made by residents of a country or by nonresidents with a PE or fixed base in a country to nonresident service providers are taxable by the country even though the work is performed outside the country (see Article 12A (Fees for Technical Services) and Article 12B (Income from Automated Digital Services). The imposition of tax in these circumstances may be justified by concerns over base erosion, as discussed in section 5.5 below.

5.4 Thresholds for the Taxation of Remote Workers by the Country in Which They Work

5.4.1 Although countries have the right to tax income arising in or derived from their countries by nonresident remote workers from their employment exercised or independent services rendered in their countries, this right is limited under the provisions of the United Nations Model Convention with respect to both employees and independent contractors.

5.4.2 The general threshold for taxation of nonresident employees is the physical presence of the employee in the source country for more than 183 days in any 12-month period where the employer is not resident in that country and does not have a PE or fixed base in that country. However, where a nonresident employee exercises employment in a country for an employer resident in that country or for a nonresident with a PE or fixed base in that country that bears the employee's salary or wages, no minimum threshold based on the employee's presence in the country applies; as a result, any income from employment exercised in the country by such an employee is taxable. In this situation, the only threshold for taxation by the country in which the employment is exercised is the requirement for any duties of employment to be exercised in the country. This minimal threshold is related to concerns about base erosion, as discussed in section 5.5 below.

5.4.3 Articles of the United Nations Model Convention that do not require any threshold for taxing remote-working employees include Article 16 (directors and top-level managerial officials), and Article 19 (government service). The only requirement for a country to tax under these articles is that the payer must be a company resident in the country in the case of Article 16, or the government of the country in the case of Article 19. Under Article 17 (artistes and sportspersons), the only threshold is the performance of any athletic or entertainment services in a country.

5.4.4 For independent contractors working remotely, the general threshold for a country to tax the income derived by such contractors from working in the country is significantly higher than the threshold for employees, and varies considerably depending on the nature of the business activities of such contractors. The thresholds for remote-working independent contractors under the United Nations Model Convention are:

- for business activities generally, a fixed place of business in the country that lasts for at least 6 months (Article 5(1)) unless that place is used only for preparatory or auxiliary activities;
- for businesses involving the conclusion of contracts, a dependent agent in the country that habitually concludes contracts on behalf of the independent contractor or plays the principal role leading to the conclusion of such contracts, unless such contracts relate to preparatory or auxiliary activities or non-core aspects of the contractor's business;
- furnishing services in the country for more than 183 days in any 12-month period (before the 2017 update of the United Nations Model Convention, the services were required to be performed with respect to the same or a connected project);
- for professional and other independent services, a fixed base regularly available to the service provider in the country for at least 6 months (Article 14(1)(a));
- for professional and other independent services, the independent contractor must "stay" (i.e., be present) in the country for 183 days or more.

5.4.5 There is no threshold for independent contractors providing managerial, technical, or consulting services or automated digital services to residents of the other contracting state under Article 12A and Article 12B respectively. As noted above, for entertainers and athletes under Article 17, the only threshold is the performance of any athletic or entertainment services in a country. The country of performance retains the right to tax income from such activities.

5.5 Reduction or Erosion of a Country's Tax Base

5.5.1 In some articles of the United Nations Model Convention dealing with remote workers, countries are allowed to tax the income of such workers where their remuneration is deductible by the payer against the country's tax base. According to the Commentary on Article 12A, base erosion is an important factor in justifying source country taxation of fees for technical services. Base erosion may also be a factor with respect to Article 12B, although the Commentary does not explicitly say so. In addition, tax base reduction appears to be an important principle with respect to the taxation of remote-working employees under Article 15 (with respect to nonresident employees of a resident employer or a nonresident employer with a PE in the country; in this situation, the employment income is taxable by the country in which the employer is resident or the PE is located irrespective of how long the employee is present or works in the country), Article 16 (with respect to directors' fees and remuneration of top-level managerial officials of resident companies), and Article 19 (with respect to government employees, although in this case it is the treasury of the source country that is reduced rather than its tax base).

5.6 Enforcement

5.6.1 There is not much sense in allocating taxing rights to countries with respect to the income derived by remote workers unless those countries can impose and collect the tax in a reasonably efficient manner. This does not mean that developing countries with limited capacity to administer and enforce income taxes should not be granted taxing rights in these situations. Instead, the better response is to take steps to improve the administrative capacity of those developing countries so that they have the ability to collect the taxes efficiently. Therefore, enforcement concerns should justify denying taxing rights to countries only where it would be very difficult or impossible for those countries to impose and collect taxes on nonresidents, even on the assumption that they have the necessary administrative capacity to impose taxes on nonresidents effectively. For example, a country may encounter serious difficulties enforcing taxation on remote workers (both employees and independent contractors) who are paid by nonresident employers or clients and who work in a country temporarily for only short periods. In contrast, the taxation of nonresident remote workers who are paid by resident employers or clients can be readily enforced through withholding obligations imposed on the resident payers.

5.6.2 The enforcement problem with respect to some remote workers is that many developing and developed countries may not be aware of the presence of such workers in their countries. Such information is a necessary precondition for countries to impose tax on those remote workers under their domestic law and in accordance with the provisions of their tax treaties. The lack of information about remote workers is especially problematic with respect to digital nomads, as discussed in section 7.6 below.

6. TAX TREATY IMPLICATIONS FOR EMPLOYERS AND CLIENTS OF REMOTE WORKERS

6.1 Tax Treaty Implications for Employers with Remote-Working Employees

6.1.1 Under the provisions of the United Nations Model Convention, the activities of an employer's employees working remotely in a country other than the country in which the employer is resident can have important consequences for the taxation of the employer by the country in which the employee is working. Probably the most important consequence is that the actions of remote-working employees may cause the employer to have a PE or fixed base in the country or countries in which the employer's employees are working. This risk arises where:

- an employee has an office, including a home office, or other fixed place of business in the country in which the employee is working, and the office or place is at the disposal of the employer and exists for at least 6 months;
- an employee working remotely concludes certain contracts on behalf of the employer or plays the principal role leading to the conclusion of such contracts; or
- an employee or independent contractor furnishes services for the enterprise in the country for more than 183 days.

If the activities are limited to preparatory or auxiliary activities, they will not result in a PE for the employer regardless of whether they are carried out at a fixed place or involve the conclusion of contracts. However, there is no parallel exemption from the concept of a fixed base for preparatory or auxiliary activities under Article 14.

6.1.2 Where an employer has an existing PE or fixed base in a country and has an employee working in that country, the tax consequences for the employer depend on whether the employee's remuneration is borne by the PE or fixed base (i.e., deductible in computing the profits of the PE or fixed base for purposes of the tax imposed by the country in which the PE or fixed base is located). If the employee's remuneration is not borne by the PE or fixed base, the employee will not be subject to tax in that country unless the employee is present in the source country for more than 183 days. If the employee's remuneration is borne by the PE or fixed base, the employee's remuneration from working in the country will be subject to tax by that country (irrespective of the time spent in the country by the employee), which may result in withholding obligations for the employer.

6.1.3 Whether an employee's remuneration is borne by a PE or fixed base is a question of fact and does not depend solely on whether a deduction for the remuneration is actually claimed in computing the profits of the PE or fixed base (see paragraph 6.2 of the UN Commentary on Article 15, quoting paragraph 7.1 of the OECD Commentary on Article 15). As a result, there could be some uncertainty for employers as to whether remote-working employees are subject to tax in the country in which the employer has a PE or fixed base. It is an open question whether the concept of an employee's remuneration being borne by a PE or fixed base could be made more certain by restricting it to situations where the remuneration is actually deducted by the PE or fixed base, although this possibility could be explored.

6.2 Tax Treaty Implications for Clients of Remote-Working Independent Contractors

6.2.1 The provisions of the United Nations Model Convention do not generally have any impact on the taxation of clients who pay independent contractors working in a country other than the country in which the clients are resident. For purposes of the taxation of a client, it does not matter in which country an independent contractor is resident or working. Where the independent contractor and the client are not dealing at arm's length, transfer pricing rules will apply to ensure that the prices for the contractor's services are in accordance with the arm's-length standard.

6.2.2 In certain situations, the country in which a client is resident or has a PE or fixed base may be entitled under the provisions of the United Nations Model Convention to impose tax on payments made by the client to an independent contractor for technical services under Article 12A, for automated digital services under Article 12B, or rent for the use of, or the right to use, industrial, commercial or scientific equipment under Article 12. In these circumstances, there is no requirement for the services to be provided in the country in which the payer is resident or the PE or fixed base is located.

6.2.3 In contrast to the situation of employers with remote-working employees, the risk of a remote-working independent contractor creating an inadvertent PE or fixed base for a client is very limited. The only situations in which a client might be considered to have a PE or fixed base in a country where an independent contractor is working for the client are where:

- a fixed place of business of the independent contractor is used by, is at the disposal of, or regularly available for the use of, the client for at least 6 months;
- the independent contractor acts as an agent for the client, concluding contracts on behalf of the client or playing the principal role leading to the conclusion of such contracts (and the independent contractor is not an independent agent acting in the ordinary course of business); or

- the independent contractor provides services on behalf of a client in a country for more than 183 days (the same rule in Article 5(3)(b) applies to employees).

7. POTENTIAL PROBLEMS AND ISSUES UNDER THE PROVISIONS OF THE UNITED NATIONS MODEL CONVENTION RAISED BY REMOTE WORKERS

7.1 Introduction

7.1.1 Commentators tend to focus on particular aspects of domestic law or tax treaties raised by remote working. However, for purposes of the United Nations Model Convention, it is important to consider all the issues comprehensively from the perspectives of both remote workers and their employers or clients. Such a comprehensive examination of the tax treaty issues is necessary to ensure that any solutions adopted – changes to the United Nations Model Convention or the Commentary – are effective, internally consistent, and do not inadvertently raise other problems.

7.1.2 The potential problems or issues raised by remote working analyzed in this note are limited to the problems and issues that arise in connection with the application of the provisions of the United Nations Model Convention. It must be emphasized that many other problems or issues also arise with respect to domestic tax law as well as other aspects of domestic law, including employment law, VAT, and social security contributions and payments.

7.1.3 At the outset, it is important to recognize that one of the important issues with respect to the taxation of remote workers under the provisions of the United Nations Model Convention is the necessity of determining whether an individual is an employee or an independent contractor.

7.1.4 The distinction between employment and other contractual relationships is embedded in the existing provisions of the United Nations Model Convention and has potentially dramatic consequences. For example, an employee working in a country, other than the country in which the employee is resident, for an employer also resident in that country (or an employer resident in another country with a PE or fixed base in that country) is taxable by that country on the employee's income from employment exercised in that country irrespective of the time spent working in that country. In contrast, an independent contractor working in a country for a client resident in that country would be taxable by that country only if the contractor has a PE or fixed base in that country, furnishes services in that country for more than 183 days, stays in that country for more than 183 days, or provides technical or automated digital services to the client.

7.1.5 For purposes of the United Nations Model Convention, the distinction between an employee and an independent contractor appears to be binary; the recognition of a status between employment and independent contractor is not possible, although the domestic employment law of some countries has apparently started to recognize hybrid situations.

7.1.6 Any action by the UN Committee of Experts to deal with remote workers raises the possibility of addressing the fundamental distinction between employees and independent contractors, although this would be a formidable challenge. Alternatively, the existing distinction could be accepted as an issue requiring a longer-term project. However, any reform options adopted by the UN Committee should not exacerbate the consequences of the existing distinction between employees and independent contractors and, if possible, minimize the importance of the distinction. Aspects of the distinction are explored in the UN Commentary on Article 15 (see paragraph 6.2, quoting paragraphs 8.1 – 8.28 of the OECD Commentary on Article 15).

7.1.7 Another fundamental issue that needs to be addressed by the UN Committee before any changes are made to the United Nations Model Convention is whether the UN Committee wants to facilitate remote working or to ensure that remote workers are subject to tax in the countries in which they work (and where they are not subject to tax in those countries, they are subject to tax in the countries in which they are resident). This is not an easy issue. Multinational enterprises competing for employees appear to view the existing provisions of domestic law with respect to the taxation of remote workers as obstacles to a new and expanding model of working that the provisions of the OECD and United Nations Model Conventions should eliminate or reduce. Similarly, some countries that have many cross-border workers with neighbouring countries, including countries in the European Union, which guarantees labour mobility, may also be in favour of modifying the provisions of the Model Conventions and other actions to facilitate remote working. However, it may be possible to reduce the risks for employers that remote workers inadvertently create PEs and create compliance costs without limiting the rights of countries to tax income earned by remote workers from working in their countries.

7.1.8 Some commentators have made claims that facilitating cross-border working will be beneficial for developing countries as a means of addressing the "brain drain" (the movement of skilled workers from developing countries to developed countries). I am skeptical about such claims in the absence of any clear evidence, and I would be cautious about any attempt to facilitate remote working by recommending to developing countries that they give up their existing taxing rights over remote workers under the existing provisions of the United Nations Model Convention. In my view, it would be preferable for countries that wish to facilitate remote working to make appropriate changes to their domestic tax law unilaterally and/or to negotiate appropriate changes to their bilateral treaties with countries for which remote working is a serious concern. See, for example, the provision described in paragraphs 7.2.6 and 7.2.7

7.2 Potential Problems or Issues with Respect to Remote-Working Employees

7.2.1 There are three major tax treaty issues for employees who work in a country other than the country in which they are resident:

Residence

7.2.2 If an employee resident in one country works in another country for an extended time and has other personal and economic connections with that country, there is risk that the other country will consider the employee to be a resident of that country. As a result, the employee is likely to be resident in both countries and the tie-breaker rules in Article 4(2) would apply to determine the employee's country of residence for purposes of the applicable tax treaty. Although an employee may encounter some compliance issues with respect to dual-residence situations, the residence provisions of the United Nations Model Convention appear to operate appropriately and do not require any modifications in this regard.

7.2.3 Of course, there are broader concerns that could be raised about the concept of residence as a basis for taxation in the modern age where individuals may have temporary personal and economic connections with multiple countries. These concerns are beyond the scope of this paper.

Taxation of Remote-Working Employees by the Country in Which They Work

7.2.4 As discussed in the introduction (section 7.1), whether the taxation of remote employees by a country is desirable or not depends on whether one considers remote working by employees as something to be facilitated or encouraged.

7.2.5 Under the existing provisions of the United Nations Model Convention, remote-working employees are subject to tax by the country in which they work only where:

- the employee works for an employer resident in the country in which the employee works or for a nonresident employer with a PE or fixed base in that country that bears the employee's remuneration. Given that the source country's tax base is reduced by the deduction of the employee's remuneration, it seems inappropriate in this situation to modify Article 15 of the United Nations Model Convention to require the source country to give up its right to tax the employee's remuneration.
- the employee is present in a country for more than 183 days. This 183-day threshold appears to be very generous. An employee who spends more than 183 days in a country, even if all of that time is not spent working, has a substantial connection to the country that justifies that country to tax the employee's employment income. The only reasonable alternatives to facilitate remote working by employees would be for the country in which the employee works to give up its taxing rights on these remote-working employees entirely or to allow that country to tax only where the employee actually works for more than 183 days in the source country (which is equivalent to about 255 total days, assuming a 5-day work week). This would make Article 5(2) similar to Article 5(3)(b). Neither alternative appears to be appropriate. An argument can be made that the 183-day threshold should be reduced to, say, 90 days, which would exacerbate problems for remote workers.
- the employee is a permanent resident of the country in which the employee works but is employed by an employer resident in another country. In this situation, the employee is clearly subject to tax by the country in which the employee is resident and the employee's employment income is not taxable by the country in which the employer is resident (except to the extent that the employee exercise duties of employment there), although that country will usually allow the employer to deduct the employee's salary. This situation is analyzed in detail in Appendix II.

7.2.6 Where an employee resident in one country works for an employer resident in another country, both the country in which the employee works and the country in which the employee is resident are entitled to tax the employee's employment income derived from the country in which the employment is exercised. Under Article 15, the country in which the employer has its place of business and where the employee works is entitled to tax the employee's income only to the extent that the employee works in that country. As a result, where an employee works partly at the employer's place of business and partly at home (which is a situation that arose frequently as a result of Covid-19), the employee's income from employment will be taxable in part by both countries in proportion to the number of days of employment in each country. Detailed record keeping is necessary to ensure that the country in which the employer is resident imposes tax only on the employee's income from employment in that country, and also to ensure that the country in which the employer is resident provides a foreign tax credit for no more than the proper amount of tax paid by the employee to the other country.

7.2.7 Where the number of employees resident in one contracting state and working for employers resident in the other contracting state are relatively equal for both states, adding a provision to the bilateral treaty between the two countries may serve to reduce the compliance burden for employees and employers and for tax administrations. Such a provision could deem the days that an employee works at home in the employee's country of residence rather than at the employer's place of business as days that the employee works at the employer's place of business, as long as those days do not exceed a maximum to be agreed by the countries. Aart Roelofsen has reported that such a provision is under consideration for inclusion in the Belgium-Netherlands treaty.

<u>Compliance Issues</u>

7.2.8 Remote-working employees may incur compliance obligations (for example, the obligation to file tax returns) where they become subject to tax in the country in which they are working. These compliance obligations do not appear to impose an undue burden on such employees. Countries imposing tax on remote-working employees should provide clear guidance for such employees with respect to their tax obligations.

<u>Relief from Double Taxation</u>

7.2.9 Where remote-working employees are subject to tax on their income from employment by the country in which they work, the country in which the employee is resident is required to relieve any double taxation. Therefore, double taxation should not be an issue. However, where the employee is resident in a country other than the country in which the employee's employer is resident, difficult double taxation issues could arise where the country in which the employer is resident imposes tax on the employee's salary. These issues are discussed in Appendix II.

7.3 Potential Problems or Issues for Employers with Respect to Remote-Working Employees

7.3.1 There are three major problems or issues for employers with respect to remote-working employees:

<u>Risk of a PE or Fixed Base</u>

7.3.2 There is a risk that a remote-working employee or employees may create a PE or fixed base for their employer. This risk increases with the number of remote-working employees that an employer has in a country and with the nature of the activities of those employees (i.e., selling, contracting and management activities are more likely to result in a PE).

7.3.3 Whether a remote-working employee's home office constitutes a PE for the employer is a difficult issue and countries take varying positions. The OECD's special guidance on the issue, issued in response to the Covid-19 pandemic, indicates that the intermittent use of a home office does not mean that the office is at the employer's disposal; however, a home office may be a PE "if it is used on a continuous basis for carrying on business of that enterprise and the enterprise has required the individual to use that location to carry on the enterprise's business." (OECD, *Updated Guidance on Tax Treaties and the Impact of the Covid-19 Pandemic*, 21 January 2021).

7.3.4 One way to reduce or eliminate this risk for multinationals would be to change the definition of PE to provide an additional exemption for the activities of remote-working employees. However, it is not clear why a multinational enterprise should not be considered to have a PE as a result of these kinds of activities by remote-working employees. It might be preferable for countries that wish to reduce the risk of an inadvertent PE from the activities of remote-working employees to provide an advance ruling procedure or change their domestic law so that multinationals can obtain the necessary certainty. However, PE determinations in these situations are highly dependent on the facts and may not be suitable for advance rulings. Moreover, it is unclear why countries should be expected to eliminate the risk that remote-working employees might create a PE or fixed base where multinationals have or should have control of their employees and should be able to minimize the risk themselves.

7.3.5 Another possibility to reduce the risk of an inadvertent PE created by remote-working employees would be to clarify the UN Commentary on Article 5 (and also perhaps on Article 14) that remote-working employees should not create a PE for their employer except in clearly specified circumstances.

7.3.6 Although the concept of a fixed base in Article 14 is similar in part to the concept of a PE in Article 5, the two concepts are not exactly the same and there is uncertainty about how the two concepts differ. For example, there are no exceptions to the concept of a fixed base equivalent to the exceptions in Article 5(4) for preparatory or auxiliary activities. Consideration could be given to adding an exception for preparatory or auxiliary activities to the concept of a fixed base. Since the term “fixed base” is not defined in the United Nations Model Convention, such a change would probably require the addition of a complete definition of a fixed base and Commentary, which would be a formidable challenge.

Compliance Burden on Employers

7.3.7 Where a resident employer in one country has an employee working in another country, the employer may be subject to a legal obligation to withhold tax and other amounts from the employee’s remuneration under the domestic law of the country in which the employee works. There may also be withholding obligations with respect to social security payments. These withholding requirements are governed solely by a country’s domestic law and are not dealt with in tax treaties.

7.3.8 It may often be difficult for countries to enforce withholding at source on employers that are neither resident in the country nor have a PE there. Where an employee of a nonresident employer spends less than 183 days in another country, the employee will not be subject to tax in that country. The employer may nevertheless be subject to withholding obligations. These compliance obligations may also apply where the remote worker is an independent contractor rather than an employee, although where an independent contractor is exempt from a country’s tax as a result of a tax treaty, the country must either exempt the payer from any withholding obligations or refund any tax that is withheld improperly. As explained above, the characterization of the relationship between a remote worker and the payer as one of employment or independent contractor is difficult, with some risk for employers.

Certainty

7.3.9 The third concern of multinational enterprises is a general concern about certainty with respect to the tax issues raised by remote-working employees. The *cri de coeur* from multinationals for tax certainty has been a persistent demand in recent years, a demand which has resonated with many tax administrations. As a result, this concern for certainty must be taken seriously and responses to multinationals’ concerns should be carefully considered. As noted above in paragraph 7.3.5, one possible response to this concern is to review the UN Commentary with respect to the provisions of the United Nations Model Convention relevant to remote working that have implications for employers in determining whether those provisions can be clarified.

7.4 Problems and Issues for Remote-Working Independent Contractors

7.4.1 Under the provisions of the United Nations Model Convention, the tax treatment of independent contractors working temporarily in countries other than the countries in which they are resident is more generous than the tax treatment of remote-working employees. Where an independent contractor is working in a country other than the country in which the contractor is resident, the contractor is not subject to tax by that country, unless:

- the contractor has a PE or fixed base in the country in which the contractor is working;
- the contractor furnishes services in the country in which the contractor is working for more than 183 days; or
- the contractor provides professional or other independent services and stays (is present) in the country in which the contractor is working for 183 days or more.

7.4.2 Where an independent contractor resident in a country provides technical or automated digital services to clients resident in other countries (irrespective of whether the services are provided by the contractor in the country of residence or in another country where the contractor works temporarily), the contractor's fees for the technical services or income from the automated digital services may be subject to tax by the country in which the payer for the services is resident in accordance with Article 12A or Article 12B of the United Nations Model Convention.

7.4.3 In summary, an independent contractor resident in one country can avoid tax on income from working in another country by not using a fixed place in the other country (i.e., a PE or fixed base) for more than 6 months, by not furnishing services in the source country for more than 183 days, and by not being present in the source country for 183 days or more. As a result, under the existing provisions of the United Nations Model Convention, there is ample opportunity for independent contractors to work temporarily in countries other than their countries of residence without becoming subject to tax in those countries.

7.4.4 In some circumstances, independent contractors may have some risk that their legal relationship with a client is characterized as employment, in which case there is a greater risk of taxation by the country in which the contractor is working.

7.5 Potential Problems and Issues for Clients Of Remote-Working Independent Contractors

7.5.1 Since an independent contractor and his or her clients are separate taxable entities, the tax treatment of an independent contractor working remotely in the same country in which the client is resident or has a PE or fixed base does not generally have any impact on the taxation of the client under the provisions of the United Nations Model Convention.

7.5.2 However, where an independent contractor (whether working remotely or not) provides technical or automated digital services to nonresident clients, Article 12A or Article 12B of the United Nations Model Convention may allow the country in which the client is resident or has a PE or fixed base to impose tax at a limited rate on the payments for those services. This concern would seem to be more relevant for Article 12A than Article 12B.

7.5.3 Some countries impose obligations on their residents and nonresidents with a PE or fixed base in the country to withhold tax from payments made to nonresident service providers. Such withholding obligations are more likely to be imposed with respect to payments to service providers working in the country.

7.5.4 There is some risk for clients of independent contractors that their legal relationship with an independent contractor may be characterized by a country as employment.

7.6 Potential problems with respect to digital nomads

7.6.1 The potential problems caused by digital nomads – remote workers who move periodically from country to country, as described in paragraph 2.5 – are related to double taxation and double non-taxation. Where such workers are resident in a country (perhaps the country in which they are domiciled or have a dwelling available for their use), they may remain subject to tax by that country. However, that country may have significant difficulties enforcing its tax where a worker has few, if any, assets in the country and chooses not to voluntarily comply. In addition, some countries may have territorial tax systems under which they do not impose tax on foreign source income earned by their residents, while other countries may tax the foreign source income of their residents on a remittance basis (i.e., foreign source income is not taxable unless or until it is remitted to the residence country).

7.6.2 Thus, there are significant opportunities for digital nomads to avoid paying tax anywhere on the income from their work or to pay less tax than they would pay if they were resident in and taxable on their worldwide income in one country.

7.6.3 With respect to the taxation of digital nomads by the country or countries in which they work, under tax treaties based on the United Nations or OECD Model Conventions, those countries will not be entitled to impose tax on the income earned in their countries unless a digital nomad spends more than 183 days working or stays for more than 183 days in a country, which seems unlikely. Even where a digital nomad spends more than 183 days working in a country, because of a lack of information, it will be very difficult for that country to enforce any tax liabilities (including any liabilities of the nonresident for which the digital nomad is working where the nonresident is deemed to have a PE in the country under Article 5(3)(b)). The tax authorities are unlikely to have any information that the digital nomad is working in the country; even where they do have such information and assess tax, the digital nomad may have already left the country, making any tax liability impossible to enforce. In all these situations, digital nomads will not be subject to tax in any country.

7.6.4 It is unlikely, but conceivable, that a digital nomad could be subject to double taxation. However, assuming that a digital nomad does not become resident in a country in which the nomad works, each country in which the nomad works is likely to impose tax only on the nomad's income earned in that country. Thus, double taxation of nomad workers is much less likely than the non-taxation of such workers, and no action with respect to the provisions of the UN Model Convention is required to deal with the risk of double taxation.

8. OPTIONS FOR REFORM

8.1 Introduction

8.1.1 A wide range of reform options is available if the UN Committee of Experts decides that the provisions of the United Nations Model Convention should be modified to facilitate remote working. This section lists some of the reform options with brief explanations, but without any detailed analysis, which seems premature at this stage.

8.1.2 The inclusion of any particular reform option in the list should not be taken as a recommendation that it should be adopted by the UN Committee. Possible reform options have been included in the list only for the purpose of providing an indication of the wide range of options for reform and to stimulate discussion of the best course of action. Also, the list does not include options to expand the taxing rights of countries with respect to nonresident remote workers since such options would have a negative impact on remote workers. However, such options could be added to the list if the Subcommittee wants to consider expanding countries' taxing rights with respect to remote workers.

8.1.3 It is worth noting that any discussion of modifying the United Nations Model Convention or its Commentary to facilitate remote working should bear in mind that any changes to the United Nations Model Convention may be ineffective without corresponding changes to countries' domestic law and, perhaps more importantly, that unilateral changes to domestic law may be sufficient by themselves to facilitate remote working. For example, a country could introduce a special low-tax regime for remote workers who work temporarily in the country. In addition, it is important to avoid any unforeseen or inadvertent tax and non-tax consequences from changes to the United Nations Model Convention designed to facilitate remote working.

8.1.4 As a preliminary matter, it is important to determine what types of remote working the UN Committee wants to facilitate. For this purpose, the following major types of remote working seem relevant:

- remote workers who are permanent residents of one country but who are temporarily present and working in another country or countries as employees or independent contractors for relatively short periods, although these temporary periods spent in a country may recur over an extended period of years, and
- remote workers (referred to in this paper as digital nomads) who are not obviously permanent residents of any country but who spend relatively short periods working in various countries.

It is also necessary for the UN Committee to determine whether it wants to facilitate remote working by reducing the risks that remote working presents for employers or by limiting the taxing rights of the countries in which remote workers are working, or both.

8.1.5 As noted above, one of the problems that countries encounter in taxing remote workers is the lack of information about the presence of such workers in their countries. Therefore, the UN Committee might consider enhancing exchanges of information regarding remote workers, both employees and independent contractors, under Article 26 of the United Nations Model Convention.

8.2 Reform Options for Remote-Working Employees and their Employers

8.2.1 Amend Article 15(2) to reduce the situations in which remote-working employees are subject to tax in the countries in which they work, by:

- eliminating the condition in Article 15(2)(a) relating to 183 days of presence in the country in which a nonresident employee is working. As a result, a nonresident employee of a nonresident employer with no PE or fixed base in the country in which the employee is working would be able to exercise their employment in that country for more than 183 days without that country having any right to tax the employee's income.
- modifying Article 15(2)(b) and (c) to add a minimum period that a nonresident employee must be employed in a country by a resident employer or a PE or fixed base of a nonresident employer. Under the existing Article 15, an employee working in a country for an employer resident in the country or for a nonresident employer with a PE or fixed base in that country

is subject to tax by that country on any employment income derived from employment activities in the country. It would be possible to limit the taxing rights of such a country to situations in which an employee works in the country for a resident employer or a nonresident employer's PE or fixed base in the country for a minimum period of time, say, for example, 30 or 60 days.

- limiting the application of Article 15(2)(c) to situations where an employee's remuneration is actually deducted in computing the profits of a PE or fixed base. The existing provision applies where the remuneration is deductible whether or not it is actually deducted and reduces the country's tax base.
- adding a threshold based on the amount of remuneration derived by an employee from working in country. A country's taxing rights with respect to nonresident employees working in the country could be limited to situations where an employee earns a minimum amount of income from employment in that country. Such a threshold would reduce the compliance problems for remote-working employees (and their employers) but would not result in a substantial loss of tax revenue for the country in which the employee works. However, there are difficulties in designing a revenue threshold that should not be underestimated.

8.2.2 Clarify the Commentary on Articles 5 and 14 as well as Article 15 concerning the circumstances in which an employee's home office will be considered to be a PE or fixed base for the employer, or consider adding alternative provisions to the Commentary that countries might adopt to reduce the risk that home offices of employees are considered to be PEs or fixed bases. The OECD guidance with respect to the use of home offices by employees during the Covid-19 pandemic is referred to in paragraph 7.3.3 above.

8.2.3 Amend Article 19(1)(b) to add a minimum time-period threshold, say, 183 days, or a minimum income threshold in order for the country in which an employee of the government of another country is resident to get the exclusive right to tax the income. This change would reduce the compliance problems for remote-working government employees with minimal tax revenue loss for the government.

8.2.4 Revise the UN Commentary on Article 15 to clarify the situations in which individuals will be considered to be employees rather than independent contractors.

8.2.5 Add a definition of fixed base to the United Nations Model Convention based to the extent appropriate on the definition of a PE in Article 5, and, in particular including an exception for preparatory or auxiliary activities.

8.2.6 Allow an exemption for remote-working employees of a nonresident employer with a PE or fixed base in a country as long as the employer does not deduct the employee's remuneration.

8.2.7 Review and, if appropriate, clarify the provisions of the UN Commentary on Article 5(3)(b), 14 and 15 dealing with remote-working employees and their employers.

8.2.8 Revise or clarify the meaning of the term "habitually" in Article 5(5) to allow short-term activities in a country by nonresident employees concluding contracts on behalf of their nonresident employers.

8.2.9 Add an alternative provision to the Commentary on Article 15 that some countries may wish to include in their bilateral treaties where the flow of remote-working employees between the two countries is reasonably equal. Such a provision would deem days that a nonresident employee works at home for an employer resident in the other country to be days of working at the employer's place of business in the other country subject to an agreed maximum number of such days. Such a provision would reduce the compliance burden for the employees and their employers, as well as the administrative burden for the tax authorities without any significant loss of tax revenue for either country. See paragraphs 7.2.6 and 7.2.7 for more detail.

8.3 Reform Options with Respect to Remote-Working Independent Contractors and Their Clients

8.3.1 The existing provisions of the United Nations Model Convention are quite generous, with few restrictions on the taxing rights of countries with respect to nonresident remote-working independent contractors in comparison with nonresident remote-working employees. The reform options set out below could exacerbate the different treatment of remote-working independent contractors and employees.

8.3.2 Eliminate the reference to "other personnel" in Article 5(3)(b). The effect of this change would be that an enterprise resident in one country would not be deemed to have a PE or fixed base in another country as a result of providing services in that country through independent contractors irrespective of how long those contractors work in the country on behalf of the enterprise.

8.3.3 Revise or clarify the meaning of the term "habitually" in Article 5(5) to allow short-term activities in a country by independent contractors concluding contracts on behalf of nonresident enterprises.

8.3.4 Introduce an exemption for preparatory and auxiliary activities in Article 14 and consider expanding the definition of such activities to include temporary activities of employees that are limited to back-office functions.

8.3.5 Replace the physical-presence test in Article 14(1)(b) with a test based on the number of days working in a country, say, 183 days. This change would make Article 14(1)(b) similar to Article 5(3)(b).

8.3.6 Clarify the meaning of the term "regularly available" in Article 14(1)(a). For example, it is unclear whether "regularly available" has the same meaning as the concept of a PE being "at the disposal" of an enterprise in the UN Commentary on Article 5.

8.3.7 Clarify the distinction between employees and independent contractors.

8.3.8 Clarify the circumstances in which an independent contractor's home office will constitute a PE or fixed place of business for an independent contractor's client.

8.3.9 Provide a threshold exemption for independent contractors based on the amount of income earned from remote working in a country. See paragraph 8.2.1, the fourth bullet with respect to a similar option for remote-working employees.

8.3.10 Review and, if appropriate, clarify the provisions of the UN Commentary on Articles 5 and 14 dealing with remote-working independent contractors.

9. CONCLUSION

9.1 The analysis in this paper leads to the following general conclusions:

- It is not clear that cross-border remote working is a serious problem for most countries; and
- Even if cross-border remote working is a serious problem for some countries, it is not clear that modifying the provisions of the United Nations Model Convention is the best way, or even a reasonable way, of responding to the problem.

APPENDIX I TO ANNEX E

UNITED KINGDOM OFFICE OF TAX SIMPLIFICATION

Hybrid and Distance Working Report: exploring the tax implications of changing working practices

1. In December 2022, the United Kingdom's Office of Tax Simplification published a useful report, "Hybrid and Distance Working Report: exploring the tax implications of changing working practices." The Report defines "hybrid working" as an employee working part-time at the employer's workplace and part-time elsewhere, either in the same country or in another country, whereas "distance working" means employees working permanently in another country. The Report indicates that some large UK businesses allow hybrid working offshore for short periods of 10-30 days but this policy has not been taken up by many employees. Large businesses also anticipate that requests by employees to work permanently abroad will increase in the future. There is no evidence that remote working by independent contractors is a problem.

2. Large businesses would like His Majesty's Revenue & Customs (HMRC) to accommodate hybrid and distance working by providing:

- an exemption from the definition of PE (which appears to be a reference to the definition in UK domestic law) where an employee stays in the United Kingdom for a short term in connection with holidays; the exemption could be limited to certain countries to ensure that the employee is taxable by their country of residence;
- for longer stays, the inclusion of back-office functions in the exception for preparatory and auxiliary activities;
- a transfer pricing safe harbour where an employer arranges for a remote-working employee to be employed by the employer's local subsidiary and then the subsidiary charges the UK employer for the employee's salary;
- an expanded network of totalization agreements with other countries with respect to social security contributions and benefits;
- an exemption from withholding obligations (tax and social security) for stays in the UK of less than 60 days; and
- the publication of clear guidance by HMRC and other countries as to tax and other issues for remote workers and their employers.

APPENDIX II TO ANNEX E

RESIDENT EMPLOYERS WITH NONRESIDENT EMPLOYEES WORKING EXCLUSIVELY OR ALMOST EXCLUSIVELY OUTSIDE THE COUNTRY IN WHICH THE EMPLOYER IS RESIDENT

1. One situation involving remote workers that was raised during the meeting of the Subcommittee on February 6, 2023 concerned the payment by an employer resident in one country to an employee permanently resident in another country and working exclusively or almost exclusively in that country or outside the country in which the employer is resident. It was suggested that this type of remote working could become more common in the future. The problem raised by this situation is that the country in which the employer is resident will usually allow a deduction for the salary, wages or other remuneration paid to the nonresident employee but would not be able to impose tax on the amount received by the employee. Similar tax results occur with respect to payments by a client resident in one country to an independent contractor resident in another country for services provided outside the country in which the client is resident (except as discussed below).

2. Under the existing provisions of the United Nations Model Convention, the country in which the employer of a nonresident employee exercising employment duties is resident is not entitled to tax the employment income derived by the nonresident employee as long as the employment is exercised outside the country. Similarly, the country in which the client of a nonresident service provider is resident is not entitled to tax the income derived by the nonresident service provider unless:

- the nonresident service provider has a PE or fixed base in the country in which the client is resident and the services are connected with the PE or fixed base;
- the payments by the client are fees for technical services covered by Article 12A (i.e., the payments are not made for services for the personal use of an individual or for teaching in or by an educational institution), payments for automated digital services under Article 12B or payments of rent for the use of scientific, industrial or commercial equipment under Article 12.

Although the treatment of this type of remote working under the existing provisions of the United Nations Model Convention is clear, some members of the Subcommittee raised the issue whether this treatment was appropriate and whether countries should be entitled to tax the income of nonresident remote workers where those countries allow a deduction for the remuneration paid to such workers by resident employers and clients.

3. It should also be noted that a resident employer with an employee resident and working in another country would be deemed to have a PE in that country under Article 5(3)(b) where the employee's work involves providing services on behalf of the employer in that country for third parties. This result exacerbates the problems of remote working for employers.

4. From a tax policy perspective, the possible justifications for taxation by the country in which the payer, employer or client is resident in these situations are the loss of potential tax revenue on the employment or services income and the reduction of the country's tax base as a

result of the deduction of the amounts paid to remote workers. However, the employment or services income derived by a nonresident remote worker is not earned in and does not arise in the country in which the payer, employer or client is resident, assuming that the source of employment and services income is derived in the country in which the employment is exercised or the services are performed. Although some countries may take the position under their domestic law that the source of fees for services (or at least certain types of services) is the country where the services are used or consumed, I am not aware of countries that tax nonresident employees of resident employers where the employees work exclusively or almost exclusively outside the countries in which the employers are resident.

5. Article 12A of the UN Model Convention allows a country to tax fees for technical services paid by residents or by nonresidents with a PE or fixed base in the country to nonresident service providers. However, Article 12A itself does not provide strong support for allowing countries to tax nonresident remote workers of resident employers or clients. First, Article 12A is not limited to individual nonresident service providers and is arguably targeted primarily at technical services provided by legal entities and, in particular, by members of multinational groups. Second, Article 12A contains an explicit exclusion for technical services provided by employees. Third, Article 12A is intended to benefit developing countries by extending their tax base to include fees paid to nonresident suppliers of technical services; developing countries are usually the recipients of technical services. In contrast, allowing countries in which employers are resident to tax nonresident employees of resident companies would primarily benefit developed countries, where most large employers are resident. Fourth, there are other tax policy justifications for Article 12A, including the elimination of the competitive advantage for nonresident service providers over resident service providers where nonresidents are not subject to tax on the fees they earn.

6. One way to deal with the asymmetry of a country allowing a deduction for salaries paid to nonresident employees but not having any right to tax those salaries might be for those countries to disallow the deduction of those salaries. However, this option is not available because the denial of a deduction for compensation paid to nonresident employees would be discriminatory, in violation of Article 24(4) (unless such amounts paid to resident employees are not deductible). A similar result would apply with respect to the deductibility of fees for technical services paid to nonresidents.

7. Therefore, the most obvious way to deal with the asymmetry would be to modify the provisions of the United Nations Model Convention to entitle the country in which an employer of a nonresident employee is resident to tax the nonresident employee's remuneration. There are several difficulties with this approach. First, a decision would have to be made about which country – the country in which the employee is resident and employed or the country in which the employer is resident – should have the first right to tax the employee's income. The other country would be under an obligation to provide relief from double taxation. If Article 12A serves as the model for the treatment of the compensation paid by a resident employer to a nonresident employee, then the country in which the employee is working would be obligated to provide a credit against its tax on the employee's income for the tax paid by the employee to the country of residence of the employer. This result is unlikely to be acceptable to many countries, including developing countries, and is not in the best interests of developing countries.

8. However, it would be possible to give the country in which the employer is resident the right to tax the employment income of the employer's nonresident employees but require that country to give a credit for the taxes paid by nonresident employees to the country in which they

are resident. Under this approach, the tax imposed by the employer's country of residence would top-up the foreign tax paid by the employees and offset any tax benefits for employees to shift their residence to low-tax countries or to countries providing tax benefits to attract remote workers. Such an approach would create additional compliance obligations for such remote workers and, indirectly, for their employers.

9. Second, the exception in Article 12A(3)(a) for amounts paid to employees for technical services would require reconsideration. Further, if countries are granted the right to tax the employment income of nonresident employees of resident employers, the question arises whether Article 12A should be extended to all payments for services by residents to nonresident service providers. In other words, there would be little or no justification for limiting Article 12A to fees for technical services.

10. Third, Article 15(1) would require amendment because employment income derived by a resident of a contracting state would no longer be taxable only in that state where the employment is exercised only in that state.

11. Fourth, variations on the basic fact situation dealt with in the paper on remote workers – an employer or client resident in one country and an employee or independent contractor resident and working in another country – would require consideration. To take just one example, what if an employee or independent contractor is resident in one country but works in another country? The result could be that all three countries would have the right to tax the income.

12. In summary, many consequential changes would be necessitated by a decision to grant taxing rights to countries in which resident employers pay nonresident employees, and these changes present a formidable challenge even if the tax policy case for the basic change is considered to convincing.

13. A similar tax policy issue arises with respect to other deductible payments made by a resident of one contracting state to residents of the other contracting state. One such situation that may raise tax policy concerns for some countries involves the taxation of pensions under Article 18 of the United Nations Model Convention. For example, some countries allow deductions for employee and employer contributions to pension plans and then impose tax on the pension payments when received by the employee after retirement. This scheme operates appropriately where the employee remains a resident of the country after retirement. However, if an employee becomes a resident of another country after retirement, under Article 18(1) of the United Nations Model Convention, only the country of residence is entitled to tax the pension payments. Under Article 18(2), the country in which the person paying the pension is resident or has a PE or fixed base is entitled to also tax the pension payments subject to providing relief from double taxation by allowing a credit for the other country's tax on the pension. This issue arises irrespective of whether employees work remotely for their employers during their working lives.