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

New York, 3-6 April 2017

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

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

Secretariat note:

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

Introduction – Purpose of this Note

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

27. The broader issue arose as to whether Committee Members should include minority views corresponding to the views expressed by their countries in relation to the OECD Model Convention (observations, reservations or positions). The secretariat was requested to prepare a short paper on the options for dealing with minority views, for the Committee's consideration at its fourteenth session, under an agenda item addressing "Other matters for consideration, including suggestions for Committee procedures and future Committee work". It was decided not to "date stamp" minority views as having been expressed at a particular session, e (edTo6 ex)-14 (p)-4 DC 8.

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

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

Views Corresponding to Country Positions on Quoted OECD Commentary

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

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

¾ paragraph 22 of the Introduction to the Model already sufficiently incorporates by reference the existence of such views when it notes that:

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

- ¾ such an approach could also be seen as creating "ambulatory" difficulties since observations and positions on the OECD Model may change over time – will a view corresponding to a later expressed position on the OECD Model need to be removed from the UN Model Commentaries, and how might such removal be (mis)interpreted;
- ¾ the general reference to observations, reservations and positions on the OECD Model is useful to understanding that Model, and commentaries on it, but (unless perhaps all these were quoted as relate to quoted parts of the Commentary) they may legitimately need to be brought to the attention of readers of the UN Model, to accurately reflect its operation in practice, and help decide which observations and reservations have had special significance in the UN debate, and to make clear the limits of acceptance of the quoted OECD text as written;
- ¾ the UN Model should reflect at least a diverse a group of views as the OECD Model in the Commentaries themselves, especially as it lacks a similar system of formal observations, reservations and positions as the OECD Model has, and therefore the views and jurisprudence referred to should not be *de facto* limited by OECD coverage of a view;
- ¾ further, the reference to observations, reservations and positions in the introduction to the UN Model may not be interpreted as "picking up" all the observations and reservations as being agreed

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

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

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

Making the Views of Absent Members Known

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

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

21. Even so, some protocols, such as a need to circulate bc 0 Tw 615 Td 04 ()TJ -24 Tw [r6C6 (ot)5 (

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

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

Subcommittee balance

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

Other Procedural Issues

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

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

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

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

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

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71. There was **some discr16 Td 0()Tj EMC00(9 (h)-8Ce)8 (r)8n t7 EMC pr28.1 (e)8 (s26.9 (e)8 (nt**

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

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

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