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## **I. Introduction**

1. In order to facilitate the discussion regarding the UN Commentaries this paper attaches two Tables. Table I shows all the quotations in the 2001 UN Commentaries derived from the OECD 1997 Model; Table II deals with the existing differences between both Models, whether there is a UN specific Commentary on such differences and in which case there may be a need for improvement. We have tried to be as accurate as possible but the papers should be understood as draft documents elaborated to be a basis for discussion. This Note is based on the work done by the Working Group on General Issues in the Review of Commentaries of the UN Model Convention (Mr. Kharbouch, Mr. Groppoli and Ms. Kana).

## **II. Relation between the UN Commentaries and the OECD Commentaries**

2. The 2001 UN Model Commentaries extensively quote the OECD Commentaries (in the 1997 version) where the text of both Models is the same (see Table I). Such situation entails some uncertainties regarding the interpretative value of the OECD Commentaries where they are quoted by the UN Model.

3. In fact, as discussed during the fourth meeting of the Committee of Experts, there is no consensus among the members of the Committee about the status of those OECD Commentaries incorporated in the UN Model.

4. Such problem is reflected in the wording of paragraph 9 of the Introduction to the UN Model which states at paragraph 9: *“The United Nations Secretariat therefore prepared a draft model convention [...] consisting of articles reproducing the guidelines formulated by the Group of Experts, together with Commentaries thereon incorporating the views of the members of the Group as expressed at its various meetings and also reproducing, where appropriate, the Commentaries on the Articles of the 1977 Model Double Taxation Convention on Income and on Capital of the Organization for Economic Co-operation and Development, hereafter referred to as the OECD Model Convention. It may be recalled that in preparing the aforementioned guidelines the Group of Experts had decided to use the OECD Model Convention as its main reference text in order to take advantage of the accumulated technical expertise embodied in that Convention and the Commentary thereon, and also for reasons of practical convenience stemming from the fact that the Convention was being used by OECD member countries in the negotiation of tax treaties not only with each other but also with developing countries. However, it was fully understood that there was no presumption of correctness to be accorded to the OECD Model Convention, and that the decisions of the Group were in no way required to be governed by the OECD text.”*

5. It is not clear from this explanation whether text of the OECD Commentaries incorporated into the UN Model constitutes important guidance in itself when interpreting the UN Model or if it is merely of an illustrative value. From the actual text it is not always possible to know what consideration has been given to the OECD text, and as the Introduction specifically

establishes that the OECD Model Convention (presumably including its Commentaries) is not presumed to be correct, the intention of the UN Model may need to be clarified. It also seems confusing that a UN Commentary, before quoting the relevant OECD Commentary, often incorporates throughout its text wording like: “*The OECD Commentary further observes*”, without making any assessment of its immediate relevance to the UN Model clauses.

6. There is also uncertainty in relation to subsequent modifications carried out to the OECD Commentary when the OECD Model text has not changed and the UN Commentary has quoted a previous version of the OECD Commentary. For example, should the modified OECD Commentary have any interpretative value for the UN Model at all? Or is it only the quoted version of the OECD Commentary which should be the applicable instrument for interpretation of the UN Model?

7. In order to provide further clarity it appears necessary to focus the work of the UN Committee on the specific UN Model text which differs from the OECD Model. As shown by Table II there are several clauses where the UN Model distinguishes itself from the OECD Commentary and where there may be a need for further work and clarification by the Committee.

8. The Committee may also want to consider the appropriateness of having UN Commentaries without references to OECD Commentaries, due in particular to the problematic issues referred to above.

9. Undoubtedly, the work and experience included in the OECD Commentaries is of importance for interpretation and common understanding of tax treaties and therefore the UN Model may want to acknowledge such situation. The technical issues and format of which should be decided on by the Committee.

10. In summary, it is suggested to discuss the following issues:

1. What should be the focus of the work on the UN Commentaries?
  2. Inclusion of OECD Commentaries in the UN Model?
  3. Interaction between UN and OECD Models?
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**Table I. UN Commentary 2001 - Quotation of OECD Commentary 1997**

Article	Quotation
<p><b>Article 1. Persons Covered.</b></p> <p>A. General considerations.</p>	<p>UN Model para. 8 reproduces paras. 7 to 10 OECD Model.  UN Model para. 9 reproduces paras. 13, 15 and 17 OECD Model.  UN Model para. 10 reproduces para. 21 OECD Model.  UN Model, para. 11 reproduces para. 22 to 26 OECD Model.</p>
<p><b>Article 2. Taxes covered by the Convention.</b></p> <p>A. General considerations</p> <p>B. Commentary on the paragraphs of Article 2</p>	<p>UN Model para. 2 reproduces para. 1 OECD Model.</p> <p>UN Model para. 2 reproduces paragraph 4 and 5, OECD Model.</p>
<p><b>Article 3. General definitions.</b></p> <p>B. Commentary on the paragraphs of Article 3.</p>	<p>UN Model para. 12 reproduces para. 13.1 OECD Model.  UN Model para. 13 reproduces paras 12 and 13 OECD Model.</p>
<p><b>Article 4. Resident.</b></p> <p>A. General considerations.</p> <p>B. Commentary on the paragraphs of Article 4.</p>	<p>UN Model para. 1 reproduces para. 1 OECD Model.  UN Model para. 2 reproduces paras 3 to 5 OECD Model.</p> <p>UN Model, para. 4, reproduces paragraph 8, OECD Model.  UN Model, para. 6 reproduces para. 8.1 OECD Model.  UN Model para. 7 reproduces paras. 9 to 20, OECD Model.  UN Model, para. 8 quotes paragraphs 21 and 22 OECD Model  UN Model, para. 9 reproduces paras. 23 and 24 OECD Model.</p>
<p><b>Article 5. Permanent establishment.</b></p> <p>B. Commentary on the paragraphs of Article 5.</p>	<p>UN Model para. 3 reproduces paras. 2, 3, 4, 5, 6, 7, 8, 10, and 11, OECD Model.  UN Model para. 4 reproduces paras. 13 and 15 OECD Model.  UN Model para. 11 reproduces paras. 18 to 20 OECD Model.  UN Model para. 15 reproduces paras. 16 to 17 OECD Model.  UN Model para. 20 reproduces paras. 21 and 27, OECD Model.  UN Model para. 21 reproduces paras. 23, 24, 25, 26, 28, 29 and 30 OECD Model.  UN Model para. 23 reproduces paragraphs 32 and 33, OECD Model.  UN Model para. 28 reproduces paragraphs 36 to 38 OECD Model.  UN Model para. 32 reproduces paras. 40, 41 and 42 OECD Model.</p>

<p><b>Article 6. Income from Immovable Property.</b></p> <p>B. Commentary on the paragraphs of Article 6.</p>	<p>UN Model para. 6 reproduces para. 1 OECD Model. UN Model para. 9 reproduces para. 4 OECD Model.</p>
<p><b>Article 7. Business Profits.</b></p> <p>A. General Considerations</p> <p>B. Commentary on the paras. of Article 7</p>	<p>UN para. 6 reproduces para. 1 and 2 OECD Model.</p> <p>UN Model para. 9 reproduces paras. 3 to 10 OECD Model.</p> <p>UN Model para. 16 reproduces paras. 11, 12, 12.1, 12.2, 13, 14, 15, 15.1, 15.2, 15.3 and 15.4 OECD Model.</p> <p>UN Model para. 19 reproduces paras. 16, 17, 17.1, 17.2, 17.3, 17.4, 17.5, 17.6, 17.7, 18, 18.1, 18.2, 18.3, 19, 21, 22, 23 and 24 OECD Model.</p> <p>UN Model para. 22 reproduces para. 25, 27 and 28, OECD Model.</p> <p>UN Model para. 23 reproduces para. 31 OECD Model.</p> <p>UN Model para. 24 reproduces paras. 32 to 37 OECD Model.</p>
<p><b>Article 8. Shipping, Inland waterways transport and air transport (alternatives A and B).</b></p> <p>B. Commentary on the paras. of Articles 8A &amp; 8B.</p>	<p>UN Model para. 1 of Article 8 (alternative A) - paragraph 10 of the UN Commentary reproduces paras. 3 to 14 OECD Model.</p> <p>UN Model para. 2 Article 8 (alternative A) and para. 3 of Article 8 (alternative B) - paragraph 16 of the UN Commentary reproduces paras. 19 to 21 OECD Model.</p> <p>UN Model para. 3 of Article 8 (alternative A) and para. 4 of Article 8 (alternative B) - paragraph 17 of the UN Commentary reproduces para. 22 OECD Model.</p> <p>UN Model para. 4 of Article 8 (alternative A) and para. 5 of Article 8 (alternative B): paragraph 18 of the UN Commentary reproduces paragraphs 23 and 24 OECD Model.</p>
<p><b>Article 9. Associated Enterprises.</b></p> <p>A: General Considerations.</p> <p>B. Commentary on the paras of Article 9.</p>	<p>UN Model para. 1 reproduces para. 1 OECD Model.</p> <p>UN Model para. 6 reproduces paras. 3 to 11 OECD Model.</p>
<p><b>Article 10.174 Tcs47. -1.1d.</b></p>	



Commentary on the paragraphs of Article 18 B.	UN Model para. 13 reproduces paras. 4 to 37 OECD Model.
<b>Article 19. Government Services.</b>	UN Model para. 2 reproduces paras. 1, 2, 2.1, 2.2, 3, 4, 5 and 6 OECD Model.
<b>Article 20. Students.</b>	UN Model para. 2 reproduces paras. 1 and 2, OECD Model. UN Model para. 3 reproduces paras. 25 to 29, OECD Model.
<b>Article 21. Other Income.</b>	UN Model para. 3 reproduces paras. 2 and 3 OECD Model. UN Model para. 4 reproduces paras. 4 to 6 OECD Model. UN Model para. 7 reproduces paras. 7 to 12 OECD Model.
<b>Article 22. Capital.</b>	UN Model para. 3 reproduces paras. 1 to 7 OECD Model.
<b>Article 23. Methods for the elimination of double taxation.</b>	
A. General Considerations.	UN Model para. 14 reproduces paras. 1 to 32 OECD Model
B. Commentaries on paragraphs of Article 23A.	UN Model para. 14 reproduces paras. 33 to 36 OECD Model. UN Model para. 16 reproduces paras. 37 to 56, OECD Model.
C. Commentary on paragraphs of Article 23B.	UN Model para. 17 reproduces paras. 57 to 79, OECD Model.
<b>Article 24. Non-discrimination.</b>	UN Model para. 2 reproduces paras. 1 to 11, OECD Model. UN Model para. 3 reproduces paras. 2, 13, 14, 15, 16, 17 and 18, OECD. UN Model para. 4 reproduces paras. 19 to 54 OECD Model. UN Model para. 5 reproduces paras. 55 and 56 OECD Model.  UN Model para. 7 reproduces paras. 57 to 59 OECD Model. UN Model para. 11 reproduces para. 60 OECD Model.
<b>Article 25. Mutual Agreement Procedure</b>	UN Model para. 3 reproduces paras. 6 to 31 OECD Model. UN Model para. 4 reproduces paras. 32 to 37 OECD Model. UN Model para. 5 reproduces paras. 39 to 42 OECD Model. UN Model para. 9 reproduces paras. 44.1 to 44.7 OECD Model.
<b>Article 26. Exchange of information.</b>	
A. General considerations.	UN Model para. 3 reproduces paras. 1 to 3 OECD Model.
B. Commentaries on paragraphs of Article 26.	UN Model para. 26 reproduces paras. 5 to 19, OECD Model.
<b>Article 27. Members of diplomatic missions and consular posts.</b>	UN commentary reproduces paras. 1 to 5 of OECD Model.



**Table II. UN Model 2001<sup>1</sup> - OECD Model 2008**

**Article -Para.**

Art. 3 para 1 h)	Definition “business”	n/a	
Art. 4 para. 1.	“...the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof”.	“...the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, <b>place of incorporation</b> , place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof”.	There is specific UN Commentary. Further elaboration may be needed. (Para. 1 UN Commentary on Art. 4)

Art. 5 para. 5 b)      n/a

“b) Has no such authority,  
but habitually maintains  
in the first-mentioned

Art. 7 para 1 (limited force of attraction)	The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State
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		<p><b>establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices.</b></p>	
Art. 7 para. 5	No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods	NOTE: The question of whether profits should be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods	There is specific UN Commentary (Para. 21 UN Commentary on Art. 7)

	or merchandise for the enterprise	and merchandise for the enterprise was not resolved. It should therefore be settled in bilateral negotiations.)	
Art. 8	n/a	Art. 8 alternative B	There is specific UN Commentary (Para. 11 to 14 UN Commentary on Art. 8)
Art. 9 para. 3	n/a	The provisions of paragraph 2 shall not apply where judicial, administrative or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under paragraph 1, one of the enterprises concerned is liable to penalty with respect to fraud, gross negligence or wilful default.	There is specific UN Commentary ( Para. 9 UN Commentary on Article 9). Further elaboration may be needed.
Art. 10 para. 2	Limited dividend rates 10/15%	No proposed rates	There is specific UN Commentary. (Para. 4 to 13 UN Commentary on Art. 10)
Art. 10 para 4	n/a	References to independent personal services and fixed base	No specific UN Commentary
Art. 10 para. 5	n/a	References to independent personal services and fixed base	No specific UN Commentary
Art. 11 para. 4 (references to independent personal services and limited force of attraction)	The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, and the debt claim in respect of which the interest is paid is effectively connected with such permanent	The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, <b>or performs independent personal services from a fixed base situated therein</b> , and the debt claim in respect of which the interest is paid is	There is specific UN Commentary (Para. 21 UN Commentary on Art. 11). Further elaboration may be needed on references to independent personal services.



that other State  
independent personal  
services from a fixed base  
situated therein, and the  
right or property in  
respect of which the  
royalties are paid is  
effectively connected  
with (a) such permanent  
establishment or fixed  
base, or with (b) business  
activities referred to in



property situated in the other Contracting State may be taxed in that other State.

immovable property situated in a Contracting State may be taxed in that State. In particular: (1) Nothing contained in this paragraph shall apply to a company, partnership, trust or estate, other than a company, partnership, trust or estate engaged in the business of management of immovable properties, the property of which consists directly or

Art. 16 para. 2 (UN Model)	n/a	Salaries, wages and other similar remuneration derived by a resident of a Contracting State in his capacity as an official in a top-level managerial position of a company which is a resident of the other Contracting State may be taxed in that other State.	There is specific UN Commentary. (Para. 3 and 4 UN Commentary on Art. 16). Further elaboration may be needed.
Art. 17 para. 1-para 2		References to article 14	No specific UN Commentary.
Art. 18 para. 2 alternative A UN Model	n/a	“2. Notwithstanding the	

subdivision or a local  
authority thereof to an  
individual in respect of  
services rendered to

Art. 22. Note UN  
Model

		<b>procedure.</b>	
Art. 25 para 5	Arbitration clause	n/a	
Art. 26 para. 1 (UN Model as approved by the Committee on its 4 <sup>th</sup> session 2008)	The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by articles 1 and 2.	The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. <b>In particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes.</b> The exchange of information is not restricted by articles 1 and 2.	There is specific UN Commentary (Paras. 4.2.and 4.3 proposed UN Commentary on Art. 26)
Art. 26 para. 2	Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect	Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State. <b>However, if the information is originally regarded as secret in the transmitting State,</b> it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the	There is specific UN Commentary. (Paras. 11 to 14.1 proposed UN Commentary on Article 26 para.2)

of, or the determination  
of appeals in relation to,  
the taxes referred to in  
paragraph 1, or the  
oversight of the above.