UNITED
NATIONS

ST

Secretariat

Distr.
LIMITED

ST/SG/AC.8/1997/L.3
28 October 1997

ENGLISH ONLY

AD HOC GROUP OF EXPERTS ON INTERNATIONAL
COOPERATION IN TAX MATTERS
Eighth meeting
Geneva, 15-19 December 1997

THE UNITED NATIONS MODEL IN PRACTICE*

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97-29593 (E) 031197

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FOREWORD

This paper was written specially for the UN Ad Hoc Group of Experts on International Cooperation in Tax Matters, for presentation at the Group's eighth meeting in Geneva in December 1997. It summarizes the results of an extensive research project, carried out by the International Bureau of Fiscal Documentation, on the impact of the UN Model Double Taxation Convention Between Developed and Developing Countries.

The research project was carried out under the leadership of Prof. Wim Wijnen, the head of the research staff of the IBFD. Substantial assistance with the research project was received from Dott. Marco Magenta. The IBFD wishes to thank Studio Associato Legale Tributario in Milan for generously making Dott. Magenta available for three months.

The authors present this paper in the knowledge that they cannot promise to have been complete but in the hope that their work will provide some new insights to the reader.

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CHAPTER I

INTRODUCTION

The aim of this paper is to assess the impact of the UN Model Double Taxation Convention Between Developed and Developing Countries (the UN Model) on current tax treaty practice. It is based on an extensive research project in which 811 concluded treaties were scrutinized in order to ascertain whether they adopt the distinctive provisions of the UN Model. These provisions were determined by comparing the UN Model with the OECD Model Tax Convention on Income and Capital (OECD Model) of 1977. The changes made to the OECD Model in 1992 and subsequently were not taken into account.

The research project was carried out using the IBFD Tax Treaty Database. It covered all comprehensive tax treaties concluded from 1 January 1980, the year in which the UN Model was published, to 1 April 1997, the date of the most recent version of the Tax Treaty Database. The treaties concluded by the former USSR and the former Republic of Yugoslavia that continue to be applied by a number of new states in that region of the world were counted only once.

For the purposes of this research project a distinction had to be drawn between developed and developing countries. Such a distinction inevitably carries an element of subjectivity, and so this invidious task was considerably simplified by reference to membership of the OECD when the UN Model was published. The 24 countries that were a member of the OECD in 1980 were regarded as developed countries and all other countries were regarded as developing countries, regardless of their actual stage of development. This meant, for example, that Mexico and Hungary, which joined the OECD only recently, were counted as developing countries.

In the first instance the research focused on the tax treaties concluded by developing countries with either a developed or another developing country. This group, referred to as Group A in this paper, comprised 697 treaties. The project also looked at the tax treaties concluded between OECD countries. This group comprised 114 treaties and is referred to as Group B.

The following provisions that are specific to the UN Model were scrutinised:

Art. 5(3)(a)	construction activities
Art. 5(3)(b)	furnishing of services
Arts. 5(4)(a) and (b)	delivery of goods
Art. 5(4)(f) OECD	combination of activities
Art. 5(5)	stock agents
Art. 5(6)	insurance activities
Art. 5(7)	agents with one principal
Art. 7(1)	limited force of attraction

Art. 7(3)	management fees, interest and royalty payments
Art. 7(5) OECD	purchase of goods
Art. 8B	shipping profits
Art. 12(3)	radio and television broadcasting
Art. 13(4)	real property shares
Art. 13(5)	other shares
Art. 14(1)	additional criteria
Art. 16(2)	top-level managerial officials
Art. 18B(1) and (2)	pensions
Arts. 18A(2) and 18B(3)	social security payments
Art. 20(2)	equal treatment of students
Art. 21(3)	source state taxation of other income
Art. 25(4)	implementation clauses
Art. 26(1)	prevention of tax fraud/evasion, secret information and implementation

The provisions relating to the withholding taxes on dividends, interest and royalties were not examined as the UN Model, unlike the OECD Model, does not recommend a particular percentage for these categories of income. In this respect any withholding rate, including the rates recommended by the OECD Model, is consistent with the UN Model. A more fundamental aspect that was not examined is the omission from the UN Model of the second sentence of Art. 4(1) of the OECD model, which limits the treaty concept of residence. The inclusion or omission of this provision is so intertwined with the rest of the treaty and the domestic law of the treaty partners that it would have been impossible to consider it without extending the project to Herculean proportions.

Even the most cursory glance at a number of concluded treaties is sufficient to reveal the tremendous variety that can be achieved within the confines of a seemingly simple and rigid framework. The authors of this paper had no choice but to select the most important and commonly occurring variations for comment. Nevertheless, where it was felt appropriate, some provisions of particular interest are mentioned even though they are found in only a very limited number of treaties. Chapter II of this paper sets out the detailed results of the research and Chapter III summarizes the results in a schematic form.

CHAPTER II

Art. 5(3)(a)
Construction activities

1. The UN Model

Art. 5(3)(a) of the UN Model reads as follows:

> (3) *The term "permanent establishment" likewise encompasses:*
> a) A building site, a construction, *assembly* or installation project *or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than six months;*
> b) *(...).*

The relevant differences between the construction clause of the OECD and the UN Model refer to:
a) the inclusion of supervisory activities, and
b) the minimum period of six months.

2. Tax treaties

a. Supervisory activities

According to the OECD Commentary supervisory activities are explicitly subsumed under the construction clause provided the work is performed by the main contractor himself. However, supervisory activities performed by a sub-contractor who is not engaged in the physical work do not constitute a permanent establishment. In this respect the UN Model departs from the OECD Model. According to the UN Model, supervisory activities may constitute a permanent establishment irrespective of whether they are performed by the main or subcontractor and irrespective of whether the contractor is physically involved in the work.

There are 449 treaties in which supervisory activities are included as one of the elements that may constitute a permanent establishment. Of these treaties 410 have been concluded by developing countries, with either a developed or another developing country (group A), and 39 have been concluded between developed countries (group B).

b. Minimum period

There are 513 treaties that prescribe a minimum period shorter than the 12 months recommended by the OECD Model. Of these treaties 484 have been concluded by developing countries, with either a developed or another developing country (group A), and 29 have been concluded between

developed countries (group B). Of the 29 treaties in group B, 5 prescribe a 9-month period and 24 prescribe a 6-month period. The following periods shorter than 12 months are found in the treaties:

Number of treaties	Period in	
	days	months
50	-	9
2	275	-
2	-	8
1	-	7
355	-	6
58	183	-
1	-	5
5	120	-
29	-	3
3	90	-
7	0*	0*

*No minimum period is included.

There are 298 treaties that prescribe a minimum period of 12 months or longer. Of these treaties 215 have been concluded by developing countries, with either a developed or another developing country (group A), and 83 have been concluded between developed countries (group B). All treaties in group B prescribe a 12-month period.

The following periods of 12 months or longer are found in the treaties:

Number of treaties	Period in	
	days	months
2	-	36
4	-	24
3	-	18
289	-	12

For the sake of completeness it should be mentioned that a few treaties contain different limits for the various types of construction activity.

Art. 5(3)(b)
Furnishing of services

1. The UN Model

Art. 5(3)(b) of the UN Model reads as follows:

> *(3) The term "permanent establishment" likewise encompasses:*
> *a) (...);*
> *b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the country for a period or periods aggregating more than six months within any 12-months period.*

This provision is not specifically included in the OECD Model.

2. Tax treaties

There are 221 tax treaties with a specific provision for the furnishing of services. Of these treaties 219 have been concluded by developing countries, with either a developed or another developing country (group A), and 2 have been concluded between developed countries (group B).

The following periods are found in the treaties:

Number of treaties	Period in	
	days	months
1	-	18
19	-	12
9	-	9
2	275	-
1	-	8
111	-	6
34	183	-
3	-	4
6	120	-
23	-	-
2	91	-
5	90	-
5	0*	0*

*No minimum period is adopted.

In 10 treaties concluded by developing countries (group A) a distinction is made between services performed for unrelated enterprises and services performed for related enterprises. In these treaties a minimum period applies to services performed for unrelated enterprises and no minimum period or a shorter minimum period applies to services performed for related enterprises. Seven treaties prescribe no minimum period in situations involving related parties and 3 treaties prescribe a shorter period than for situations involving unrelated parties (i.e. 30 days instead of 90 days).

The two treaties between developed countries (group B) prescribe the 6-month period recommended by the UN Model.

Art. 5(4)(a) and (b)

Delivery of goods

1. The UN Model

Art. 5(4)(a) and (b) read as follows:

> (4) Notwithstanding the preceding provisions of this article, the term "permanent establishment" shall be deemed not to include:
>
> a) The use of facilities solely for the purpose of storage *or* display // of goods or merchandise belonging to the enterprise;
>
> b) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage *or* display //; (...).

In this paragraph the term "delivery" as provided in the corresponding provisions of the OECD Model is omitted.

2. Tax treaties

There are 167 tax treaties that do not list "delivery" as one of the activities that do not constitute a permanent establishment. All these treaties are concluded by developing countries, with either a developed or another developing country (group A).

Art. 5(4)(f) OECD

Combination of activities

1. The UN Model

The UN Model does not include the provision contained in Art. 5(4)(f) of the OECD Model which is formulated as follows:

> "the maintenance of a fixed place of business solely for any combination of activities, mentioned in sub-paragraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character".

2. Tax treaties

In line with the UN Model, no provision for the combination of activities is adopted in 264 treaties. Of these treaties 233 have been concluded by developing countries, with either a developed or another developing country (group A), and 31 have been concluded between developed countries (group B).

Art. 5(5)(b)
Stock agents

1. The UN Model

Art. 5(5)(b) of the UN Model reads as follows:

> (5) Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 7 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such person:
>
> a) Has and habitually exercises in that State an authority to conclude contracts .....; *or*
>
> b) *Has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.*

This subparagraph b extends the concept of an "agent".

2. Tax treaties

There are 243 treaties with a specific provision for stock agents. Of these treaties, 234 have been concluded by developing countries, with either a developed or another developing country (group A) and 9 have been concluded between developed countries (group B).

These provisions differ in wording, albeit not in content. Thus, in 62 of these treaties reference is made to the fulfilment of orders or to the supply of goods rather than to the delivery of goods.

In addition to the provision for stock agents, 56 of these treaties include a specific provision for agents who habitually secure orders for the sale of goods or merchandise. Further, 30 of these treaties include a specific provision for agents who manufacture or process goods. An example of the first type of provision is:

> *c) he habitually secures orders for the sale of goods or merchandise in the first mentioned State, wholly or almost wholly on behalf of the enterprise itself, or on behalf of the enterprise and other enterprises controlled by it or which have a controlling interest in it.*

An example of a provision for agents who manufacture goods is:

> *c) he manufactures, assembles, processes, packs or distributes in the first-mentioned State for the enterprise goods or merchandise belonging to the enterprise.*

Finally, in two treaties the specific provision for stock agents applies only in the case of abuse. This provision reads as follows:

> *b) (stock agent) ... The foregoing provision of this subparagraph shall apply only if it is proved that in order to avoid taxation in the first-mentioned State, such person undertakes not only the regular delivery of the goods or merchandise, but also undertakes virtually all the activities connected with the sale of goods or merchandise except for the actual conclusion of the sales contract itself.*

Art. 5(6)

Insurance activities

1. The UN Model

Art. 5(6) of the UN Model reads as follows:

> *(6) Notwithstanding the preceding provisions of this article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.*

This provision is not included in the OECD Model. The provision broadens the definition of permanent establishment by including the following activities carried on by insurance enterprises:

a) the collection of premiums
b) the insurance of risks

These activities qualify as a permanent establishment only if they are not performed through an agent of an independent status.

2. Tax treaties

There are 210 tax treaties with a specific provision for insurance activities. Of these treaties 184 have been concluded by developing countries, with either a developed or another developing country (group A), and 26 have been concluded between developed countries (group B).

It should be noted, however, that only in 137 treaties (5 of which belong to group B) insurance activities are deemed to constitute a permanent establishment as provided by the UN Model. In the remaining 73 treaties (21 of which belong to group B) the same result is achieved by adopting in Article 7 or in the protocol to Article 7 a provision stating that the provisions of Article 7 do not affect the application of domestic law regarding the taxation of profits from insurance business.

In 7 treaties in group A the right of the source state to tax profits from insurance activities is limited to 2.5% of the gross amount of the premiums. In one of these treaties this limitation applies only to profits from reinsurance activities while the right to tax profits from insurance activities remains unlimited.

Art. 5(7)

Agents with one principal

1. The UN Model

Art. 5(7) of the UN Model reads as follows:

> (7) An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent, or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. *However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.*

The second sentence of this provision extends the scope of the permanent establishment concept by treating an agent who acts wholly or almost wholly for one principal as a dependent agent.

2. Tax treaties

There are 243 tax treaties with a specific provision for agents with only one principal. All these treaties have been concluded by developing countries, with either a developed or another developing country (group A).

In 54 of these treaties the scope of this provision is limited to cases in which the transactions between the agent and the enterprise are not on an arm's length basis. An example of such an additional clause is: *"(...) if the transactions between the agent and the enterprise were made under conditions which differ from those which would be made between independent enterprises."* In 5 of these treaties the taxpayer is given the possibility of demonstrating that the transactions were concluded in arm's length conditions.

In 22 of these treaties this specific provision not only covers activities performed by the agent on behalf of the enterprise itself, but also activities on behalf of associated enterprises. In that case the provision may be formulated as follows: "However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise *itself or on behalf of that enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise,* he will not be considered an agent of an independent status within the meaning of this paragraph."

Art. 7(1)
Limited force of attraction

1. The UN Model

Art. 7(1) contains a force of attraction which is limited as follows:

> (1) 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 but only so much of them as is attributable to (a) that permanent establishment; *(b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.*

Clauses (b) and (c) strengthen the position of the source state by extending its right to tax to profits from business activities that are not carried out by an enterprise through its permanent establishment. The source state may attribute such non-p.e. profits to a permanent establishment of the enterprise if they are derived from the sale of goods or merchandise or any other business activity in the source state, provided that these transactions are similar to those concluded through the permanent establishment.

2. Tax treaties

There are 162 treaties with a limited force of attraction rule. Of these treaties 153 have been concluded by developing countries, with either a developed or another developing country (group A), and 9 have been concluded between developed countries (group B).

In 38 of these treaties (one of which belongs to group B) the enterprise may prove that the transactions or activities were genuinely carried out otherwise than through the permanent establishment. The wording of this provision differs in the various treaties. Two frequently recurring examples are:

> *However, the profits derived from the sales described in subparagraph (b) or other business activities described in subparagraph (c) shall not be taxable in the other State if the enterprise demonstrates that such sales or business activities have been carried out for reasons other than obtaining a benefit under this convention.*

The provisions of subparagraph (b) and (c) shall not apply if the enterprise shows that such sales or activities could not reasonably have been undertaken by that permanent establishment.

In 19 of these treaties (five of which belong to group B) the limited force of attraction rule applies only in cases of tax avoidance or abuse. In this case the burden of proof is on the tax authorities. An example of such a provision is:

The provisions of subparagraph (b) and (c) shall only apply provided that it is proved that the transaction concerned has been resorted to in order to avoid taxation in the Contracting State where the permanent establishment is situated.

In 12 treaties (three of which belong to group B) the limited force of attraction rule applies only if there is some connection with the permanent establishment. An example of such a provision is:

The provisions of subparagraph (b) and (c) shall only apply provided that the permanent establishment has contributed in any manner in those sales or activities.

In 6 treaties in group A the scope of the limited force of attraction rule is restricted; the rule applies only to sales of goods or merchandise and business activities of the *same* kind as those sold or effected through the permanent establishment, not to *similar* sales and activities.

One treaty in group A refers only to sales, not to other business activities.

Art. 7(3)

Management fees, interest and royalty payments

1. The UN Model

Art. 7(3) of the UN Model reads as follows:

(3) In *the determination* of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes *of the business* of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere. *However, no such deduction shall be allowed in respect of amounts, if any, paid (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 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.

In this paragraph the principles laid down in the first sentence are defined and clarified in the second and third sentences.

2. Tax treaties

There are 201 treaties that include a clarification with respect to the determination of the profits of a permanent establishment. Of these treaties 195 have been concluded by developing countries, with either a developed or another developing country (group A), and 6 have been concluded between developed countries (group B).

Art. 7(5) OECD

Purchase of goods

1. The UN Model

The UN Model does not include the provision contained in Art. 7(5) of the OECD Model which is formulated as follows:

> No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

2. Tax treaties

In line with the UN Model the above-mentioned provision is omitted from 45 treaties. All these treaties have been concluded by developing countries, with either a developed or another developing country (group A).

Art. 8 B
Shipping profits

1. The UN Model

Art. 8 B(2) of the UN Model reads as follows:

> *Profits from the operation of ships in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated unless the shipping activities arising from such operation in the other Contracting State are more than casual. If such activities are more than casual, such profits may be taxed in that other State. The profits to be taxed in that other State shall be determined on the basis of an appropriate allocation of the over-all net profits derived by the enterprise from its shipping operations. The tax computed in accordance with such allocation shall then be reduced by ▩ per cent. (The percentage is to be established through bilateral negotiations.) (...)*

This provision attributes to the source state a limited right to tax shipping profits, if the shipping activities in the source state are more than casual.

2. Tax treaties

There are 108 treaties providing for source state taxation with respect to shipping profits. Of these treaties 105 have been concluded by developing countries, with either a developed or another developing country (group A), and 3 have been concluded between developed countries (group B).

3. Deviations from the UN Model

A number of treaties contain provisions similar to, but deviating from, the UN Model. The most relevant deviating provisions can be summarized as follows:

- in 4 treaties in group A the taxing right of the source state is unlimited;
- in 101 treaties in group A and 3 in group B the right of the source state to tax is not dependent on the activities being "more than casual". Consequently, under these treaties it is irrelevant whether there is a scheduled or planned visit of a ship to a particular country to pick up freight or passengers;
- in 14 treaties in group A the scope of the provision is extended to air transport profits;
- 5 treaties in group A provide for a limited taxing right during the first 10 fiscal years after the entry into force of the treaty. After that period the source state loses its right to tax profits of shipping enterprises of its treaty partner.

In 3 treaties in group A the taxing right of the source state is limited to profits from the operation of ships between ports of the source state and ports of third states. Profits from operations between ports of the source state and ports of the treaty partner state are therefore not subject to tax in the source state.

4. Limitations to the taxing right of the source State

There are various types of limitation in the 104 treaties that provide for a limited right to tax in the source state. These limitations can be summarized as follows:

- 59 treaties in group A and 3 in group B provide for a reduction of the tax imposed by the source state by 50%;

- 1 treaty in group A provides for a reduction of the tax imposed by the source state by 2/3;

- 5 treaties in group A provide for a reduction of the tax imposed by the source state of 50% during the first 5 years after the entry into force of the treaty and of 25% during the subsequent 5 years;

- 8 treaties in group A allow a withholding tax to be levied on the gross amount of the receipts derived in the source state. The withholding percentages vary from 1% to 3%;

- 5 treaties in group A provide for a maximum taxation in the source state equal to the lesser of 50% of the tax imposed by domestic law and a certain percentage of the gross receipts derived in that state. The percentage varies from 2% to 4%;

- 13 treaties provide that the tax charged by the source state *"shall not exceed the lesser of: (a) 1.5% of the gross revenue derived from sources in that State; and (b) the lowest rate of (name of one Contracting State) tax that may be imposed on profits of the same kind derived under similar circumstances by a resident of a third State"*. In one of these treaties, the percentage in (a) is 1% rather than 1.5%;

- 10 treaties provide that (a) the tax imposed by the source state is to be reduced by 50% and (b) the taxable profits are to be deemed not to exceed a certain percentage of the gross receipts. The percentage varies from 5% to 7.5%.

Art. 12(3)

Radio or television broadcasting

1. The UN Model

The royalty definition of Art. 12(3) of the UN Model reads as follows:

> (3) The term "royalties" as used in this article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, *or films or tapes used for radio or television broadcasting*, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.

The OECD Model does not include in the definition of the term "royalties" payments made as a consideration for the use of, or the right to use, films or tapes used for radio or television broadcasting.

2. Tax treaties

There are 712 treaties that mention films or tapes used for radio or television broadcasting in the royalty definition. Of these treaties 610 have been concluded by developing countries, with either a developed or another developing country (group A), and 102 have been concluded between developed countries (group B).

It should be mentioned, however, that radio broadcasting is not mentioned in 39 treaties in group A and 6 treaties in group B. Further, 6 treaties in group A and 5 in group B include a generic reference to sound and video recording or to all means of reproduction of sound and image, while television and radio broadcasting are not expressly mentioned.

Art. 13(4)
Real property shares

1. The UN Model

Art. 13(4) of the UN Model reads as follows:

> *(4) Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State.*

This provision is not specifically included in the OECD Model.

2. Tax treaties

There are 374 treaties with a specific provision for real property shares. Of these treaties 308 have been concluded by developing countries, with either a developed or another developing country (group A), and 66 have been concluded between developed countries (group B). In a number of these treaties real property shares are not dealt with in a separate paragraph, but together with gains on the alienation of real property in the first paragraph of the capital gains article.

In many treaties real property shares quoted on an approved stock exchange are excluded from this special regime. On the other hand quite a number of treaties specifically include interests in real property partnerships and/or trusts.

In 9 treaties the special regime for real property shares applies only if the participation exceeds a certain limit.

Art. 13(5)
Other shares

1. The UN Model

Art. 13(5) of the UN Model reads as follows:

> *(5) Gains from the alienation of shares other than those mentioned in paragraph 4 representing a participation of ... per cent (the percentage is to be established through bilateral negotiations) in a company which is a resident of a Contracting State may be taxed in that State.*

Under the OECD Model the right to tax capital gains on the alienation of shares is attributed to the state of which the alienator is resident, whereas under the UN Model this right is attributed to the state of which the company is resident (the source state).

2. Tax treaties

There are 384 treaties which more or less follow the recommendation of the UN Model. Of these treaties 322 have been concluded by developing countries, with either a developed or another developing country (group A), and 62 have been concluded between developed countries (group B).

In all these treaties the taxing right on capital gains on shares is explicitly attributed to the source state. It should be mentioned, however, that the same result may be achieved without such an explicit attribution. This is the case if, for example, the capital gains article does not contain a sweeping clause and there is no other income article, or there is an other income article that is in conformity with Art. 21(3) of the UN Model. Such situations in which the source state can apply its domestic legislation are not included in the above-mentioned figures.

Further, it should be mentioned that the structure and wording of the regime for capital gains on shares in many treaties deviate considerably from the recommendation of the UN Model set out above. The complexity of this regime in many treaties makes it difficult to consider its elements in isolation rather than in their entire context. Nevertheless, a few general remarks can be made.

In many treaties the taxation right attributed to the source state is limited:

- in 82 treaties in group A and 25 treaties in group B the source state has only the right to tax capital gains on shares derived by individuals who emigrated to the treaty partner state. In most of these treaties this taxation right is limited to a certain period after emigration;

- in 13 treaties in group A the tax that the source state may levy on capital gains on shares is explicitly limited to a certain percentage varying from 10 to 25%;

- in 7 treaties in group A and 1 in group B the taxation right of the source state is limited by the exclusion of capital gains realised in the course of a corporate organisation, reorganisation, amalgamation, division or similar transaction;

- in 2 treaties in group A and 3 in group B the taxation right of the source state is limited to cases in which the shares are sold to a resident of the source state.

In 228 treaties in group A and 50 treaties in group B no minimum participation requirement is adopted. Of the remaining 106 treaties 44 have a participation requirement based on the shares sold and 62 have one based on the shares owned by the seller.

Art. 14(1)
Additional criteria

1. The UN Model

Art. 14(1) of the UN Model reads as follows:

> (1) Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State *except in the following circumstances, when such income may also be taxed in the other contracting State:*
>
> a) If he has [] a fixed base *regularly available to him in the other Contracting State for the purpose of performing his activities; in that case,* only so much of *the income* as is attributable to that fixed base *may be taxed in that other Contracting State; or*
>
> *b) If his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State; or*
>
> *c) If the remuneration for his activities in the other Contracting State is paid by a resident of that Contracting State or is borne by a permanent establishment or a fixed base situated in that Contracting State and exceeds in the fiscal year... (the amount is to be established through bilateral negotiations).*

The principal differences between the independent personal services provisions of the OECD and the UN Models are to be found in the criteria based on:

a) a length of stay of 183 days, and
b) an amount of remuneration.

2. Tax treaties

a. The length of stay

In comparison with the OECD Model the source state's right to tax is extended by a provision that it may tax if a professional is present in that state for at least 183 days in a fiscal year, even if there is no fixed base.

There are 284 tax treaties with a length of stay criterion. Of these treaties, 264 have been concluded by developing countries, with either a developed or another developing country (group A), and 20 have been concluded between developed countries (group B).

The following periods are found in the treaties:

Number of treaties	Length of stay in	
	days	months
225	183 days	
1	182 days	
2	180 days	
1		6 months
17	120 days	
2	91 days	
36	90 days	

There are no treaties between developed countries that prescribe a period shorter than 183 days.

The length of stay must be computed over the fiscal year, a period of 12 months or the calendar year. One treaty, however, provides for a length of stay (183 days) to be computed over two consecutive years.

No fixed base criterion has been adopted in 46 of these treaties, two of which have been concluded between developed countries. In one treaty in group A neither a fixed base nor a 183 days' presence in the source state is per se sufficient to attribute a taxing right to the source state, but both criteria must be met at the same time.

In two treaties in group A the right to tax is attributed to the source state if a fixed base is maintained in that state for at least 183 days. In this case, the existence of the fixed base is irrelevant if it is not maintained for a period of at least 183 days. On the other hand, the fact that a professional stays in the source state for more than 183 days is also not relevant in the absence of a fixed base maintained for the said period.

b. The amount of remuneration

In the UN Model the source state's right to tax is extended by a provision that the source state may tax any remuneration for independent personal services that exceeds a certain amount.

There are 45 tax treaties that include a criterion based on the amount of remuneration. All these treaties have been concluded by developing countries, with either a developed or another developing country (group A).

No fixed base criterion has been adopted in 14 of these treaties; two of them also include no length of stay criterion.

Art. 16(2)

Top-level managerial officials

1. The UN Model

Art. 16(2) of the UN Model reads as follows:

> *(2) 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.*

In this provision the principle applicable to the taxation of directors' fees is extended to the taxation of the remuneration paid to top-level managerial officials.

2. Tax treaties

There are 68 treaties dealing with remuneration paid to top-level managerial officials. Of these treaties 62 have been concluded by developing countries, with either a developed or another developing country (group A), and 6 have been concluded between developed countries (group B).

In 11 of these treaties (five of which belong to group B) a definition is adopted of the term "top-level managerial function". According to this definition the term applies only to functions similar to those carried out by the members of the board of directors referred to in Art. 16(1) of the OECD and the UN Models.

In 7 of these treaties (3 of which belong to group B), remuneration for the discharge of day-to-day functions is excluded from the scope of Art. 16. In these treaties such remuneration is covered by Art. 15 (Dependent Personal Services).

Art. 18A(2) and 18B(3)

Social security payments

1. The UN Model

The provision recommended by the UN Model in Art. 18A(2) and 18(B)(3) on social security payments reads as follows:

> *Notwithstanding the provisions of paragraph 1, pensions paid and other payments made under a public scheme which is part of the social security system of a Contracting State or a political subdivision or a local authority thereof shall be taxable only in that State.*

This provision is not specifically included in the OECD Model. It attributes an exclusive taxation right to the source state.

2. Tax treaties

There are 254 treaties with a separate provision for social security payments attributing the right to tax to the source state. Of these treaties 206 have been concluded by developing countries, with either a developed or another developing country (group A), and 48 have been concluded between developed countries (group B).

Most of these treaties prescribe an exclusive taxation right. Only in 31 treaties in group A and 20 treaties in group B is a non-exclusive taxation right attributed to the source state.

In 15 treaties in group A and 5 in group B the taxation right attributed to the source state is limited by the exclusion of social security payments made to an individual who is both a resident and a national of the treaty partner state. In one treaty in group A and one treaty in group B the taxation right of the source state is limited to social security payments made to nationals of the source state. Finally, in one treaty in group B the taxation right of the source state is limited by a maximum rate of 17.5%.

Art. 18B(1) and (2)
Pensions

1. The UN Model

The provisions recommended by the UN Model in Art. 18B(1) and (2) on pensions read as follows:

(1) Subject to the provisions of paragraph 2 of article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration to past employment *may be taxed* in that State.

(2) *However, such pensions and other similar remuneration may also be taxed in the other Contracting State if the payment is made by a resident of that other State or a permanent establishment situated therein.*

The OECD Model does not attribute any right to tax to the source state. The UN Model attributes a non-exclusive taxation right to the source state.

2. Tax treaties

There are 295 treaties attributing to the source state a right to tax pensions. Of these treaties 259 have been concluded by developing countries, with either a developed or another developing country (group A), and 36 have been concluded between developed countries (group B).

Most of these treaties prescribe a non-exclusive taxation right. Only in 41 treaties in group A and 4 treaties in group B is an exclusive taxation right attributed to the source state. In one treaty in group B the exclusive taxation right of the source state applies only to the State's own nationals.

In 149 treaties in group A and 28 in group B the taxation right of the source state applies to annuities. It should be noted, however, that in 6 of those treaties in group A the source state taxation applies only to annuities and not to pension payments which are taxable exclusively in the residence state.

In 16 treaties in group A and 8 treaties in group B the taxation right of the source state is limited to lump sum payments, while all other pension payments are taxable only in the residence state of the recipient.

In a number of treaties the right of the source state to tax pensions is not specifically dealt with by a separate treaty provision. In 14 treaties in group A and 3 treaties in group B this taxation right is based on an "other income" article that is in line with the UN Model. In 6 treaties there is no "other income" article, which means that the source state can apply its domestic law.

In 34 treaties in group A and 6 in group B the taxation right of the source state is limited to a percentage that varies from 5% to 20%. Furthermore, 2 treaties in group B provide for a reduction of 50% of the ordinary tax rate in the source state. In most of these treaties the limited flat rate does not apply in all cases. In some treaties the limited taxation right applies only to periodic payments, while lump sum payments are subject to ordinary taxation. In other treaties pensions are subject to a limited taxation right or, if lower, the tax which would be due by a resident of the source state on the pension payment and/or annuity. Further, there are treaties providing for different percentages for pension payments and annuities.

In 6 treaties in group A and 1 in group B the taxation right of the source state is limited to payments that exceed a certain amount per year. In 6 other treaties in group A the allocation of the taxation right to the source state is subject to the condition that the pension and/or annuity is borne, paid or deducted by an enterprise or a permanent establishment situated in that State.

In 9 treaties in group A and 2 in group B the taxation right of the source state is limited to pensions and/or annuities that are paid to a former resident of the source state.

In a number of treaties the taxation right of the source state depends in various configurations on the nationality of the receiver of the pension payment or annuity. A few other treaties contain a number of other additional conditions.

Art. 20(2)

Equal treatment of students

1. The UN Model

Art. 20(2) of the UN Model reads as follows:

> *(2) In respect of grants, scholarships and remuneration from employment not covered by paragraph 1, a student or business apprentice described in paragraph 1 shall, in addition, be entitled during such education or training to the same exemptions, reliefs or reductions in respect of taxes available to residents of the state which he is visiting.*

This provision is not specifically included in the OECD Model.

2. Tax treaties

There are 53 treaties with a specific equal treatment provision for students. All these treaties have been concluded by developing countries, with either a developed or another developing country (group A).

It should be mentioned, however, that there are many treaties prescribing a greater exemption, relief or reduction than that recommended by the UN Model.

Art. 21(3)

Source State taxation

1. The UN Model

Art. 21(3) of the UN Model reads as follows:

> *(3) Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing articles of this Convention and arising in the other Contracting State may also be taxed in that other State.*

This provision deviates from the OECD Model in that the source state may tax "other income" that arises in the source state.

2. Tax treaties

There are 343 treaties providing for source state taxation on "other income" arising in the source state. Of these treaties 308 have been concluded by developing countries, with either a developed or another developing country (group A), and 36 have been concluded between developed countries (group B).

It should be mentioned that there is no "other income" article in 38 treaties. Such situations in which the source state can apply its domestic legislation are not included in the above-mentioned figures.

Three of these treaties in group A provide for a withholding tax to be applied on the gross amount of "other income". The withholding rates are 10, 15 and 17.5%. Three other treaties in group A attribute an exclusive taxing right to the source state rather than the non-exclusive taxing right prescribed by the UN Model.

Art. 25(4)
Implementation clauses

1. The UN Model

Art. 25(4) of the UN Model contains the following bilateral (second sentence) and unilateral (third sentence) implementation clauses:

> *(4) (...). The competent authorities through consultations, shall develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this article. In addition, a competent authority may devise appropriate unilateral procedures, conditions, methods and techniques to facilitate the above-mentioned bilateral actions and the implementation of the mutual agreement procedure.*

This provision is not specifically included in the OECD Model.

2. Tax treaties

There are 39 treaties that cover the implementation of the mutual agreement procedure. In 27 treaties only the bilateral implementation clause of the second sentence is adopted and in one treaty only the unilateral implementation clause of the third sentence is adopted. The remaining 11 treaties include both implementation clauses.

All these treaties have been concluded by developing countries, with either a developed or another developing country (group A). None of them has been concluded between developed countries.

Art. 26(1)

Prevention of tax fraud/evasion
Secret information

Implementation clause

1. The UN Model

Art. 26(1) of the UN Model reads as follows:

> (1) The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention, insofar as the taxation thereunder is not contrary to the Convention, *in particular for the prevention of fraud or evasion of such taxes.* The exchange of information is not restricted by article 1. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State. *However, if the information is originally regarded as secret in the transmitting State* it shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes *which are the subject of* the Convention. Such persons or authorities shall use the information only for such purposes *but* may disclose the information in public court proceedings or in judicial decisions. *The competent authorities shall, through consultation, develop appropriate conditions, methods and techniques concerning matters in respect of which such exchanges of information shall be made, including, where appropriate, exchanges of information regarding tax avoidance.*

2. Tax treaties

a. Prevention of tax fraud/evasion (first sentence)

There are 154 treaties that explicitly refer to the prevention of tax fraud or evasion. Of these treaties 146 have been concluded by developing countries, with either a developed or another developing country (group A), and 8 have been concluded between developed countries (group B).

There are only a few treaties the wording of which deviates from the recommendations of the UN Model.

b. Secret information (fourth sentence)

There are 50 treaties explicitly dealing with information that is secret in the transmitting state. All these treaties have been concluded by developing countries, with either a developed or another developing country (group A).

c. Implementation clause (last sentence)

There are 65 treaties that cover the implementation of the exchange of information. All these treaties have been concluded by developing countries, with either a developed or another developing country (group A).

A few of these treaties do not contain any reference to tax avoidance.

CHAPTER III
SUMMARY

UN Model	Tax treaties	
	group A	group B
Art. 5(3)(a): supervisory activities period < 12 months	410 484	39 29
Art. 5(3)(b)	219	2
Art. 5(4)(a) and (b)	167	-
Art. 5(4)(f) OECD	233	31
Art. 5(5)	234	9
Art. 5(6)	184	26
Art. 5(7)	243	-
Art. 7(1)	153	9
Art. 7(3)	195	6
Art. 7(5) OECD	45	-
Art. 8 B	105	3
Art. 12(3)	610	102
Art. 13(4)	308	66
Art. 13(5)	322	62
Art. 14(1)(b)	264	20
Art. 14(1)(c)	45	-
Art. 16(2)	62	6
Art. 18A(2) and B(3)	206	48
Art. B(1)(2)	259	36
Art. 20(2)	53	-
Art. 21(3)	308	36
Art. 25(4): implementation clauses	39	-
Art. 26(1): prevention fraud/evasion secret information implementation clause	146 50 65	8 - -
Tax treaties 1980/1997	**697**	**114**
