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Michael Kirsch
Notre Dame Law Library, michael.s.kirsch.1@nd.edu

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Michael S. Kirsch

TAX TREATIES AND THE TAXATION OF SERVICES IN THE ABSENCE OF PHYSICAL PRESENCE

Michael S. Kirsch[*]

By now, it is old news that modern technological developments have strained long-standing international tax policies and principles. Tax treaties have attempted to keep pace by fitting these new developments within the existing framework. Perhaps the most notable example of this phenomenon is the efforts of the Organisation for Economic Co-operation and Development (OECD) to address the growth of web-based electronic commerce, fitting that development within the "fixed place of business" paradigm of permanent establishments ("PE") by focusing on the location of the tangible computer servers.[1] Looking to the future, these strains can be expected to continue, raising the question as to how, if at all, existing principles can stretch to fit these ongoing developments or whether new principles should be adopted.

This brief article focuses on one aspect of technological developments that can directly affect individual taxpayers—the increasing ability to deliver personal services electronically across borders, without the need for the service provider to have a physical presence in the "source" country. While the concept of services can be very broad, incorporating everything from physical labor by an individual to automated computer processes that deliver information to an end user, the focus here is closer to the former—i.e., activities performed by an individual that traditionally might have been performed by an individual present in the source country, but that can now be delivered through com-

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* Professor of Law, Notre Dame Law School. A.B., Cornell University, 1985; J.D., Harvard Law School, 1988; LL.M., New York University School of Law, 1989. I would like to thank participants in the 2015 Brooklyn Law School Symposium, "Reconsidering the Tax Treaty," for their helpful comments on an earlier draft.

1. *See* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], COMMENTARIES ON THE ARTICLES OF THE MODEL TAX CONVENTION art. 5, para. 42.2 (2010).

munications technology so that the individual need not be present in the would-be source country.[2] This phenomenon is perhaps best illustrated by the Amazon Mechanical Turk website, developed by Amazon.com, Inc., which describes itself as "a global marketplace of Workers," enabling a company or individual to access "more than 500,000 Workers from 190 countries" to perform one-time tasks requiring human intelligence, such as language translation, audio transcription, data research, identification of objects in photos, and many others.[3] Another example involves the growth of telemedicine, whereby a healthcare professional uses telecommunications to evaluate, diagnose, and treat a patient located elsewhere (including, in some cases, performing telesurgery via synchronous remote robotic equipment).[4]

These developments raise the question of whether a country can exercise source-based taxation on services income when the service provider is not physically present within the "source" jurisdiction. The domestic laws of some developing countries might

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2. To the extent the OECD BEPS project addresses the impact of modern technology on the taxation of services, it primarily focuses on the latter end of the spectrum—i.e., delivery of automated services through modern communication. *See generally* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY, ACTION 1: 2014 DELIVERABLE (2014).

3. *We Can Help Make Your Business Successful*, AMAZON MECHANICAL TURK, https://requester.mturk.com/tour (last visited July 11, 2016). The Amazon Mechanical Turk website bills itself as

> a marketplace for work that requires human intelligence. The Mechanical Turk service gives businesses access to a diverse, on-demand, scalable workforce and gives Workers a selection of thousands of tasks to complete whenever it's convenient. Amazon Mechanical Turk is based on the idea that there are still many things that human beings can do much more effectively than computers . . . . Traditionally, tasks like this have been accomplished by hiring a large temporary workforce (which is time consuming, expensive, and difficult to scale) or have gone undone.

Overview, AMAZON MECHANICAL TURK, https://www.mturk.com/mturk/help?helpPage=overview (last visited Aug. 9, 2016). Currently, there are approximately one million human intelligence tasks, or HITs, posted on the website. *See* AMAZON MECHANICAL TURK, http://www.mturk.com (last visited Aug. 9, 2016).

4. *See generally* Michael S. Kirsch, *The Role of Physical Presence in the Taxation of Cross-Border Personal Services*, 51 B.C. L. REV. 993 (2010).

allow such taxation even in the absence of a PE or fixed base of the service provider, provided that the services are either "consumed or used" in the country or the payment for services is deductible by a resident of the country, a PE, or fixed base in the country.[5] Neither the OECD Model nor the current U.N. Model Treaty, however, would allow the taxation of such services where the service provider is not physically present (and does not otherwise have activities in the country). This result, though, may change under the U.N. Model, as discussions currently are underway to relax the source-based principles applicable to payments for technical services.[6] After briefly summarizing the treatment of physically remote services under the current OECD and U.N. Model treaties, this article discusses the proposed changes to the U.N. Model and offers some preliminary observations.

Under Article 7 of the OECD Model Treaty, a country can exercise source-based taxation over services income only if it is attributable to a PE in the country. Under Article 5, the taxpayer has a PE only if he or she has a fixed place of business through which the services are carried out. Accordingly, an individual who has no physical presence in the country would not have a PE and would not be taxable. Even under the optional "services PE" provision in the OECD Commentary, the individual would not be taxable.[7] That provision deems services to be carried on through a PE if, *inter alia*, services are performed in the contracting state for more than 183 days in a twelve-month period. While this provision eliminates the requirement for a fixed place of business, it does not eliminate the requirement that the services be physically performed within the contracting state. Indeed, the OECD Commentary to the services PE provision explicitly notes that "all member States agree that a State should

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5. *See* Brian J. Arnold, *The Taxation of Income from Services* (U.N. Papers on Selected Topics in Protecting the Tax Base of Developing Countries, Draft Paper No. 2, 2013), http://www.un.org/esa/ffd/wp-content/uploads/2014/10/20140604_Paper2_Arnold.pdf.

6. *See* Bryce Baschuk, *UN Panel Advances Tax Policy Guidance for Developing Nations*, 24 TRANSFER PRICING REP. 838 (2015) (noting that the U.N. Committee of Experts on International Cooperation in Tax Matters reached an initial agreement on a new model treaty article addressing "technical services," subject to further modification of the proposed text in 2016).

7. *See* OECD, *supra* note 1, art. 5, para. 42.23.

not have source taxation rights on income derived from the provision of services performed by a nonresident outside that State."[8]

In some circumstances, an individual who is not physically present in the source country arguably could be viewed as performing services in the source country through a PE if the services involve the remote operation of equipment located in the source country. For example, a physician resident and located in State R might perform telesurgery on a patient located in State S through a synchronous robotic surgery system that the physician operates.[9] While the physician is not physically present in State S, he or she is controlling equipment that is located there. Under the OECD Model, the ability of State S to tax the physician on her surgical fee would turn on whether the robotic system in State S constituted a fixed place of business. According to the model commentary, "machinery or equipment" can constitute a place of business.[10] In addition, the State S surgical suite could constitute "premises" or "facilities" under the place of business standard.[11] Ultimately, the determination might hinge on whether the robotic equipment in State S is "at the disposal" of the surgeon. If, for example, the surgeon was entitled to use the remote robotic equipment whenever she desired (rather than only having limited access due to the demands and schedules of other surgeons using the equipment), the arrangement might constitute a PE, making her surgical fees taxable in State S. The OECD Model Commentary on website servers, however, implies that there might not be a PE even if the surgeon has frequent remote access to the surgical equipment, provided the surgeon does not own or lease the equipment.[12]

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8. *See id*. art. 5, para 42.18; *see also id.* art. 5, para. 42.22 ("Clearly, such taxation should not extend to services performed outside the territory of a State.").

9. *See generally* Kirsch, *supra* note 4, at 1027–35 (discussing this example in more detail).

10. *See* OECD, *supra* note 1, art. 5, para. 2.

11. *See id.*

12. The surgeon's remote access and control over the surgical robot may be analogous to an enterprise's remote control of its website's software code hosted on a remote server that is owned by an independent service provider. The commentary states that the latter situation does not create a PE, given the enterprise's lack of physical access to the server. *See* OECD, *supra* note 1, art. 5, para. 42.3. For a more thorough discussion of this analogy, see generally Kirsch, *supra* note 4, at 1032–35.

Returning to the more general case of a nonresident individual performing services while physically located outside of the would-be source country (and assuming the services do not involve the remote operation of equipment located in the source country), the current U.N. Model Treaty reaches the same conclusion as the OECD Model—the income from those services is not taxable in the would-be source country. Under Article 14 of the U.N. Model, an individual performing "professional services or other activities of an independent character" is subject to source country taxation if she has a fixed base regularly available to her for the purposes of performing her activities or if she stays in the country for at least 183 days in a twelve-month period.[13] Thus, even under the U.N. Model Treaty that provides greater deference to source taxation by developing countries, an individual with no fixed base who has no physical presence in the would-be source country is not subject to taxation there.

Despite the "physical presence" criterion under both the current OECD and U.N. Models, pressure to allow source-country taxation of services in the absence of physical presence might be the next logical step in treaties' responses to modern technological developments. The ability of modern communications and other developments to facilitate significant intrusions into a country's economy in the absence of a fixed place of business has already led the OECD to soften traditional paradigms (through the contemplation of a services PE in the commentary).[14] That

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13. MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES art. 14(1) (U.N. DEP'T OF ECON. & SOC. AFFAIRS 2011). Similarly, Article 5 of the U.N. Model Treaty provides that an enterprise will have a PE if it furnishes services that continue (for the same or a connected project) for a period of more than 183 days in a twelve-month period, even in the absence of a fixed place of business. *Id.* art. 5(3)(b); *see also* U.N. Comm. of Experts on Int'l Cooperation in Tax Matters, Rep. on the Tenth Session, U.N. Doc. E/2014/45-E/C.18/2014/6, para. 19 (2014) [hereinafter Rep. on Tenth Session], http://www.un.org/ga/search/view_doc.asp?symbol=E/2014/45&Lang=E ("The Committee . . . agreed to include in the [U.N. Model treaty] commentary . . . a new paragraph providing that the traditional interpretation of [Article 5(3)(b)] would require the physical presence in the source State of individuals, being an employee or personnel of the enterprise furnishing such services, in order for a permanent establishment to exist in that State, while recognizing that some Committee members disagreed.").

14. *See* OECD, *supra* note 1, art. 5, para. 42.16 ("These States are concerned that some service businesses do not require a fixed place of business in their territory in order to carry on a substantial level of business activities therein and consider that these additional rights are therefore appropriate.").

same unwillingness of source countries to surrender sourcing rights might also lead to a softening of physical presence requirements for services, to the extent modern developments enable significant intrusions into the source economy without physical presence.

While the OECD Commentary on services PEs makes clear that the OECD has no current plans to abandon physical presence as a prerequisite for source-based taxation of services,[15] recent developments suggest that the U.N. Model may soon allow source-based taxation of at least some types of services even in the absence of the service provider's physical presence. Although this change is being led by the U.N. Model, which focuses on protecting source-based taxing rights of developing countries, the future expansion of remotely provided services will not exclusively (or, perhaps, even primarily) involve the flow of services from providers in developed countries to users in developing countries. Much of the development of remote services has involved the outsourcing of services to lower-cost countries, which then remotely provide those services to users in more developed countries (for example, the outsourcing of radiology and other medical diagnosis from U.S.-based hospitals to India-based radiologists).[16]

During the past few years, the U.N. Committee on Experts on International Cooperation in Tax Matters (the "U.N. Committee") has considered proposals to eliminate a physical presence requirement for source-country taxation of "technical services." In October 2013 a majority of the U.N. Committee approved a proposal to move forward with the drafting of a new article to allow source-country taxation of "technical services" (defined as managerial, technical, or consulting services) on a gross basis (and at a rate to be agreed upon by the negotiating states), "irrespective of whether the services are rendered inside or outside

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15. As noted above, the OECD Commentary to the services PE provision explicitly states that "all member States agree that a State should not have source taxation rights on income derived from the provision of services performed by a non-resident outside that State." *Id.* art. 5, para. 42.18.

16. As long as the flows of such services are relatively balanced (or primarily involving developed-country service providers entering developing-country markets), this might not be a significant issue for OECD countries. However, to the extent there is continued outsourcing of cross-border services to service providers physically located in developing countries, this may become a more important issue to OECD members. *See* Kirsch, *supra* note 4, at 1078–79.

the source country," and without any other "threshold for the imposition of source-country tax."[17] In response to this mandate, in October 2014 Brian Arnold prepared and presented draft language and commentary for a new article on technical services to the U.N. Committee.[18] Following discussions at the 2014 meeting of the U.N. Committee, a revised draft of the proposed article and commentary was presented in October 2015.[19] Under the draft proposal, in addition to taxation by the service provider's state of residence, payments for technical services can be taxed in the state in which the payments arise.[20] In general, payments are deemed to arise in a state if the person making the payments is a resident of that state or has a PE or fixed base in that state and the payments are borne by the PE or fixed base.[21] Most notably, there is no requirement that the service provider be physically present in the source state when performing the services. This lack of a physical presence requirement is confirmed in the draft commentary, which notes that source taxation may occur "irrespective of whether the person who performs the services . . . performs the technical services in that State."[22] In October 2015 the U.N. Committee reached an initial agreement on the proposed new article, subject to continued modification of the text.[23]

17. Brian J. Arnold (Senior Advisor, Canadian Tax Foundation), *Note on a New Article of the UN Model Convention Dealing with the Taxation of Fees for Technical and Other Services*, U.N. Doc. E/C.18/2013/CRP.5, annex I (Oct. 11, 2013) [hereinafter Arnold, *Taxation of Fees for Services*], http://www.un.org/esa/ffd/tax/ninthsession/CRP5_Services.pdf; U.N. Comm. of Experts on Int'l Cooperation in Tax Matters, Rep. on Ninth Session, U.N. Doc. E/2013/45-E/C.18/2013/6, at 17 (2013), http://www.un.org/ga/search/view_doc.asp?symbol=E/2013/45&Lang=E (discussing the first option in Arnold, *Taxation of Fees for Services*).

18. *See* Brian J. Arnold (Consultant for the Subcomm. on Tax Treatment of Servs.), *Note from the Coordinator of the Subcommittee on Tax Treatment of Services: Draft Article and Commentary on Technical Services*, U.N. Doc. E/C.18/2014/CRP.8 (Sept. 30, 2014) [hereinafter 2014 Draft Article and Commentary], http://www.un.org/esa/ffd/tax/tenthsession/CRP8_TechnicalServices.pdf.

19. *See* U.N. Comm. of Experts on Int'l Cooperation in Tax Matters, Revised Draft Article XX and Commentary, U.N. Doc. E/C.18/2015/CRP.5 (2015) [hereinafter 2015 Draft Article and Commentary], http://www.un.org/esa/ffd/wp-content/uploads/2015/10/11STM_CRP.5_Services.pdf.

20. *See id.* para. 2 (Draft Article XX).

21. *Id.* para. 5 (Draft Article XX).

22. *Id.* para. 37 (Draft Article XX Commentary).

23. *See* Baschuk, *supra* note 6.

The principal justification given for this proposal is that "with the rapid changes in modern economies, particularly with respect to cross-border services, it is now possible for an enterprise resident in one State to be substantially involved in another State's economy without a PE or fixed base and without being physically present in that other State."[24] This, in turn, leads to concerns that "[t]echnical and other similar services may . . . result in the erosion of the tax base of source countries if such countries are prevented from taxing such payments by the provisions of the [U.N. Model treaty]."[25] This base erosion concern is heightened in the context of multinational groups, which might use intragroup services to facilitate unwarranted profit shifting to service-providing members of the group established in low-tax jurisdictions (and without a PE in the source country).[26] The draft commentary observes that, despite these concerns, "[t]he OECD BEPS project does not identify the performance of services as a base-erosion or profit-shifting issue to be dealt with."[27]

The proposed new article creates a number of concerns. While the draft and commentaries attempt to define the types of managerial, technical, and consulting services that come within the provision,[28] this type of inquiry raises significant line-drawing problems.[29] For example, which of the hundreds of thousands of service jobs currently listed on the Amazon Mechanical Turk website (including language translation, audio transcription, data research, identification of objects in photos, and many others) would constitute technical services?[30]

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24. 2015 Draft Article and Commentary, *supra* note 19, para. 2 (Draft Article XX Commentary).

25. *Id.* para. 10 (Draft Article XX Commentary).

26. *Id.* para. 11 (Draft Article XX Commentary).

27. *Id.* para. 13 (Draft Article XX Commentary).

28. *See id.* para. 3 (Draft Article XX), paras. 50–83 (Draft Article XX Commentary). The draft commentary explicitly notes that "Article XX applies only to payments for technical services, and not to all payments for services." *Id.* para. 50 (Draft Article XX Commentary).

29. Some of these concerns regarding the scope of services covered by the draft article were raised during the U.N. Committee's 10th Session discussing the draft. *See* Rep. on Tenth Session, *supra* note 13, paras. 77, 83.

30. *See supra* note 3. The draft commentary provides that, in addition to regulated professions, technical services can include "other occupations, such as scientists, academics, etc., . . . if those services involve specialized knowledge, skill and expertise." 2015 Draft Article and Commentary, *supra*

More importantly, for purposes of this article, the proposed article raises questions as to how well it fits its underlying justifications. As noted above, these justifications focus on base erosion. While the principal concern seems to involve base erosion effected through multinational-enterprise profit shifting, the draft article is not limited to this situation. Rather, the proposed article covers payments to an unrelated nonresident service provider if the payment is either made by a resident of the source country or is borne by a PE in the source country. Admittedly, this standard provides a relatively bright-line triggering threshold. The 2014 draft commentary, however, acknowledged the potential breadth of this provision with an example of a State S resident traveling to State R to have heart surgery.[31] Under the 2014 draft, when the heart surgeon (a resident of State R) performs heart surgery in State R, he would be taxable by State S because the patient is a resident of State S (even though the surgery takes place in State R).[32] Unlike the telesurgery example discussed above where the surgeon located in State R controls a surgical robot located in State S, in the draft commentary example the State R surgeon has no connection to State S other than the fact that he or she agreed to perform surgery (in State R) on an individual who traveled from State S to State R.[33] Indeed, the surgeon might not know that the patient traveled from State S (and even if he had knowledge of the visiting status, he is unlikely to know of the patient's residence status under the State S tax laws). This raises significant fairness concerns with respect to the heart surgeon unknowingly being brought within the State S taxing regime. In addition, if this type of taxation

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note 19, para. 54 (Draft Article XX Commentary). While some Amazon Mechanical Turk services (such as identifying common objects in pictures) might not fit this definition, other services might (such as performing data research or translating from a foreign language), particularly because some Amazon Mechanical Turk tasks can be limited to workers with specific qualifications.

31. *See* 2014 Draft Article and Commentary, *supra* note 18, para. 56 (Draft Article XX Commentary).

32. *See id.*

33. The draft commentary notes that State S may want to carefully consider whether it would, under its domestic laws, attempt to exercise the taxing rights allowed by the draft article under these circumstances. *See id.* para. 58 (Draft Article XX Commentary). The draft commentary notes that there might be enforcement difficulties, and it also might discourage residents from seeking appropriate medical care. *Id.*

became widespread, it could lead some State R surgeons to refuse to treat patients visiting from other countries for fear of being brought within the other countries' tax regimes. Furthermore, it is difficult to perceive State R voluntarily relinquishing taxing rights over the surgeon's fee (in order to provide relief from double taxation, as would be required under the amendments),[34] given that all aspects of the surgical procedure—including its location, the residence of the surgeon, the legal and technological infrastructure, and most likely the surgeon's education—took place in State R.

A more fundamental problem with this example is that it may allow source-country taxation in a circumstance when the principal concern underlying the draft article—i.e., base erosion—is not even present. Although the payment may be made by a resident of State S, base erosion would otherwise occur only if State S allows the individual a deduction for these medical expenses. If no medical expense deduction is allowed, then there is no base erosion in State S, even if State S is not allowed to tax the payment to the heart surgeon.

The 2015 draft article partially alleviated this concern by adding an exception to the definition of "fees for technical services" if the payment is made "by an individual for services for the personal use of the individual."[35] This exception uses "personal use" as a proxy for nondeductibility,[36] thereby precluding State S taxation in this circumstance where base erosion is not present. The draft commentary also suggests that this exception alleviates potential enforcement and compliance problems.[37]

While this "personal use" exception addresses the lack-of-base-erosion concern (at least to the extent that nondeductible payments arise in a personal use setting), it does not address the fairness issues to the service provider illustrated in the heart surgeon example above. The exception also does not address the

34. *See id.* para. 29 (Draft Article XX Commentary) ("[T]he residence country is obligated to prevent double taxation . . . through exemption or credit for any source-country tax imposed on payments for technical services in accordance with Article XX.").

35. 2015 Draft Article and Commentary, *supra* note 19, para. 3(d) (Draft Article XX).

36. *See id.* para. 60 (Draft Article XX Commentary) ("[Personal use payments] would not normally be deductible by those individuals and, therefore, the payments would [not] cause any erosion of the tax base of the State in which the fees for technical service arise.").

37. *See id.*

efficiency concern regarding the potential refusal of a professional to perform services in her home country for a foreign person. Consider, for example, an executive of a State S enterprise who travels to State R for business. While in State R, he might need to consult a State R attorney with respect to his activities in State R (for example, a question regarding a State R business visa extension or some other matter exclusively related to activity in State R). Given the executive's work on behalf of the State S enterprise, these payments might be deductible by the State S enterprise for State S tax purposes, thereby entitling State S to impose a tax on the State R attorney's fees. From the perspective of the State R attorney, however, all of the legal advice with respect to the executive's activities in State R and interpreting State R law took place in State R. The only connection to State S was that the client (who was physically in State R) was from State S. Such a tenuous connection, which involved no deliberate effort by the State R attorney to enter the State S market, seems like a meager basis upon which to assert State S taxing rights (despite the loss of tax revenue to State S when the enterprise takes a deduction) and to eliminate State R's taxing rights via the required relief from double taxation. More fundamentally, it is difficult to consider the State R attorney as having entered the State S market at all, given that the relevant market involves State R legal advice (and thus, it would be difficult to argue that the State R attorney's services displaced services that otherwise might have been performed by a resident of State S). Furthermore, as with the heart surgeon example, broad State S taxing rights in this situation creates a risk that attorneys in State R would be very reluctant to provide legal advice to visitors from foreign countries, lest they become subject to the foreign country's tax regime.

For these reasons, base erosion by itself does not appear to be a sufficient nexus upon which to impose source-country taxation of services that do not involve physical presence in the country.[38]

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38. *But cf.* 2014 Draft Article and Commentary, *supra* note 18, para. 16 (Draft Article XX Commentary) ("Base erosion is a sufficient nexus to justify source country taxation of income from employment under Article 15 and directors' fees and remuneration of top-level managerial officials under Article 16."). Of course, it is possible that the purported justifications for expanded taxation of technical services may only be a pretext for a more general revenue-driven desire to expand source-country taxation (this possibility was suggested

Taken to its extreme beyond the personal services context, reliance solely on base erosion to justify taxing the recipient suggests that a country might be entitled to hold onto its tax base forever—any payment that is deductible from the source country's tax base would allow the source country to tax the recipient. At a minimum, in order to address the fairness issues highlighted above and to prevent individual taxpayers from being dragged into another country's tax regime unknowingly,[39] the source country should be able to tax payments for technical services performed outside the country only when the service provider has made some purposeful entry into the source country market, thereby eliminating situations similar to the State R attorney example above. After all, the impetus for the proposed new article was the fact that modern communications and other developments enable a service provider to deliver services from abroad that otherwise would have physically taken place in the source country (thereby implying some purposeful entry into the source-country market). Of course, a standard that focuses on the extent of a service provider's intent or purpose would raise significant compliance and enforcement difficulties, suggesting that it most likely would not be feasible. Similar problems would arise to the extent the standard attempts to define circumstances where a service provider enters the source-country market without physical presence, particularly to the extent the purported entry moves from a more obvious entry (such as the synchronous operation of a telesurgery robot that itself is physically located in the source country) to a less obvious entry (such as the asynchronous performance of an Amazon Mechanical Turk research task that might be viewed as only having an indirect impact on the source country, whether because the results of that task may eventually be utilized in the source country or the performance of that task abroad displaced research that otherwise would have taken place in the source country).

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by some participants at the 2015 Brooklyn Law School Symposium, "Reconsidering the Tax Treaty"). Regardless of whether or not that is the case, it is important that the justifications offered be considered on their face, particularly given the potentially broader implications of the arguments.

39. Similar concerns underlie the OECD Commentary's focus on the computer server (rather than on the intangible website) for purposes of PE analysis. If a taxpayer could be brought within a source country's taxing jurisdiction merely because an end user clicked on its website, tremendous administrative and fairness issues could arise. *See* Kirsch, *supra* note 4, at 1047, 1047 n. 245.

The concerns raised above suggest that treaty drafters should exercise caution in expanding taxing rights over services performed without a physical presence in the country. In particular, to the extent the U.N. Model treaty proposal would cast a wide net based on broad base erosion principles, significant definitional, administrative, fairness, efficiency, and other concerns may arise. Rather than implementing such a broadly grounded expansion of source-country taxing rights, the U.N. Committee, to the extent it believes some expansion is warranted, should instead focus on the more specific concern raised in the introductory comments to the proposal—profit shifting within a multinational group through the use of service fees. The introductory commentary to the U.N. Model proposal acknowledges that this is a principal concern underlying the proposal.[40] Moreover, the report of the Tenth Session of the U.N. Committee implies that this was a significant concern among the participants.[41] By focusing more narrowly on this specific concern, the Committee may be able to address the more important concerns of developing countries while limiting the problems associated with the broader proposal.

40. *See* 2015 Draft Article and Commentary, *supra* note 19, paras. 11–13 (Draft Article XX Commentary); *see also* Arnold, *supra* note 5, at 3 ("[I]t is relatively easy for multinational enterprises to reduce the tax payable to a source country in respect to a group company resident and doing business in that country through payments for services rendered to that company by other nonresident group companies.").

41. *See* Rep. on Tenth Session, *supra* note 13, para. 87. As a result, the committee added a new paragraph to the draft article explicitly addressing excess payments when there is a special relationship between the payer and the service provider. *See id.* The Associated Enterprises provision of Article 9 would also apply more generally to such circumstances. *See id.*