

Subcommittee on Article 8: International Transportation Issues

Recommendation of the Subcommittee on
possible changes to the Commentary on
Article 8

Article 8 Subcommittee Terms of Reference

- The Subcommittee is mandated to report to the Committee, beginning at the Eleventh session, on possible updates to the Commentary on Article 8 of the UN Model Convention, in particular:
 - the coverage of the concept of “auxiliary activities”; and
 - the issue of the application of Article 8 to cruise shipping.

Auxiliary Activities

While UN and OECD Models in Article 8 use exactly the same language "**Profits from the operation of ships and aircraft in international traffic**" they describe the scope of the application of this expression in a different way.

Auxiliary Activities

- Article 8 of the UN Model Convention allows for source State taxation under “Alternative B” for shipping.
- Both Alternatives share with the OECD Model Convention the term “Profits from the operation of ships in international traffic” and “Profits from the operation of aircraft in international traffic”.
- The Sub-Committee could not identify any substantive justification for different meanings to be assigned to the same wording in the two Models.
- Assigning different meanings would lead to widespread confusion over interpretation of the treaty and taxing rights.

Auxiliary Activities

- The current UN Commentary on Article 8 uses the same language as the pre-2005 OECD Commentary's description of activities covered by Article 8:
 - profits "obtained by the enterprise from the carriage of passengers or cargo" in international traffic and
 - profits from "**auxiliary**" activities.
- According to the updated OECD Commentary, Article 8 now refers to:
 - profits "obtained by the enterprise from the carriage of passengers or cargo" in international traffic and
 - profits from activities to permit, facilitate or support international traffic operations:
 - ✓ Directly connected with such operations,
 - ✓ Not directly connected but "**ancillary**" to such operations.

Auxiliary Activities

The 2014 paper (E/C.18/2014/CRP.1) concluded that the two terms (auxiliary and ancillary) “appear to be largely used as alternatives in modern usage, and to the extent that there may be any difference in usage in technical areas it seems to be that ‘auxiliary may mean something held in reserve and not activated’ while ancillary means something used but in a subsidiary capacity. Such a distinction appears irrelevant in the current context, where both usages are by definition referring to actual activities.”

Auxiliary Activities

- UN - “auxiliary” activities

“(...) those which by reason of their nature or their close relationship with the profits directly obtained from transport may all be placed in a single category.”

- OECD - “ancillary” activities

“Activities that the enterprise does not need to carry on for purpose of its own operation of ships or aircraft in international traffic but which make a minor contribution relative to such operation and are so closely related to such operation that they should not be regarded as a separate business or source of income of the enterprise (...).”

Auxiliary Activities

The Subcommittee recommends adopting the OECD version of the interpretation of "Profits from the operation of ships and aircraft in international traffic" expressed in paragraphs 4-14.1 of the Commentary to Article 8 of the OECD Model:

- Uniform interpretation of Article 8 (1) of DTCs.
- Linguistic consistency is useful where no substantive difference is intended (i.e., identical treaty text should be given the same interpretation to the extent possible).
- The treatment of modern operating activities of shipping and airline enterprises can be more clearly described by adopting the language of the OECD Commentary.
- The use of "ancillary" avoids the potential for confusion with the concept of "preparatory or auxiliary" activities under article 5(4) of the UN Model.

The Application of Article 8 to Cruise Shipping

- The UN Model Commentary states that Article 8 applies to profits “from the carriage of passengers” in international traffic (paragraph 10’s incorporation of pre-2005 OECD Model Commentary paragraph 4).
- This clearly means that a cruise can be included within “international traffic” as a transport of passengers.
- The Sub-Committee recommends that the UN Model Commentary follow the updated OECD Model Commentary on Article 3’s definition of “international traffic”.

The Application of Article 8 to Cruise Shipping

Paragraph 6.3 of the OECD Commentary to Article 3 (1) (e):

“The definition of “international traffic” does not apply to a transport by an enterprise which has its place of effective management in one CS when the ship or aircraft is operated between two places in the other State, even if part of the transport takes place outside that State. Thus, for example, a cruise beginning and ending in that other State without a stop in a foreign port does not constitute a transport of passengers in international traffic.”

Next Steps

- The Subcommittee will prepare a detailed draft Commentary based upon the OECD Commentary for consideration at the next session.