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Memorandum

To:	Jeffrey Owens Director, Centre for Tax Policy and Administration (“CTPA”) Organisation for Economic Co-Operation and Development (“OECD”)	**Date:**	September 15, 2010
From:	J. Scott Wilkie	**Tel:**	416.862.4252

I am writing in response to the request for comments on the OECD’s, and in particular the CTPA’s, proposed examination of “intangibles”. The immediate context is transfer pricing and “business restructuring”.

There are many aspects of this subject that bear close and considered examination. These comments do not attempt or purport to be or anticipate the kind of comprehensive review that no doubt will frame the CTPA’s inquiry. Rather, I merely wish to identify and briefly discuss a number of factors of particular concern to me that I think ought to be part of the inquiry and possibly guide how it takes place.

These comments are made in my personal capacity, and are not those of and should not be attributed to any organization with which I am or have been associated including my firm. Also, I acknowledge my informal involvement in relation to several recent OECD projects for which the “intangibles” issue is relevant, including in particular as a member of the “Business Advisory Group” that contributed to studying “business restructuring”.

Revised Transfer Pricing Guidelines, “Profit” and “Business Restructuring

The OECD and the CTPA are to be congratulated on the recently completed update of the Transfer Pricing Guidelines and the formulation of the study on “business restructuring” in new Chapter IX. It is difficult in the continuously evolving and dynamic global business environment to propagate a “principle”, the “arm’s length principle”, that as useful as it may be to understanding the industrial characteristics and economic circumstances of affected taxpayers, is inherently antithetical to why they exist and operate as they do. This recent work is the most obvious context for an examination of “intangibles”. That said, as I later comment, the effectiveness of this completed work may depend on how the OECD and its members’ tax systems address this critical issue. Moreover, reaching some understanding of what “intangibles” are or connote seems to be a necessary and indeed intrinsic extension of this work without which, in some respects, that work will not be entirely complete.

Profit Focus

The shift in focus of revised Chapters I – III of the Transfer Pricing Guidelines in favour of profit-oriented measures is notable. Acknowledging that separate entity, transactions – based comparative methodologies may be less primary and perhaps less analytically determinative relative to profit – based methods is important in two principal respects.

First, profit – oriented approaches may more accurately reflect how integrated multinational organizations actually function, across legal entity lines and despite the strictures of separate entity accounting. The legal transactions, *per se*, that connect their members may not readily indicate, or be the best reflection or measure of how their collective profits are earned functionally and geographically and apportioned among the members.

Second, emphasizing a profit focus is faithful to and both a reminder of and a signal to remember the text and origins of Article 9 of the Model Tax Convention, in the service of which the Transfer Pricing Guidelines exist. Article 9 does not speak in terms of "entities" as such but of "enterprises" of residents; that is, their businesses are the subject of this Article. Neither does the Article speak in terms of "transactions", "revenue", "expenses", "costs", "margins" or any of the other analytical devices that the Transfer Pricing Guidelines, as analytical tools, adopt to provide tax administrations and taxpayers with a common platform on which to build an understanding of and test the adequacy of a taxpayer's reported income.

Inherently, the transfer pricing exercise is one of apportioning profit on a rational basis, taking account of contributions to earn it but neutralizing the effect of common control to redirect profit away from those whose contributions should be rewarded.

Accordingly it is notable that Article 9 speaks in terms of, and authorizes an adjustment to, "profits" of enterprises if those profits have been distorted by non-commercial "conditions" attributable to their association, namely an ability to manipulate profits regardless of what commercial considerations otherwise would recommend which arises from common control. The focus on "profits" is important. "Profits" are the net financial outcome of a taxpayer's commercial endeavours – using the language of the Article the sum and blend of the entire collection of its "commercial and financial relations". No doubt actual transactions support this outcome. But still the indicative focus – the expressed interest – of Article 9 is "profits". This is borne out by its historical development dating from the 1920's when transfer pricing and other tax considerations, addressed in relation to gratuitous tax-induced impediments to international trade, became the serious subjects of tax inquiry they continue to be.

Transfer Pricing Guidelines and Countries' Law

The Transfer Pricing Guidelines can serve the very useful objective of assisting to test the freedom of reported corporate profits from distortions attributable to the influence of common control within a multinational enterprise. But, they do not supplant or even modify the tax or other law of the OECD's member states, even if adopted as administrative guidance in the interpretation and application of that law. They may well be highly probative in the application of members states' tax law, notably in a tax treaty context. That is the case, for example, in Canada. But they are not, as a recent Canadian transfer pricing case reflected, law themselves and if in conflict with the law do not displace it. If the Transfer Pricing Guidelines, and in particular economic concepts intrinsic to them, are to have legal status it is incumbent on member states to ensure that their general law – contract, property and commercial laws -

underlying the tax law and their tax law itself incorporate notions that the Transfer Pricing Guidelines consider important.

As compelling as transfer pricing analysis according to the arm's length principle, informed by the Transfer Pricing Guidelines, may be, it cannot be effective to achieve its objectives unless the relevant local law identifies a "taxable object" – a property or service that the law recognizes generally and possibly the tax law recognizes specifically as having legal identity, and additionally a "taxable event" – a trigger (an event or medium) for subjecting a transmission of value involving that "taxable object" to taxation. The mere transmission of economic value, for example the renunciation or sharing of a "soft intangible" or a change in the intensity with which a business is conducted in a jurisdiction, may not be a taxable event if the local law does not assign or otherwise accommodate this status. Or, in any event, this conclusion may be sufficiently infirm or doubtful as to fuel rather than alleviate disagreements with and among tax authorities about how tax on the international profits of an integrated multinational enterprise should be shared among them.

Transfer Pricing, "Intangibles" and the Nature of Multinational Enterprise

"Intangibles" At the Heart of Transfer Pricing

"Intangibles" are, in my view, intrinsic if not the key to defining and evaluating profit-making and profit measurement for a multinational enterprise in the present and increasingly intricate global business and tax regulation environment. Of immediate concern is a lack of clarity and international agreement about what "intangibles" means. As a likely significant factor in the existence and measurement of and accountability for residual entrepreneurial profit – a notable focus of the Transfer Pricing Guidelines as revised – this notion inevitably puts the utility of the Guidelines and the Model Tax Convention in play. It is for these reasons that I offer some additional comments on the importance, but also risks of studying and making pronouncements on "intangibles".

Ultimately the "transfer pricing issue" mostly concerns the relative sharing by tax regimes of the income of their taxpayers and taxpayer groups almost, with respect, as if they were constructive "co-venturers" with them in their commercial endeavours (i.e., their financial interests are aligned). In effect governments have a kind of derivative "commercial interest" in their taxpayers' circumstances, in relation to each other. In any transfer pricing situation, then, there are essentially four axes of interest, on the assumption that two corporate group members are dealing with each other commercially. The fourth axis is usually the most important because it manifests the double taxation question that the Model Tax Convention and the Transfer Pricing Guidelines seek to address. Each taxpayer interacts with its own tax authority. These are two axes. Third, the two taxpayers interact with each other commercially; it is not obvious or even necessarily accurate that they do not have adverse commercial interests. Fourth, the two tax authorities have what amounts to an interest in the commercial outcomes of their respective taxpayers, in relation to their own relative interests as representatives of their tax regimes.

The evolved thrust of the Transfer Pricing Guidelines to more clearly recognize the utility and significance of profit – based methodologies and to reinforce what some may perceive as an obligation of taxpayers to select the best way of explaining their profitability, and the attention paid in new Chapter IX to "profit potential" and the uniqueness of business organizations that may imperil the reliability of "comparables" analysis, point in the direction of the obvious importance of “non-transactional” “intangibles” – so-called “soft intangibles” – to measuring and allocating group profit.

In relative terms “transactional intangibles” – species of “intangible property” that in the first instance are “property” as a legal matter, reflected for example in patents, trademarks and copyrights, are more readily addressed in the typical transfer pricing environment. This is because they are manifestations of unique knowledge and experience that the law generally recognizes as “property”. They can be evaluated on a transactional basis and comprise private interests that can be protected and defended by a legal remedy. This is consistent with the Commentary to Article 12 of the Model Tax Convention, particularly paragraphs 11.3, 11.4 and 11.5 where intangible property in the nature of “know-how” is associated with, indeed defined by, inherent unique intellectual content that is in some manner or other not generally known and is protected from disclosure

Other “intangibles” that manifest less clearly defined unique and protectable characteristics and elements of corporate organization and behaviour, or comprise a general or duplicated (or readily replicated) awareness of information, practices or knowledge that are not somehow secured for the exclusive and protected benefit of their “owners”, are more difficult. In transfer pricing language, it may be that these sorts of “intangibles” are some kind of hybrid of “routine” and “non-routine” elements, possibly closer to the “non-routine” end of the spectrum because they are not or may not be unknowable but for the routine transactions costs to “acquire” them. This of course reflects both the substantive question of what “is” an “intangible”, and the equally difficult valuation question of its worth.

Implicitly, this presents two fundamental questions that will inevitably have to be addressed. First, does the “intangible” manifest a “thing” or “something” to which the law ascribes legal definition?

Second, even assuming that the answer to the first question is positive, what is the value of “something” that is not, in contrast with “know-how” as the OECD explains that notion in the commentary to Article 12 of the Model Tax Convention, secret, private or subject to enforceable limitations on disclosure? For example is being allowed access to information that is generally knowable or that the source cannot or does not seek to protect worth very much (or much more than the out-of-pocket costs to obtain it)? Would a third party pay very much (more than this) for it? But it may be these kinds of “intangibles” – pooled and shared awareness of information, practices, procedures and the like as well as “synergies” associated with the compilation of these sorts of “intangibles” - that distinguish corporations and corporate group from each other and therefore sharpen the focus on whether the “arm’s length” analogue underlying contemporaneous transfer pricing is challenged. These may also be the core of what needs to be explored in the “intangibles” project.

“Non-Transaction” or “Soft” Intangibles – The Key Issue

“Intangibles” – and in particular “soft intangibles” – may have none but an economic significance or connotation. This does not diminish their relevance or importance for transfer pricing analysis although it may imperil how effectively this analysis can find its way into actual tax regulation. What the industrial economic literature might refer to, for example, as “organizational intangibles” as well, as among others, what some, imprecisely, refer to as “marketing intangibles” are in fact hallmarks of idiosyncratic manifestations of knowledge and experience that define the taxpayers to which the “arm’s length principle” and countries’ transfer pricing legislation are meant to apply. But they may not be comprised in or themselves exist as property or services according to general or tax law so as to allow them to be “taxable objects” within a tax system, and in turn the object of “taxable events” when somehow transmitted to benefit others within a corporate group who would assume responsibility and risk in relation to them.

Pointedly, simply because transfer pricing guidance or tax authority practices assert the significance of transmissions of economic value to have transactional significance does not make this so as a legal matter. Tax regimes are legal systems. They operate within and are accessory to “larger” legal systems concerning contract, property and other rights. For example, it may well be the case that the efforts of a local distributor are extraordinary, and contribute to the value to the manufacturer of its product and relevant legally protected intellectual property. But that does not necessarily give rise to an interest recognized by the law of the distributor in the manufacturer’s property or cause “something” in the nature of property – some sort of interest in the local market – to “spring” into existence as a transmissible property interest, even though as matter of economics theses might not be unreasonable economic judgements.

A Canadian Example: Illustrating the Issue

A particular example, admittedly oversimplified, with reference to the situation in Canada might be helpful to illustrate the desirability of more clearly dealing with “intangibles”. The “goodwill” associated with a business, often in casual discussion taken for granted as property, is simply the residual (entrepreneurial) value of the business and its property assuming a certain continuity of activity and pattern of asset use. Broadly, it is the value associated with business assets used together in a going concern operation, contrasted with their value independent of each other on a standalone basis (in a manner of speaking, their “break-up” value). In Canadian law, this financial, or economic, or accounting notion may or may not manifest “property”.

In one, but only one, Canadian case of marked brevity and limited analysis, the evidently seamless continuation by two sons of their retired father’s business was treated as a taxable deemed disposition of “goodwill” by the father for proceeds equal to its fair market value. Interestingly in the contemporary business restructuring context, the Court made parting reference to the realignment of business risks that occurred. In fact in that case it appears that the sons, through a new corporation, succeeded to the entirety of the business, including customer and supplier relationships and other elements that could be considered “hard” assets and not merely residual “goodwill” as if it did or could stand alone.

On the other hand, Canadian law and related practice does not recognize “property” in information or experience as such (unless of course it is of the sort that is legally protectable and has been made manifest in, for example, a patent, copyright or trademark). However, expenditures in a business context may be defined and treated by Canadian tax law as “eligible capital expenditures” that are in relation to “eligible capital property”, two tax notions. Whether this imports a primary requirement of being or giving rise to “property” in the general legal sense is not often discussed though could be important, for example, in determining whether a tax-deferred reorganization “rollover” would be available (a point that is generally, in its context, not normally controversial because in any event usually there are “hard” assets transferred, to the use or existence and transfer of which the residual business value would attach, and therefore “goodwill” is not effectively some sort of stand-alone “asset”). As well, pending changes to the

Canadian tax law will treat as dispositions certain contractual undertakings – for example transfers of "reputation" value or restrictions on competition – that otherwise the law has not treated as taxable dispositions of property or any other situation giving rise to tax.

All of this is to say that in Canada's case, what an "intangible" is, particularly a "soft intangible", as an object of taxation is hardly settled. And this is a determination that must be made even before addressing the possibly even more difficult valuation question. This is significant, and will be even more so if Canada's perceptions and treatment will be tested in the international arena in relation to those of other countries which may be different. It is even more fundamental given the close association of this issue with corporate profitability and uniqueness and the demands made by a transfer pricing analysis, particularly dealing with "business restructuring", to identify and value not only existing states of play but transitions between them.

If "intangibles" are to have a particular connotation or be subject to a regimen of definition and valuation, then it will be important in an international setting that countries more or less agree on the standards for making these determinations and that they apply them consistently and selflessly. An odd and awkward potential result of not doing so is the contention, by more than one country, that the "goodwill" or other non-routine intangible value resides with its taxpayer, resulting in more arithmetic profit and business value than in absolute terms exists or even is possible. In other words, symmetry is important.

It would not be surprising if these were concerns for most countries. To my immediate awareness, The United States and Germany are possibly among a small group of countries if not unique in themselves, in legislating in their tax law when transmissions of economic value of this nature should be treated as "taxable events" involving "taxable objects" recognized by the law. Presumably, this recognizes that apart from such legislation there is doubt whether the targeted result would obtain. Indeed, current discussions in the U.S. seem aimed at reinforcing this, notably with respect to manifestations of knowledge and experience that otherwise still might not satisfy these criteria; "work force in place" comes particularly to mind. Comparatively in light of Canadian law, I think reasonable minds can differ about whether the law accommodates as taxable changing the intensity with which business is conducted by reassigning or otherwise transferring significant employees.

Why Is It Important to Resolve Uncertainty?

The Residual Value Target: Law "And", or Law "Versus", Economics

It is critical to the effective application of transfer pricing analysis grounded in the "arm's length principle" to address how "organizational" intangibles – and more generally "soft intangibles" - are understood in the context of the Transfer Pricing Guidelines and countries' relevant tax legislation. These "intangibles" manifest the essence of the residual profitability of a multinational enterprise and in many ways define its distinctive character. In short this is the "elephant in the room" concerning the potential effectiveness of the revised Transfer Pricing Guidelines. Without venturing, here, into the resurgent debate about the relative adequacy and utility of the "arm's length principle", the inherent and unique characteristics and elements of "corporate organization" are what challenge the theoretical integrity of the "arm's length principle" as a principle. Objectively they account for why multinational organizations essentially exist in a manner of speaking in defiance of and to avoid limitations and risks attendant on unrestricted arm's length dealing. "Soft intangibles", reflected in unique corporate organizational characteristics, efficiencies and synergies are more than anything else, then, the defining characteristics of multinational organizations and the reason why, despite general deference to comparables analysis, it is often if not usually difficult to find acceptable comparables. The taxpayers whose transactions are being judged are presumptively different in ways that are not discernable or easily detectible. Therefore, the utility of the Transfer Pricing Guidelines and the analytical integrity and hegemony of the "arm's length principle" are significantly implicated. Accordingly, the "intangibles" question is key to measuring and comparing profitability and detecting gratuitous distortions of profitability as Article 9 of the Model Tax Convention requires.

Transfer Pricing Principles Increasingly Influence the Model Tax Convention

A second reason arises from greater acknowledged reliance on transfer pricing guidance to inform other analyses relating to the more general application of the Model Tax Convention and tax treaties based on it. In particular, the revision of Article 7 and its Commentary, and the OECD's report on attributing profits to permanent establishments, rely on and borrow heavily from the transfer pricing experience to measure attributed permanent establishment profit and to offer objective shape and texture to "dealings" within an enterprise. The analysis of implied transactions is difficult enough. But "dealings" are an aspect of the internal operation of multinational enterprises that entails being able to pool and share, even possibly without adverting to it in typical commercial ways, the experiences and opportunities of group or collective enterprise. Inevitably, this is grounded in, or at least materially affected by, what loosely would be referred to as "soft intangibles".

Taxation In Accordance With A Convention: Incubating Tax Disputes

A third reason pertains to the fundamental justification for having and being guided by the Model Tax Convention and the Transfer Pricing Guidelines. Their role is to establish an objective basis, both with reference to non-arm's length arrangements and otherwise, for apportioning a shared tax base among national tax systems able to assert credible claims to it based on how income is earned and taxpayers conduct themselves, so as to mitigate unresolved "double taxation". An issue that no doubt will be increasingly prominent as transfer pricing guidance assumes a more prominent role in its natural Article 9 setting and more generally as a device to assist the application of Article 7, is whether taxation is in accordance with a tax convention. This will in turn require determining, possibly more frequently and with higher stakes, whether differences of view between tax authorities are legal or factual, and whether in the Article 23 context and more generally unresolved double taxation inevitably leads to greater reliance on mutual agreement proceedings between Competent Authorities – a time consuming process not well adapted to "real time" predicable tax determinations and related financial reporting – to ensure the intended application of the Model Tax Convention and the Transfer Pricing Guidelines. Clearly, this situation will be exacerbated to the extent that *a*, if not *the*, primary determinant of profitability is a notion - "intangibles" - on which not only is there not international agreement but importantly no legal definition in countries whose treaty interests, and whose taxpayers' tax interests, are in play. In short, in the absence of a factual and legal platform on which to resolve double taxation, one that is sufficiently definite that it can be meaningfully anticipated by taxpayers and tax authorities, the objectives of the Model and the Guidelines may be frustrated. This is doubly important to the extent that countries actually adopt the Transfer Pricing Guidelines directly or by allusion in their specific treaties, as Canada and

The United States recently have done in the Fifth Protocol to the *Canada-United States Income Tax Convention* for the purpose of measuring attributed permanent establishment profits.

Guidelines Versus Law: What Supports the Application of the Transfer Pricing Guidelines?

A fourth reason has both practical and legal implications. As important and significant as the Transfer Pricing Guidelines are, they are guidelines. Tax administration takes place, in each country, within a legal system that comprises the general law on which tax law floats as an accessory, and the tax law. Economic notions cannot be given legal status simply by declaration. That is, guidance by the OECD and its members, as significant and compelling as it is, is guidance. For the most part, the Transfer Pricing Guidelines historically have provided guidance on transfers that presumptively would have been seen as involving "property" and "services" in the legal sense. It is a consequence of "globalization" – possibly an over-used rationalization for imprecision and indecision – and the conduct of global business on functionally integrated and effectively consolidated rather than separate entity lines, that accounting for the geographic and entity attribution of multinational profits will more and more be affected by the "intangibles question". Accordingly to avoid the Transfer Pricing Guidelines being marginalized and the utility of the "arm's length principle" being impaired, it is necessary, in my view, for countries that adhere to the kinds of positions in, for example, new Chapter IX of the Transfer Pricing Guidelines and that seek to capture as taxable events transmissions of economic value manifest in "intangibles" - "soft intangibles" - that may lack legal status and therefore status as taxable objects and events, to carefully consider the capacity of their existing general and tax law to sustain the objectives and positions that the OECD would offer as guidance. In that regard they may wish to consider legislative changes that give defined, observable legal life to these economic notions. This observation and my other comments, I hasten to say, should not be mistaken as some sort of slavish adherence to formalism. They are not that. Nor are they a judgment about whether the Transfer Pricing Guidelines should head in the direction of invoking a focus on "intangibles"; that has happened. The question now is what it means.

Transfer Pricing Guidelines As Model Tax Convention Commentary: New or Improved?

There is a fifth reason collateral to the fourth, for being particularly careful with this question. Although no doubt some would debate this, the Transfer Pricing Guidelines are effectively an extended Commentary to Article 9 of the Model Tax Convention. Accordingly to the extent that they, like other Commentary, cannot be considered merely to embroider or elaborate pre-existing notions inherent in or contemplated by Article 9 and therefore what treaty negotiators objectively and presumptively would be considered to have taken into account in concluding treaties, and instead are considered to invoke novel interpretative or substantive notions, the probative value even as guidance of the Transfer Pricing Guidelines and of the Model Tax Convention where the Guidelines are relevant to it might be challenged. This would affect the resolution of bilateral treaty disputes hinging on the "Associated Enterprises" and "Mutual Agreement Procedure" provisions of tax treaties, and be a factor in how prominently the Transfer Pricing Guidelines would figure in an adjudication of a transfer pricing controversy in a country's judicial environment. This is additionally important because of the significance of the Transfer Pricing Guidelines for an Article 7 business profits attribution inquiry. In other words, the status as compelling guidance and authority of the Model Tax Convention and relevant Commentary and the Transfer Pricing Guideline is affected.

The "Arm's Length Principle" Redux

A final, sixth reason for approaching the "intangibles" question carefully subsumes all of the prior points. There is, as there has been for some time, an ongoing and increasing pointed debate about the adequacy and sustainability of the "arm's length principle" versus other approaches to transfer pricing. To the extent that the devices and notions underlying important elements of that principle are undefined or too opaque, the utility of the principle to capture and deal with increasingly important determinants of corporate group income and its allocation geographically and within a corporate group may be imperilled. As you have said on a number of occasions, the arm's length principle is entrenched in international tax practice and administration, and generally those concerned with it it have at least a visceral understanding of its role and significance. If suitable focus is directed to what Article 9 actually says in contrast with the lore built up around it, the attitudinal and regulatory direction of the arm's length principle is fairly clear even though its methodological application, with respect, may sometimes seem a bit like the "Caucus Race" in Lewis Carroll's *Alice's Adventures in Wonderland*: no beginning, no ending and no over-arching extant rule to determine the final outcome. That said, the continued hegemony of this "principle" in the face of criticisms of its relevance and effectiveness will not be assisted by imprecision as to how "intangibles" will be perceived, defined and treated, or by inadequate translations of the OECD's relevant work into the law and consistent practice of its members.

No Problem Without A Solution

These are difficult questions. I do not propose to try to answer them here. I anticipate the answer will be imperfect even after much study. In other circumstances, a study of this sort might only be approached guardedly and with reservation. However, given the nature of corporate organization and the implications of global business it is inevitable to confront this issue. In any event, in a manner of speaking the inquiry has already been launched by the revised Transfer Pricing Guidelines, in particular Chapter IX. The real test may lie in generating a measure of specific agreement as to what manifestations of economic change or industrial character should be factors in a transfer pricing or "dealings" analysis and therefore treated as taxable "intangibles" and then what characteristics contribute to valuing them – bearing in mind the "routine" versus "non-routine" distinction that affects and is already incorporated in transfer pricing analysis. However the work already completed by the OECD to revise the Transfer Pricing Guidelines seems to advance this aspect a considerable conceptual distance.

It may be that the best, or at least only useful answer has two aspects.

First OECD member countries would be encouraged to ensure, if this is their objective, that their (tax) law specifically captures transmissions of "intangible" value that otherwise may not be encompassed by the tax system because it, or the transmission event, would not be recognized in the law as giving rise to a taxable outcome. This would include not only addressing whether the "intangible" is recognized as a "taxable object" by the legal system, but also by what (taxable) events (i.e., disposition, provision of services, royalty/licence) it and interests in or rights to it can, or possibly could only be, transmitted, as well as when, if this is a concern, a taxpayer's self selection of the manner of transmission will be respected. The corollary issue of valuation needs also to be addressed. This is a domestic law matter for member countries. But its importance cannot be underestimated. And neither can the need, not merely desirability, for countries to adopt a more or less consistent outlook. If a tax claim cannot be sustained under the law according to which it is asserted, then the Transfer Pricing Guidelines will have muted significance even if sound conceptually to identify realized or shifting value. If countries adopt inconsistent approaches, then transfer pricing disputes may end up confronting "phantom profit" that exceeds any reasonable absolute measure of value, worth or income. In some respects, the international concentration on modern statements of transfer pricing obscures the fact that normative business valuation analysis has had to contend with these issues long before transfer pricing, as such, assumed its present prominence. Possibly, there is something to be learned by taking the experience of more "ordinary" business valuation into account.

Second, to encourage a measure of international consistency, a model definition of "intangibles" for transfer pricing purposes and of the nature of a "taxable event" in that connection, would be proposed. Countries then could adopt or adapt this in their domestic legislation and tax conventions (including, possibly, collateral legislation dealing with their interpretation). This would satisfy the requirement that tax be the outcome of a "taxable event" (i.e., a "disposition, or other arrangement, such as providing services or use through a licence) in relation to a "taxable object" (i.e., property or some specific definition of the "intangible" recognized in the law by for this purpose) of a "taxable subject" (i.e., a taxpayer). It would establish a common platform on which questions of taxation in accordance with a tax convention could be measured and resolved, and on which mutual agreement procedure proceedings could proceed. The decision of a country not to adopt such notions in its law or, if it did how it adopted them, could be evaluated as an interpretative matter in relation to the unreserved agreement of OECD member states on the "model treatment". Finally, this would accord with recent OECD practice in Commentaries to the Model Tax Convention to identify difficult questions and propose ways in which members could address them.

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I hope these comments are interesting to you. As you know, I have great respect for the OECD and the CTPA. It has been a privilege to contribute even informally to its work. This is a very important project. In my view its outcome is critical to the continuing utility of much of the OECD's recent work concerning transfer pricing and the attribution of profit to permanent establishments. I would be happy to assist in it if you think that would be helpful.

Regards,