The 2016 OECD International Tax Conference
June 6-7, 2016
Four Seasons Hotel
Washington D.C.
Permanent Establishments:
They’re back ...
Panel

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What we will cover

1. A brief history of the OECD work on PE
2. Changes to the PE definition resulting from BEPS Action 7
3. The 2012 changes to the Commentary on the PE definition (they’re back...)
4. The US view of the PE definition
1. A brief history of the OECD work on PE
OECD work on PE: 2003 changes to the Commentary on Article 5

• Clarification of “fixed place of business through which the business of an enterprise is wholly or partly carried on”
  • What is a place?
  • What is a “place of business”?  
  • What is a “fixed place of business”? Temporal aspect; “administrative practice” of 6 months except for “recurrent activities” and “one-shot project”
From 1963 to 1977

- Art. 5(1): “in which” becomes “through which”
- Art. 5(2): the construction site example (Art. 5(2)g)) becomes an exception (Art. 5(3))
- Art. 5(4)e): advertising, supply of information and scientific research are deleted; Art. 5(4)f) is added
- Art. 5(5) no longer deems the agent to be the PE; all exceptions of Art. 5(4) are incorporated
- Art. 5(5) and 5(6) no longer refers to an enterprise of one State having a PE in the other State
- Commentary is substantially expanded
2003 changes

- What is the meaning of “through which the business of an enterprise is wholly or partly carried on”? 
  - Most difficult part of the definition: relationship between place and taxpayer’s business
    - Owned or rented by the taxpayer?
    - Right to use or simply use?
    - When is a place at the taxpayer’s disposal?
    - Painter’s example

- Minor changes to Commentary on agency PE
- Clarification of PE in e-commerce: “server-PE non-issue”
The painter’s example is still controversial:

“A fourth example is that of a painter who, for two years, spends three days a week in the large office building of its main client. In that case, the presence of the painter in that office building where he is performing the most important functions of his business (i.e. painting) constitute a permanent establishment of that painter.”
• 2005: *Philip Morris* amendments; PE definition applies on a single entity view of what is an “enterprise”

• 2008: the service-PE alternative provision included in the Commentary (follow-up work to the 2003 report)
UN Model has its own provision:

The term “permanent establishment” also encompasses:

(a) A building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months;

(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 if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned.
1998 to 2010

- Development of the Authorized OECD Approach (AOA) from 1998 to 2008 as a follow-up to the 1995 Transfer Pricing Guidelines
- Development of a new Art. 7 from 2008 to 2010 in order to allow the application of the full AOA
2011 and 2012 discussion drafts

Address 25 different issues, including

- Meaning of “at the disposal of”
- Home office as a PE
- Main contractor who subcontracts all aspects of a contract
- Time requirement for the existence of a permanent establishment
- Meaning of “to conclude contracts in the name of the enterprise”
2. Changes to the PE definition resulting from BEPS Action 7
Develop changes to the definition of PE to prevent the artificial avoidance of PE status in relation to BEPS, including through the use of *commissionnaire* arrangements and the specific activity exemptions. Work on these issues will also address related profit attribution issues.
Concern
Avoidance of local country tax based on the use of commissionnaire and similar arrangements, specific activity exemptions and other techniques
As a matter of policy, where the activities that an intermediary exercises in a country are intended to result in the regular conclusion of contracts to be performed by a foreign enterprise, that enterprise should be considered to have a taxable presence in that country unless the intermediary is performing these activities in the course of an independent business.
Art. 5(5) and 5(6) of the OECD Model are modified in order to

- apply where a person “concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise”;

- refer to contracts in the name of the enterprise, for the transfer of property of the enterprise or for the provision of services by the enterprise; and

- Restrict the scope of the “independent agent” exception in Art. 5(6) in order to limit it to genuinely independent businesses
“Notwithstanding the provisions of para. 1 and 2, where a person – other than an agent of an independent status to whom para. 6 applies – is acting on behalf of an enterprise and has, and habitually exercises in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a PE in that State […]” (emphasis added)

“Notwithstanding the provisions of para. 1 and 2 but subject to the provisions of para. 6, where a person is acting in a Contracting State on behalf of an enterprise and in doing so habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are:

a) in the name of the enterprise, or
b) for the transfer of the ownership of, or for the granting of the rights to use, property owned by that enterprise or that the enterprise has the right to use, or
c) for the provision of services by that enterprise,
that enterprise shall be deemed to have a PE in that State […]” (emphasis added)
Art. 5(5) changes

• Dependent agent (para. 5) - Considerations
  – Significant lowering of the PE threshold
    • But not as extensive as the Discussion Drafts
  – Interpretation of new concepts:
    • “The principal role”
    • “without material modification”
An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that 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.
a) Par. 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of another Contracting State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.

b) For the purpose of the Article, a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50% of the beneficial interest in the other (or, in the case of a company, more than 50% of the aggregate vote and value of the company’s shares of the beneficial interest in the company) or if another person possesses directly or indirectly more than 50% of the beneficial interest (or, in the case of a company, more than 50% of the aggregate vote and value of the company’s shares of the beneficial interest in the company) in the person and the enterprise.” (emphasis added)
Independent agent (para. 6)

• More extensive application of independent agent exception
• Introduction of “closely related” concept based on control
• “Control based on facts and circumstances” – more than 50% ownership equals de facto control
  - Limited guidance for “economic dependency”
  - “(almost) exclusively”: where the person’s activities on behalf of enterprises to which it is not closely related do not represent a significant part of that person’s business
“... habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification …”
A person acts on behalf of an enterprise;
that person either
  – habitually concludes contracts, or
  – habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise,
Contracts are either
  – in the name of the enterprise,
  – for the transfer of the ownership or right to use, property that the enterprise owns or has the right to use, or
  – for the provision of services by that enterprise.
• Contract considered concluded under the relevant governing law.
• Active negotiation of the terms is not necessary condition, if law treats acceptance of an offer to enter into a standard contract with that enterprise.
• Signing inside the State is not necessary condition
Covers cases where activities exercised in a State are intended to result in the regular conclusion of contracts, (sales force of the enterprise.)

Typically be associated with the actions that convince a 3rd party to enter into a contract with the enterprise.

Applies where, a person solicits and receives orders that are routinely approved and which are sent directly for fulfillment to a warehouse from which goods belonging to the enterprise are delivered.

Does not apply where a person merely promotes and markets goods or services of an enterprise in a way that does not directly result in the conclusion of contracts.

“habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification …”
Representatives of a pharmaceutical enterprise actively promote drugs produced by that enterprise by contacting doctors that subsequently prescribe these drugs.

Marketing activity does not directly result in the conclusion of contracts between the doctors and the enterprise, even though the sales of these drugs may significantly increase as a result of that marketing activity.
• Send emails, make telephone calls to, or visit large organisations to convince them to buy RCO’s products and services;
• Use relationship building skills to anticipate needs of buyers and convince them to acquire products and services offered by RCO.
• When buyer expresses interest, SCO employee indicates the fixed price structure that will be payable for the quantity ordered, describes terms of contract and directs buyer to website where the buyer can conclude contract directly with RCO
• Buyer concludes contract online for the quantity discussed with SCO and in accordance with the price structure presented
• Remuneration of SCO employees is partially based on the revenues derived by RCO from buyers
Conclusion:

• SCO’s employees play the principal role leading to the conclusion of the contract between the buyer and RCO and such contracts are routinely concluded without material modification by the enterprise.

• The fact that SCO’s employees cannot vary the terms of the contracts does not mean that the conclusion of the contracts is not the direct result of the activities that they perform on behalf of the enterprise,

• Convincing the buyer to accept these standard terms being the crucial element leading to the conclusion of the contracts between the account holder and RCO.
## Comparing Examples

<table>
<thead>
<tr>
<th>RCO/SCO Example</th>
<th>Pharma Example</th>
<th>Possible differentiation</th>
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</thead>
<tbody>
<tr>
<td>Active promotion through direct contact with buyer</td>
<td>Yes? Contact with doctors who right prescription – for buyer</td>
<td><strong>Direct Contact</strong>: Is it significant that Doctor is intermediary?</td>
</tr>
<tr>
<td>E-mails/calls/visits</td>
<td>Visits, not clear how frequent is content</td>
<td><strong>Frequency of Contact</strong>: Is it implied that pharma rep is making less frequent contacts?</td>
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<tr>
<td>Relationship building skills to anticipate needs</td>
<td>Contacting doctors</td>
<td><strong>Customization</strong>: Implication that Pharma sales effort are less personalized to doctors needs?</td>
</tr>
<tr>
<td>Description of Fixed Pricing and contract terms</td>
<td>Presumably drug prices are set and terms for purchase also fixed. Buyers go on line or store to purchase.</td>
<td><strong>Explicit discussions of Price</strong>: Is it implied that if price is not discussed you are ok?</td>
</tr>
<tr>
<td>Remuneration based on sales</td>
<td>Not stated</td>
<td><strong>Comp structure</strong>: as long as not tied to sales?</td>
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Restricting Art. 5(4) to preparatory or auxiliary activities

• In order to ensure that profits derived from core activities performed in a country can be taxed in that country, Article 5(4) will be modified to ensure that each of the exceptions included therein is restricted to activities that are otherwise of a “preparatory or auxiliary” character.
Given the ease with which MNEs may alter their structures to obtain tax advantages, it was decided to clarify that it is not possible to avoid PE status by fragmenting a cohesive operating business into several small operations in order to argue that each part is merely engaged in preparatory or auxiliary activities that benefit from the exceptions of Art. 5(4)
The new anti-fragmentation rule takes account not only of the activities carried on by the same enterprise at different places but also of the activities carried on by closely related enterprises at different places or at the same place.
Specific activity exemptions (para. 4)

A fixed place of business is not considered to be a PE:

a) Use facilities solely for storage, display, delivery
b) Stock of goods / merchandise solely for storage, display, delivery
c) Stock of goods / merchandise solely for processing by another enterprise
d) For purchasing goods or merchandise or collecting info
e) Solely for any other activity
f) Solely for a combination of a) to e)

d) and e) subject to a preparatory or auxiliary nature test

All categories subject to a preparatory or auxiliary nature test
Specific activity exemptions (para. 4)

- All specific activity exemptions now subject to an overriding preparatory or auxiliary test
- Intention to narrow PE exemptions for warehouses etc. – Particular focus on facilities for delivering goods and ‘purchasing offices’
- New examples to illustrate intended interpretation
Action 7 additions to the Commentary

- Explanations of the changes made to Article 5
- Splitting-up of contracts:
  - Example added to the Commentary on the Principal Purposes Test (PPT) rule
  - For States that are unable to address the issue of splitting-up of contracts through domestic anti-abuse rules, a more automatic rule will be included in the Commentary as an alternative provision
• Tackle abuse of dividing contracts to escape from PEs requiring a minimum duration (e.g. 12 months for constructions in some DTTs)

• Specific example in Commentary on principal purpose test rule focusing on splitting up of contracts
• Major changes to article 5 and significant lowering of PE threshold
• More controversy:
  – Tax authorities aggressively applying PE rules
  – Ambiguity in new guidance
• Current dispute resolution may be insufficient
• PE rules may be an alternative to TP disputes
Another panel will deal with the proper application of Art. 7

Interaction of Art. 5 and Art. 7 work:

– How much profit will be attributed to new PEs resulting from Action 7 should be relevant to the question of whether a PE should be recognized

– Significant administrative burden and collateral consequences with no benefit to source country

– Precedence in law and practice in determining that there is no PE if there are no profits to attribute
Attribution of profit issue

- Original paragraph 23 commentary dealing with specific activity exemptions:
  - “It is recognized that such a place of business may well contribute to the productivity of the enterprise, but the services it performs are so remote from the actual realisation of profits that it is difficult to allocate any profits to the fixed place of business in question.”

- 2012 Report: “The Working Party agreed . . . to redraft the penultimate sentence of paragraph 23 in order to remove any suggestion that there could be a link between the attribution of profits and the existence of a PE”

- Action 7 Report: Did not adopt and retained original sentence.
3. The 2012 changes to the Commentary on the PE definition
New Article 5 and its Commentary

• Changes to the Commentary on Art. 5 proposed in a 2012 discussion draft (some of these changes are included in the following slides as they appeared in the discussion draft; a number of modifications, however, have already been agreed to)

• Ongoing work on integrating these changes with the changes resulting from BEPS Action 7

• The resulting new Article 5 and its Commentary will be included in the next update of the OECD Model, currently scheduled for 2017
“Negative inference” issue

• Changes that will result from the 2102 discussion draft are intended to apply to existing treaties

**BUT**

• How will the changes resulting from Action 7 affect the interpretation of existing treaties?
“It should be noted that these changes \textit{i.e. Action 7 changes to Art. 5 and its Commentary} are prospective only and, as such, do not affect the interpretation of the former provisions of the OECD Model Tax Convention and of treaties in which these provisions are included, in particular as regards the interpretation of existing paragraphs 4 and 5 of Article 5.”
The “preparatory or auxiliary” issue

- Para. 75 of the 2012 Discussion Draft: “The Working Party ... therefore agreed that the Commentary should be amended to clarify that subparagraphs a) to d) were not subject to the extra condition that the activities referred to therein be of a preparatory or auxiliary nature...”

- Report on Action 7: added an overall condition “provided that such activity is of a preparatory or auxiliary character”
Option not to adopt the changes to Art. 5(4): Background and Implications

Action 7 Report:

- “…some delegates [] argued that the proposed interpretation in the 2012 Report did not appear to conform with what they considered to be the original purpose of the paragraph, i.e. to cover only preparatory or auxiliary activities.”

- “Regardless of the original purpose, . . . [i]t is agreed to modify Art. 5(4) . . . So that each of the exceptions included in that provision is restricted to activities that are otherwise of “preparatory or auxiliary” character.”

- Some States, however, consider “…that there is no need to modify Art. 5(4) as suggested ... and that the list of exceptions in subparagraphs a) to d) of paragraph 4 should not be subject to the condition that the activities referred to in these subparagraphs be of a preparatory or auxiliary character”
Para. 114 of the 2012 Discussion Draft: “The Working Party agreed that whilst it was not possible to reach a common view on the situations dealt with in the court decisions, it would be helpful to add to paragraph 32.1 of the Commentary an example of a situation where a foreign principal would be bound by a contract even though the contract would not literally be concluded in his name.”

Report on Action 7: changes to Art. 5(5)
Discussion draft dealt with 25 different issues related to the interpretation of Article 5

Most of the proposed changes are still relevant and will be pursued but some are more important than others
1. Can a farm be a permanent establishment?

3. Can the premises of a (converted) local entity constitute a permanent establishment of a foreign enterprise under paragraph 1?

5. Shops on ships operated in international traffic

9. Application of paragraph 3 to joint venture and partnership activities

10. Meaning of “place of management”

11. Additional work on a construction site
12. Must the activities referred to in paragraph 4 be of a preparatory or auxiliary nature?

13. Relationship between delivery and the sale of goods in subparagraph 4 a)

14. Does a development property constitute a PE?

16. Carrying on various activities listed alternatively in subparagraphs 4 a) and b)

17. Negotiation of import contracts as an activity of a preparatory or auxiliary nature
15. Do “goods or merchandise” cover digital products or data?

18. Fragmentation of activities

19. Meaning of “to conclude contracts in the name of the enterprise”

20. Is paragraph 5 restricted to situations where sales are concluded?

21. Does paragraph 6 apply only to agents who do not conclude contracts in the name of?
22. Assumption of entrepreneurial risk as a factor indicating independence
23. Activities of fund managers
24. Clarification of paragraph 8 of the Commentary on Article 5
25. Activities of insurance agents
4.2 Whilst no formal legal right to use a particular place is required for that place to constitute a permanent establishment, the mere presence of an enterprise at a particular location does not necessarily mean that that location is at the disposal of that enterprise. \textit{Whether a location may be considered to be at the disposal of an enterprise in such a way that it may constitute a “place of business through which the business of [that] enterprise is wholly or partly carried on” will depend on that enterprise having the effective power to use that location as well as the extent of the presence of the enterprise at that location and the activities that it performs there. [...]}
This is illustrated by the following examples. Where an enterprise has an exclusive legal right to use a particular location which is used only for carrying on that enterprise’s own business activities (e.g. where it has legal possession of that location), that location is clearly at the disposal of the enterprise. This will also be the case where an enterprise is allowed to use a specific location that belongs to another enterprise or that is used by a number of enterprises and performs its business activities at that location on a continuous basis during an extended period of time. [...]

Jacques
[...] This will not be the case, however, where the enterprise’s presence at a location is so intermittent or incidental that the location cannot be considered a place of business of the enterprise (e.g. where employees of an enterprise have access to the premises of associated enterprises which they often visit but without working in these premises for an extended period of time). Where an enterprise does not have a right to be present at a location and, in fact, does not use that location itself, that location is clearly not at the disposal of the enterprise; [...]
[...] thus, for instance, it cannot be considered that a plant that is owned and used exclusively by a supplier or contract-manufacturer is at the disposal of an enterprise that will receive the goods produced at that plant merely because all these goods will be used in the business of that enterprise (see also paragraph 42 below). It is also important to remember that even if a place is a place of business through which the activities of an enterprise are partly carried on, that place will be deemed not to be a permanent establishment if the business activities carried on at that place all fall within the scope of paragraph 4. [the rest of existing paragraph 4.2 is moved]
4.8 Even though part of the business of an enterprise may be carried on at a location such as an individual’s home office, that should not lead to the automatic conclusion that that location is at the disposal of that enterprise simply because that location is used by an individual (e.g. an employee) who works for the enterprise. Whether or not a home office constitutes a location at the disposal of the enterprise will depend on the facts and circumstances of each case. In many cases, the carrying on of business activities at the home of an individual (e.g. an employee) will be so intermittent or incidental that the home will not be considered to be a location at the disposal of the enterprise (see paragraph 4.2 above). [...]
Where, however, a home office is used on a regular and continuous basis for carrying on business activities for an enterprise and it is clear from the facts and circumstances that the enterprise has required the individual to use that location to carry on the enterprise’s business (e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office), the home office may be considered to be at the disposal of the enterprise.
4.9 A clear example is that of a non-resident consultant who is present for an extended period in a given State where she carries on most of the business activities of her own consulting enterprise from an office set up in her home in that State; in that case, that home office constitutes a location at the disposal of the enterprise. Where, however, a cross-frontier worker performs most of his work from his home situated in one State rather than from the office made available to him in the other State, one should not consider that the home is at the disposal of the enterprise because the enterprise did not require that the home be used for its business activities. [...]
It should be noted, however, that since the vast majority of employees reside in a State where their employer has at its disposal one or more places of business to which these employees report, the question of whether or not a home office constitutes a location at the disposal of an enterprise will rarely be a practical issue. Also, the activities carried on at a home office will often be merely auxiliary and will therefore fall within the exception of subparagraph e) of paragraph 4.
• Can a home office ever be a PE?
6. Since the place of business must be fixed, it also follows that a permanent establishment can be deemed to exist only if the place of business has a certain degree of permanency, *i.e.* if it is not of a purely temporary nature. A place of business may, however, constitute a permanent establishment even though it exists, in practice, only for a very short period of time because the nature of the business is such that it will only be carried on for that short period of time. It is sometimes difficult to determine whether this is the case. [...]

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6. Time requirement for the existence of a permanent establishment

[...] Whilst the practices followed by member countries have not been consistent in so far as time requirements are concerned, experience has shown that permanent establishments normally have not been considered to exist in situations where a business had been carried on in a country through a place of business that was maintained for less than six months (conversely, practice shows that there were many cases where a permanent establishment has been considered to exist where the place of business was maintained for a period longer than six months).

[the rest of the paragraph is moved to new paragraphs 6.1 to 6.3]
6. Time requirement for the existence of a permanent establishment

6.1 One exception to this general practice has been where the activities were of a recurrent nature; in such cases, each period of time during which the place is used needs to be considered in combination with the number of times during which that place is used (which may extend over a number of years). That exception is illustrated by the following example. An enterprise of State R carries on drilling operations at a remote arctic location in State S. The seasonal conditions at that location prevent such operations from going on for more than three months each year but the operations are expected to last for 5 years. [...]
6. Time requirement for the existence of a permanent establishment

[...] *In that case, given the nature of the business operations at that location, it could be considered that the time requirement for a permanent establishment is met due to the recurring nature of the activity regardless of the fact that any continuous presence lasts less than 6 months; the time requirement could similarly be met in the case of shorter recurring periods of time that would be dictated by the specific nature of the relevant business.*
6.2 Another exception to this general practice has been made where activities constituted a business that was carried on exclusively in that country; in this situation, the business may have short duration because of its nature but since it is wholly carried on in that country, its connection with that country is stronger. That exception is illustrated by the following example. An individual resident of State R has learned that a television documentary will be shot in a remote village in State S where her parents still own a large house. The documentary will require the presence of a number of actors and technicians in that village during a period of four months. […]
6. Time requirement for the existence of a permanent establishment

[...] The individual contractually agrees with the producer of the documentary to provide catering services to the actors and technicians during the four month period and, pursuant to that contract, she uses the house of her parents as a cafeteria that she operates as sole proprietor during that period. These are the only business activities that she has carried on and the enterprise is terminated after that period; the cafeteria will therefore be the only location where the business of that enterprise will be wholly carried on. [...]
[...] In that case, it could be considered that the time requirement for a permanent establishment is met since the restaurant is operated during the whole existence of that particular business. This would not be the situation, however, where a company resident of State R which operates various catering facilities in State R would operate a cafeteria in State S during a four week international sports event. In that case, the company’s business, which is permanently carried on in State R, is only temporarily carried on in State S.
10. **There are different ways in which an enterprise may carry on its business. In most cases,** the business of an enterprise is carried on mainly by the entrepreneur or persons who are in a paid-employment relationship with the enterprise (personnel). This personnel includes employees and other persons receiving instructions from the enterprise (e.g. dependent agents). The powers of such personnel in its relationship with third parties are irrelevant. It makes no difference whether or not the dependent agent is authorised to conclude contracts if he works at the fixed place of business **of the enterprise** (see paragraph 35 below). 

[the rest of the existing para. 10 is moved to new para. 10.2]
As explained in paragraph 8.11 of the Commentary on Article 15, however, there may be cases where individuals who are formally employed by an enterprise will actually be carrying on the business of another enterprise and where, therefore, the first enterprise should not be considered to be carrying on its own business at the location where these individuals will perform that work. Within a multinational group, it is relatively common for employees of one company to be temporarily seconded to another company of the group and to perform business activities that clearly belong to the business of that other company.
[...] In such cases, administrative reasons (e.g. the need to preserve seniority or pension rights) often prevent a change in the employment contract. The analysis described in paragraphs 8.13 to 8.15 of the Commentary on Article 15 will be relevant for the purposes of distinguishing these cases from other cases where employees of a foreign enterprise perform that enterprise’s own business activities.
7. Presence of foreign enterprise’s personnel in the host country

10.2 But a permanent establishment may nevertheless exist if the business of the enterprise is carried on mainly through automatic equipment, the activities of the personnel being restricted to setting up, operating, controlling and maintaining such equipment. Whether or not gaming and vending machines and the like set up by an enterprise of a State in the other State constitute a permanent establishment thus depends on whether or not the enterprise carries on a business activity besides the initial setting up of the machines. [...]

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7. Presence of foreign enterprise’s personnel in the host country

[...]

A permanent establishment does not exist if the enterprise merely sets up the machines and then leases the machines to other enterprises. A permanent establishment may exist, however, if the enterprise which sets up the machines also operates and maintains them for its own account. This also applies if the machines are operated and maintained by an agent dependent on the enterprise.
10.1 An enterprise may also carry on its business through subcontractors, acting alone or together with employees of the enterprise. In that case, a permanent establishment will only exist for the enterprise if the other conditions of Article 5 are met. In the context of paragraph 1, that will require that these subcontractors perform the work of the enterprise at a fixed place of business that is at the disposal of the enterprise. [...]

8. Main contractor who subcontracts all aspects of a contract
8. Main contractor who subcontracts all aspects of a contract

[...] Whether a fixed place of business where subcontractors perform work of an enterprise is at the disposal of that enterprise will be determined on the basis of the guidance in paragraph 4.2; in the absence of employees of the enterprise, however, it will be necessary to show that such a place is at the disposal of the enterprise on the basis of other factors showing that the enterprise clearly has the effective power to use that site, e.g. because the enterprise owns or has legal possession of that site and controls access to and use of the site. [...]
Paragraph 19.1 illustrates such a situation in the case of a construction site; this could also happen in other situations. An example would be where an enterprise that owns a small hotel and rents out the hotel’s rooms through the Internet has subcontracted the on-site operation of the hotel to a company that is remunerated on a cost-plus basis.
19. A site exists from the date on which the contractor begins his work, including any preparatory work, in the country where the construction is to be established, e.g. if he installs a planning office for the construction. *If an enterprise (general contractor) which has undertaken the performance of a comprehensive project subcontracts all or parts of such a project to other enterprises (subcontractors), the period spent by a subcontractor working on the building site must be considered as being time spent by the general contractor on the building project. [...]*
8. Main contractor who subcontracts all aspects of a contract

[...]

In that case, the site should be considered to be at the disposal of the general contractor during the time spent on that site by any subcontractor where circumstances indicate that, during that time, the general contractor clearly has the construction site at its disposal by reason of factors such as the fact that he has legal possession of the site, controls access to and use of the site and has overall responsibility for what happens at that location during that period. The subcontractor himself has a permanent establishment at the site if his activities there last more than twelve months.
4. The US view of the PE definition
1 and 2 [no changes]

3. A building site or construction or installation project, or an installation or drilling rig or ship used for the exploration or exploitation of the sea bed and its subsoil and their natural resources, situated in one of the Contracting States constitutes a permanent establishment only if it lasts, or the exploration activity continues—the activities of the rig or ship lasts, for more than twelve months. For the sole purpose of determining whether the twelve-month period referred to in this paragraph has been exceeded:
Art. 5(3) of the new US Model Treaty

a) where an enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site or construction or installation project and these activities are carried on during periods of time that in the aggregate do not last more than twelve months; and
b) connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding thirty days, by one or more enterprises that are connected persons with respect to the first-mentioned enterprise,

these different periods of time shall be added to the periods of time during which the first-mentioned enterprise has carried on activities at that building site or construction or installation project.
4. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:

a) to e) [no changes]

f) the maintenance of a fixed place of business solely for any combination of the activities mentioned in subparagraphs (a) through (e) of this paragraph, provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
5. Notwithstanding the provisions of paragraphs 1 and 2 of this Article, where a person -- other than an agent of an independent status to whom paragraph 6 of this Article applies -- is acting on behalf of an enterprise and has and habitually exercises in a Contracting State an authority to conclude contracts that are binding on the enterprise, that enterprise shall be deemed to have a permanent establishment in that Contracting State in respect of any activities that the person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 that, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.
6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that Contracting 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 as independent agents.

7. The fact that a company that is a resident of a Contracting State controls or is controlled by a company that is a resident of the other Contracting State, or that carries on business in that other Contracting State (whether through a permanent establishment or otherwise), shall not be taken into account in determining whether either company has a permanent establishment in that other Contracting State.
3. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include any one or more of the following:

a) the use of facilities solely for the purpose of storage, display, or occasional delivery 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, display, or occasional delivery;

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;

e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for other activities which have a preparatory or auxiliary character, for the enterprise.
4. Notwithstanding the provisions of paragraphs 1 and 2, where a person other than an agent of an independent status to whom paragraph 5 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 State if:

a) he has and habitually exercises in the first-mentioned State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph;
Art. 5 of the India-US treaty

\(b\) he 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, and some additional activities conducted in that State on behalf of the enterprise have contributed to the sale of the goods or merchandise; or

\(c\) he habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise.
5. 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 and the transactions between the agent and the enterprise are not made under arm's-length conditions, he shall not be considered an agent of independent status within the meaning of this paragraph.
BEPS Action Plan

February 2013
July 2013
October 2015
October 2015
October 2015