

# Attachment to Coordinator Paper:

## (7) Draft Outline of Guidance Note on Permanent Establishment Issues for the Extractive Industries

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- I. Executive Summary/Purpose:** Relevance of the PE concept in the EI
- II. Status of this Note:** Guidance only
- III. Terms Used:** Reference to the Note on Selected Treaty Issue terms
- IV. Background:** The OECD Model and the UN Model lack clarity in a number of areas in the application of the PE concept to the taxation of the Extractive Industries
- V. Interrelationship with Other Guidance Notes (e.g. Overview, Selected Tax Treaty Issues, Decommissioning and Capital Gains Taxation)**
- VI. The Basic Rules of Permanent Establishments**
  - 1. The “place of business test”**
    - a. The fixed place of business
    - b. The “positive list”
    - c. Natural resources
  - 2. The “location test”**
    - a. The link between the place of business and a geographical point
    - b. The “spatial delimitation approach”
  - 3. The “permanence test”**
    - a. The duration of business activity
    - b. Calculation of the duration of the business activity
    - c. Analogy from the time threshold for construction PEs
    - d. Reiteration and interruption of business activity
  - 4. The “right of use/at the disposal test”**
    - a. The “factual” and “legal” approach
    - b. Profit Sharing Arrangements

5. **The “business connection test”**
  - a. Business performed “through” a fixed place of business
  - b. The “force of attraction principle”
6. **The “business activity test”/exceptions to the notion of PE**
  - a. Coordination centres as places of management
  - b. Preparatory or auxiliary activities
  - c. Research, development and collecting information activities
  - d. Storage activities
7. **Application to phases of extractive industries project life cycles**

#### **VII. The Construction Work Clause**

1. **Scope of what is considered to constitute a “construction”**
2. **The construction clause and its relationship to the basic rules**
  - a. Identification of the general contractor and subcontractor
  - b. Identification of construction projects
3. **Planning and supervision of construction work**
4. **Application to phases of extractive industries project life cycles**

#### **VIII. Specific approaches for onshore and offshore exploration and exploitation**

1. **Offshore**
  - a. 30 day deemed PE rule
  - b. US provision on drilling rigs
2. **Onshore**
  - a. Australian provision on substantial equipment
3. **“Source-state taxation” clause of other resource-rich states with a coast line**
4. **Case law and examples**

#### **IX. The Agency PE**

1. **The concept of agency: civil vs common law**
2. **Dependent vs independent agent**

#### **X. Aggregation of PEs**

3. **The “geographical and commercial coherence” test**
  - a. Geographical coherence
  - b. Commercial coherence
  - c. Ring fencing
  - d. Case law and Examples

## **XI. The Attribution of Profits to a PE**

### **1. The attribution of functions, assets and risk to PE**

- a. Criteria for the attribution of functions and assets to a PE under the AOA
- b. Attribution of risks to a PE

### **2. The attribution of capital to a PE**

### **3. The methods for the attribution of profits to a PE**

## **XII. Other possible issues**

- 1. Services PE**
- 2. Insurance PE**
- 3. Stock agent**

## **XIII. BEPS 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances**

- 1. Splitting up of contracts**
- 2. Anti-abuse rules for PEs established in third States**

## **XIV. BEPS 7: Preventing the Artificial Avoidance of PE Status**

## **XV. Methods to Avoid Double Taxation**

### **1. The exemption and the credit method**

- a. The exemption method
- b. The credit method

### **2. The “final losses” concept under EU jurisprudence**

## **XVI. Conclusions**

## **PRELIMINARY LIST OF SOURCES TO BE REVIEWED IN PREPARATION OF DRAFT NOTE**

Michael Lennard. "The UN Model Tax Convention as Compared with the OECD Model Tax Convention – Current Points of Difference and Recent Developments". IBFD Asia-Pacific Tax Bulletin January/February 2009.

Arvid A. Skaar. "Permanent Establishment. Erosion of a tax Treaty Principle". Series of International Taxation. Kluwer Law and Taxation Publishers. Deventer. Boston. 1991.

Radhakishan Rawal. The Taxation of Permanent Establishments an international perspective. Spiramus 17 August 2006.

Jan de Goede and Ruxandra Vlasceanu. "Permanent Establishment Implications for Coordination Centres in the Oil and Gas Industry". IBFD Bulletin for International Taxation, September 2013.

Roberto Bernales and Bart Kusters. Spain: Oil&Gas Operational Structure Based on Joint Operation Agreements Gives Rise to Multiple Permanent Establishments within a Single Country. European Taxation, 2015 (Volume 55), No. 10. September 2015.

Barbara M. Angus, "Chipping Away at the Permanent Establishment Concept", Tax Management International Journal, Vol. 42, No. 5 May 10, 2013.

International Monetary Fund. "Fiscal Regimes for Extractive Industries: Design and Implementation". Prepared by the Fiscal Affairs Department. August 15, 2012.

Bryan Land. "Capturing a fair share of fiscal benefits in the extractive industry". Transnational Corporations, Vol. 18. Nº 1 (April 2009).

Keith R. Evans. "Leased Equipment: When Does a Permanent Establishment Exist?". Canadian tax journal / revue fiscale canadienne. (2002) vol. 50, no 2.