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Agenda item 3 (a) (ii)

Article 5 (Permanent establishment): The meaning of “connected projects”

Article 5: the meaning of “the same or a connected project”

In the seventh session of the Committee it was acknowledged that it is necessary to clarify the meaning of the word “connected” in Article 5 paragraph 12 to describe projects that are sufficiently related to be added together. Ms. Claudine Devillet was requested to prepare a paper for the eighth session as well as updates for the ninth and the tenth session. The meaning of “the same or a connected project” was discussed during those sessions. The changes to the UN Commentary in that respect should in particular clarify whether physical presence is required, which factors are relevant for the determination of whether projects are connected, and if the condition “for the same or a connected project” should be examined from the perspective of the enterprise or the customer. Furthermore, an additional optional provision for the calculation of the 183-days threshold for situations where different parts of the same or a connected project are performed by different associated enterprises is suggested. As paragraph 12.1 and 12.2 (as redrafted during the tenth session) were already agreed on in the tenth session, this update includes only the Secretariat’s suggestions for a few editorial changes to these paragraphs. In the tenth session, it was also agreed that paragraph 12.3 should be reviewed to clarify the issues raised by simplifying the language and reducing the number of examples.

1. Article 5(3)(b) of the UN Model addresses the situation of an enterprise that performs services in a Contracting State through employees or other personnel in relation to “the same or a connected project”. There is no guidance in the Commentary on Article 5(3)(b) with respect to the meaning of the terms “the same or a connected project” and Contracting States may interpret these terms in different ways. Some rules and some examples could be included in the UN Commentary in order to clarify this issue.

2. Besides, Article 5(3)(b) refers to “[t]he furnishing of 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 ...”. Taking into consideration that Article 5(3)(b) uses the term “furnishing” and not the term “performing”, a minority view was expressed during several sessions of the Committee that services furnished within the

source country without the physical presence of personnel or employees in that country are covered by that provision if the furnishing of services within the country lasts more than 183 days. During the discussion, a large majority of those speaking considered, however, that a physical presence is required by Article 5(3)(b). The UN Commentary should clarify this issue.

3. Finally, most countries consider that only the profits attributable to the performance of services through employees or other personnel within a Contracting State during the specified time period [can be attributed to a permanent establishment according to Article 5\(3\)\(b\) and](#) are [therefore](#) taxable in the source country in accordance with Article 7. Some countries, however, have expressed the view that the term “furnishing” used in Article 5(3)(b) may imply that, where employees or other personnel are present in the source country during the specified period of time, all the profits attributable to the services furnished in the framework of a same project or connected projects, including profits attributable to activities performed outside the source country, are taxable in the source country in accordance with Article 7. The Committee has agreed during its ninth session that the UN Commentary should incorporate the interpretation shared by a large majority.

4. The following paragraphs 12.1 to 12.8 could be added immediately after paragraph 12 of the Commentary on Article 5(3):

12.1 The Committee has agreed that the traditional interpretation of the current provision of subparagraph b) requires the physical presence in the source [State country](#) of individuals, being ~~an~~ [employees](#) or [other](#) personnel of the enterprise furnishing services, in order for a permanent establishment to exist in that State. This interpretation is in accordance with the intention of the Group of experts that has decided to include subparagraph b) in the UN Model (1980). The Manual for the negotiation of bilateral tax treaties between developed and developing countries (1979) refers, indeed, to the discussions held within the Group and the following comments indicate that members from developing countries and from developed countries understood that the text retained ~~was requiring~~[required](#) a physical presence in the ~~State of~~ [source country](#):

“Concerning the time-limit established in paragraph 3, subparagraphs (a) and (b), of guidelines 5, some members of the Group from developing countries said that they would have preferred to remove the time-limit altogether for two main reasons: first, because construction, assembly and similar activities could as a result of modern technology be of very short duration and still result in a considerable profit for the enterprise carrying on those activities; and, secondly, because the period during which the foreign personnel involved in the activities remained in the source country was irrelevant to the definition of the right of developing countries to tax the corresponding income. [...]

Most members agreed that monetary limitations, if set by analogy with those applied to services of individuals in a number of tax treaties, would be meaningless in the area of the corporate services here discussed, while other members were opposed to any monetary limitations. On the other hand, some members felt that the physical presence of representatives of a foreign

corporation in the source country for a minimum period, such as six months, would be a reasonable limitation which would, as a practical matter, cover most of the important situations and would preclude administrative difficulties in the case of merely sporadic activities.”

Article 5(3)(b) refers to furnishing of services, including consultancy services, by an enterprise through employees or other personnel. Some Committee members noted, however, that the development of the digital economy might create challenges for the application of that provision. The growth of the digital economy had resulted in enterprises of a Contracting State furnishing services in the other Contracting State with a limited physical presence or without any physical presence in that other State. They further noted that enterprises might now centrally manage many functions that previously required local presence, and expressed concerns about the effects of these changes on the allocation of taxing rights between the source country and the residence country. While some of those concerns may be addressed by adopting the Article on Fees for Technical Services, such an Article may not cover all services covered under Article 5(3)(b). These services may not be covered by Article 5(3)(b) if physical presence is required. Therefore, some Committee Members requested the inclusion of a minority view to the effect that a physical presence requirement is obsolete in view of the developments of the digital economy.

Comment [Sec't1]: This part has been redrafted during the tenth session. It was agreed not to include an alternative wording for countries that regard the physical presence requirement obsolete.

Comment [Sec't2]: This reflects a comment by Pragya Saksena.

~~{Some of those concerns may be addressed by adopting the Article on Fees for Technical services.}~~

12.2 As, under the traditional interpretation of subparagraph b), the term “permanent establishment” only encompasses the services performed through employees or other personnel within the ~~State of source~~ country during the specified period of time-period, only the profits attributable to the services performed within that State are taxable in that State in accordance with Article 7. Furthermore, under that interpretation, profits attributable to activities performed outside the ~~State of source~~ country in order to furnish services in the framework of the same project or a connected project are not attributable to the permanent establishment and are not taxable in the ~~State of source~~ country.

12.3 The reference to “connected project” is intended to cover cases where, even though the services are provided in the framework of separate projects, those projects are carried on by a single supplying enterprise and are commercially connected. This aggregation rule addresses in particular abusive situations under which the supplying enterprise may artificially divide its activities into separate projects in order to avoid meeting the 183-day threshold. The determination of whether projects are connected will depend on the facts and circumstances of each case. Factors that may be especially relevant for that purpose include whether:

Comment [Sec't3]: This is the former paragraph 12.4 as suggested in E/C.18/2014/CP.11. The paragraph about different projects for a single customer is suggested to be put in 12.4 which deals with issue whether the perspective of the enterprise or the perspective of the customer is relevant for the question whether projects are connected or not. We further suggest to delete the examples 3-5 as found in E/C.18/2014/CP.11 as they are dealing with situations that should be clear when looking at the factors.

- the projects are covered by a single master contract;
- the projects would have been covered by a single contract in absence of tax planning considerations;

Comment [Sec't4]: In order to avoid subjective elements it could be considered to refer to the usual situation instead of asking whether the particular parties involved have concluded separate contracts on purpose. An alternative wording could be: “the projects are usually covered by a single contract”.

- the contracts covering the different projects were concluded with the same person or related persons;
- the conclusion of additional contracts with a person is a logical consequence of a previous contract concluded with that person or related persons;
- the nature of the services provided under the different projects is the same or similar;
- the same individuals engaged by the enterprise are performing the services under the different projects.

~~12.43. As Article 5(3)(b) deals with the furnishing of services by an enterprise, it would seem logical to determine the issue of whether the activities are performed “for the same or a connected project” from the perspective of the enterprise that furnishes the services and not from the perspective of the customer. Some members of the Committee stress, however, the fact that the condition “for the same or a connected project” must not allow situations where an enterprise could easily split projects up into different parts and avoid the time threshold of subparagraph b). Consequently, to avoid possibilities of abuse of this provision these members consider that such this condition should be examined from the perspective of both the enterprise that furnishes the services and the customer. If the activities form part of the same or a connected project from the perspective of either the enterprise or the customer, Article 5(3)(b) should apply. The provision therefore applies if the activities are part of the same or a connected project only from the perspective of the customer even though those activities are not part of the same or a connected project from the perspective of the enterprise performing the services. Following that approach it would be only if where it would be clear, a single project exists from neither from the perspectives of the enterprise nor from the perspective of and the customer should projects be regarded as unconnected, that no single project exists or that different projects are not connected that one should consider that activities are not performed for the same or a connected project.~~

Looking at both the perspective of the enterprise and the perspective of the customer does not require examining the state of mind of the parties but rather considers what conclusions a reasonable person would draw on the perspectives of the enterprise and the customer, taking all relevant circumstances into account. The organizational structure of an enterprise should be considered but is not itself decisive. On this approach it is enough to meet the test if activities form part of the same or connected projects of either the enterprise or the customer from an objective perspective (considering the factors in 12.3).

~~[The Committee is of the opinion that this approach should be favoured in order to determine if activities would be performed for the same or a connected project.]~~

Some members of the Committee have, however, expressed the view that services performed for one single customer may always be considered as performed for connected projects and that no specific interaction between the projects is required in such case.

Example 1: An enterprise provides services for the maintenance of several medical devices used by a nursing home as well as services for the training of medical staff

Comment [Sec't5]: The Secretariat notes that the Committee may wish to consider whether additional factors that have been suggested in the literature may be included. Additional factors – in addition to those mentioned here which have been taken from the OECD Commentaries on Art. 5 para 42.41 – would be especially necessary as it is laid down later in para 12.4. that also the perspective of the customer should be considered. The listed factors are however more focused on the perspective of the enterprise.

- the services are provided at the same or different locations;
- the services are provided continuously or at different times;
- the projects are billed separately or together on the same invoice;
- there was separate bidding and negotiation for the projects or whether the projects all resulted from the same discussion;
- the results of the projects are independent of each other or whether one result is somehow connected to or dependent on another result;
- the results under each project are capable of separate delivery or acceptance;
- there are uninterrupted periods between contracts
- a reasonable business person would have entered into the contract for one project by itself or whether the business person would have done so only because the other contracts for the other projects were also to be granted.

Comment [Sec't6]: This is the former paragraph 12.3. as found in E/C.18/2014/CPR.11. It has been redrafted to clarify that the Committee has agreed on the interpretation that both the perspective of the enterprise and the customer have to be taken into account.

In order to avoid the misinterpretation that could arise by using the word BOTH, that there has to be a connected project from both perspectives, we have clarified by adding additional sentences that it is enough if EITHER from the perspective of the customer or the enterprise activities are part of the same or connected projects.

Comment [Sec't7]: This is the second paragraph of 12.4. as found in E/C.18/2014/CPR.11.

~~operating different devices recently sold to that customer. Two contracts have been concluded by two different departments of the supplying enterprise and two different types of services are performed by different employees.~~

~~Those services are performed in the framework of two unrelated projects from the perspectives of the supplying enterprise because these projects have no commercial link from the perspective of that enterprise except the fact that the different types of services are furnished to a same customer. From the perspective of the customer, it seems difficult to argue that the two contracts are part of a same project simply because the different types of services relate to the operation of medical equipment pertaining to the nursing home (see paragraph 12.4 hereafter). Some members of the Committee would, however, consider that the services covered by the two contracts would be furnished for the same project or, at least, for connected projects from the perspective of the customer.~~

Example 2¹: An enterprise provides services for the maintenance of several similar machines used by a number of related companies. A single contract was signed by the director of the supplying enterprise, on the one hand, and by a representative of the parent company, on the other hand, ~~and~~ the services are performed by the same employees. The contract provides for favourable conditions taking into consideration the large number of machines covered.

Comment [Sec't8]: This example was included as Example 2 in E/C.18/2014/CRP.1. The changes shall clarify that it is enough if activities are within a connected project of either the perspective of the enterprise or the customer.

Comment [Sec't9]: An adapted version of former Example 1 is now Example 2.

~~Even where the supplying enterprise provides services to different customers, these services may be considered as being performed in the framework of a the same project, or at least in the framework of connected projects, as the projects are connected from the perspective of the supplying enterprise. Even though the services were provided for different customers the services have been performed in the framework of a same project since it is sufficient for the activities to be within the same project of either the enterprise or the customer.~~

Example 2: An enterprise produces medical devices and offers a large range of support with respect to those devices. The enterprise has different departments with different employees responsible for production, maintenance and training. A nursing home buys medical devices from the enterprise and separately concludes two service contracts with that enterprise. Under the first contract, a department of the enterprise maintains the medical devices. Under the second contract, another department trains the medical staff operating these devices.

Comment [Sec't10]: This example was included as Example 1 in E/C.18/2014/CRP.1. The example has been changed to show that it is sufficient if the project is a single or connected project from the perspective of the consumer.

From the perspective of the supplying enterprise those services can be considered as being performed in the framework of two unrelated projects. Separate contracts have been concluded and two different types of services are performed by different employees in different departments of the enterprise. The nature of the work is different as one contract provides for maintenance whereas the other contract provides for training.

From the perspective of the customer, however, the services provided under the two contracts could be considered as being part of the same project, or at least be

connected projects. The contracts were concluded with the same person and are related to each other as they both concern the same medical devices. From an objective perspective the conclusion of one single contract would have been standard business practice.

The interpretation that both the perspective of the enterprise and the perspective of the customer have to be taken into account ensures that neither the state of mind of the parties nor the organizational structure of an enterprise are decisive factors for the determination whether activities form part of the same or connected projects.

12.4. The reference to “a connected project” is intended to cover cases where, even though the services are provided in the framework of separate projects, those projects are carried on by a single supplying enterprise and are commercially connected. This aggregation rule addresses in particular abusive situations under which the supplying enterprise would artificially divide its activities into separate projects in order to avoid meeting the 183-day threshold. The determination of whether projects are connected will depend on the facts and circumstances of each case. Factors that may be relevant for that purpose include:

Comment [Sec't11]: This is now 12.3.

- ~~▪ whether the projects are covered by a single master contract; the fact that the activities are covered by several contracts is, however, not conclusive; the interaction between the projects covered by the different contracts should be taken into account in order to determine whether or not the projects are connected (see the following factors);~~
- ~~▪ whether the contracts covering the different projects were concluded with the same person or related persons;~~
- ~~▪ whether the conclusion of additional contracts with a person is a logical consequence of a previous contract concluded with that person or related persons;~~
- ~~▪ whether the projects would have been covered by a single contract absent tax planning considerations;~~
- ~~▪ whether the nature of the work involved under the different projects is the same;~~
- ~~▪ whether the same employees are performing the services under the different projects.~~

Some members of the Committee have, however, expressed the view that services activities performed for different projects may be considered as performed for connected projects because they are performed for a single customer and that no specific interaction between the projects is required in such case.

Comment [Sec't12]: We would suggest to move this sentence to the perspectives-discussion.

Example 3: A consultant has been hired to install a new computer system for a bank in State Y. That consultant's activities will take place in the headquarters and in several separate branches of the bank within that State. All the activities are covered by two separate contracts, one of them covering the activities to be performed in the headquarters and the second one covering the activities performed in the branches. In such case, even if one concludes to the existence of two different projects, there is a commercial link between them so that they will be considered to be connected projects.

Comment [Sec't13]: This example has been deleted as – considering the factors in 12.3. – should be clear. It was agreed on in the last Committee Meeting that the number of examples should be reduced.

Example 4: A consultant is hired to install a particular computer system for a bank. At the end of this project, based on a comparison between several estimates established by different professionals, he is hired again by the same company, pursuant to a separate contract, to train employees to use new software unrelated to the computer system that he recently installed. In this case, even though both contracts are concluded between the same two parties, there is no interaction between the two projects, which are therefore not connected neither from the perspective of the consultant nor from the perspective of the customer. Taking into account the fact that the services activities are performed for a single customer, some members of the Committee would, however, consider that the services are performed for connected projects.

Example 5: In June 2010, hardware company XYZ concluded a services contract with a resident of State Y. Pursuant to that contract, XYZ provides a large range of support with respect to any hardware of its own brand used by the customer. The support provided includes expert advice, maintenance and training, those services being performed by different employees. Furthermore, the services contract provides that hardware of another brand can be added to the contract as this hardware comes off support elsewhere. In July 2012, hardware of the brand TILL is added to the contract. In this case, even though the master contract covers activities of a different nature (training and maintenance for instance) performed by different employees and even if additional activities were included later on, all the activities performed by XYZ are performed in the framework of commercially connected projects, since the large and flexible scope of its services contracts is an important sales argument for XYZ.

12.5 The 183-day threshold provided for in Article 5(3)(b) may give rise to abuses. It has indeed been found that some enterprises seek to make what is in reality divide a single project, or connected projects, appear to be distinct projects, especially through the use of separate contracts and associated companies into several parts. Those each apparently distinct projects covering a period or periods of less than 183 days each and are partly and attributed parts of those projects to one or more associated companies. Domestic legislative or judicial anti-avoidance rules may apply to prevent such abuses. This issue may, however, also be dealt with in Article 5 of the treaty through a specific provision, which could be drafted along the following lines:

“For the purposes of determining whether the period of more than 183 days in any 12-month period referred to in of subparagraph 3(b) has been met,

a) where an enterprise ~~that is performing~~ services in a Contracting State during periods of time that do not last more than 183 days, and

b) in a Contracting State is, during a period of time, associated with another enterprises that performs ~~substantially similar~~ services in that State for the same or a connected project through employees or other personnel who, during that period, are present and performing such services in that State, during different periods of time,

these different periods of time shall be added to the period of time during which the first-mentioned enterprise shall be deemed, during that period of time, to be ~~has performed~~ services in that State, for that same or connected project

Comment [Sec't14]: Should be clear.

Comment [Sec't15]: Should be clear considering the factors in 12.3.

Comment [Sec't16]: The issue discussed in this paragraph is similar to the issue of Splitting up of contracts dealt with in para 18 of the OECD Commentary on Art 5 and para. 42 et seq. of the Discussion Draft on BEPS Action 7. The suggested changes are proposed in order to increase consistency and to align the wording with existing and suggested wording in OECD documents.

Comment [Sec't17]: For a distinction from Article 9 and to clarify that this term has a meaning different from Article 9 the Committee may consider to use the term 'connected enterprises' instead of the term 'associated enterprises'.

If the "term associated enterprises" is used, a number of question might arise: Should the term 'associated company' have the same meaning as 'associated enterprise' in the title of Article 9? Does 'associated enterprise' according to Article 9 include only what is covered by Article 9 (1) and (b) or does it extend to the "and in either case" part? For the purpose of application of Article 9, this is not an issue. However, the term "associated company, within the meaning of Article 9" is also used in the Commentary on Article 26 para. 10.1(d) on p. 441 where the meaning is not completely clear.

Comment [Sec't18]: The Committee may also consider a reference to the Commentary on Article 1 para. 38 where it is acknowledged that abusive transactions can be disregarded under an interpretation of the treaty that takes into account the treaty's object and purpose. In this respect an additional sentence could be added: In addition, also the interpretation of Article 5(3)(b) in the light of the object and the purpose of the treaty may lead to the conclusion that in such a situation the activities are performed within one single project or at least within connected projects and consequently to the existence of a permanent establishment in the country where the activities are performed.

In case the Committee considers to introduce principle-purpose-test as it is suggested in BEPS Action 6 to be to be included the OECD Model, the Committee could decide to just include an example in the Commentary on the Article which includes the Principle Purpose Test presenting this case as an example where the PPT should apply instead of including an alternative provision for associated enterprises.

Comment [Sec't19]: We think that "substantially similar" should not be specifically referred to even though it is implicit it could be interpreted as an additional requirement which has to be fulfilled for the provision to apply in addition to the requirement of the services being performed for the same or a connected project.

~~through these employees or other personnel.~~ For the purpose of the preceding sentence, an enterprise shall be associated with another enterprise if one is controlled directly or indirectly by the other, or both are controlled directly or indirectly by the same persons, regardless of whether or not these persons are residents of one of the Contracting States."

12.6 According to this provision, the activities carried on in a Contracting State through the employees or other personnel of an associated enterprise for the same or a connected project are taken into consideration in order to determine if the 183-day threshold is met and if the activities carried on in that State by an enterprise of the same Group are deemed to be carried on through a permanent establishment that the enterprise has in that State.

Example 3: Company RLAMBDA, a resident of State RX, obtains a contract for the maintenance of equipment situated on the industrial site of Company FIRS, a resident of State YS. Those activities are supposed to be performed through several employees and to last 220 days. In such case, the 183-day threshold would be met and Article 5(3)(b) would apply. However, Company LAMBDA and Company FIRS agree to split the project into two separate contracts:

- a first contract concluded between Company S and Company R covers the maintenance of the equipment from 1 January to 30 June (120 days) ~~for a fee of 240.000 euros~~; and
- another contract between Company S and Company X, a member of the same Group as Company R and a resident of State X, covers the maintenance of the equipment from 1 July to 31 December (100 days) ~~for a fee of 200.000 euros~~.

The tax treaties between State R and State S and between State S and State X include the alternative provision suggested in paragraph 12.5. The 120 days of activity performed by Company R through its employees and the 100 days performed by Company X through its employees are added together in applying paragraph 3(b) to Company R and Company X, so that the 183-day threshold is met. ~~Under the alternative provision suggested in the preceding paragraph,~~ The profits attributable to the activities performed by Company R through its own employees are thus profits of Company R attributable to a permanent establishment in State S while the profits attributable to the activities performed by Company X through its own employees are profits of Company X attributable to a permanent establishment in State S.

~~Example 7: If under the same circumstances, DELTA were a resident of State Z and the tax treaty between State S and State X did had not included a similar~~ the alternative provision, the activities performed by Company R through its employees would not be taken into consideration in applying subparagraph b) to Company X. In this case, the 183-day threshold would not be met as far as Company X is concerned. As a result, the profits attributable to the activities performed by Company X through its employees would not be attributable to a permanent establishment in State S and State

Comment [Sec't20]: As it has been already mentioned in a previous comment, it may create a misunderstanding if the same term as in Art 9 is used but a different definition is provided. The Committee therefore may consider using the term 'connected enterprises' instead.

The OECD also uses in its Discussion Draft of BEPS Action 7 for its proposals concerning the splitting-up of contracts the term 'connected enterprises'. It defines the term as follows: "For the purpose of this Article, a person shall be connected to an enterprise if one possesses at least 50 per cent of the beneficial interests in the other (or, in the case of a company, at least 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses at least 50 per cent of the beneficial interest (or, in the case of a company, at least 50 per cent of the aggregate voting power and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise. In any case, a person shall be considered to be connected 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." (BEPS Action 7, Proposed changes to Article 5 para 6, p. 13, referred to on p. 35 where the issue of splitting up of contracts is discussed).

Comment [Sec't21]: We would suggest combining Example 6 and 7 in one longer example.

S would not have the right to tax those profits even though it would have the right to tax the profits of Company R.¹

12.7 Article 5(3)(b) addresses the situation of an *enterprise* that performs services in a Contracting State through employees or other personnel ~~in relation to a particular project or to connected projects, and this over a substantial period of time~~. The 183-day threshold referred to in subparagraph b) ~~therefore~~ applies ~~thus in relation~~ to the enterprise and not ~~in relation~~ to the different employees or other personnel through ~~which whom~~ the activities are performed. A day will ~~count towards be taken into consideration for calculating~~ the 183-day threshold ~~provided if~~, during that day, the enterprise performs its activities through, at least, one of its employees or other personnel or – if the anti-abuse provision suggested in paragraph 5 above is included in the treaty – one of the employees or other personnel of an associated enterprise ~~is~~ present in that State. However, a day will count only as a single day regardless of how many employees or other personnel – of the enterprise itself or of an associated enterprise – are present in that State and performing services during that day. [An enterprise that agrees to keep employees or other personnel available for a client who needs their services and charges the client for making such personnel available, the period during which the employees or other personnel are available to the client will count towards the threshold irrespective of the fact that they are idle during the days when they remain available.]

Comment [Sec't22]: This was submitted as a suggestion by Pragya Saksena for consideration by the Committee.

Example 48: Company LAMBDA R, a resident of State X R, obtains a contract for the maintenance of several ~~pieces of equipments~~ situated on ~~several different~~ industrial sites ~~of belonging to~~ Company FIRS, a resident of State Y S. Those activities are supposed to be performed through several employees and to last from 15 January ~~2012~~ to 31 October ~~2012~~ (i.e. 220 days of activities). In such case, the 183-day threshold would be met and Article 5(3)(b) would apply. However, Company LAMBDA R and Company FIRS agree to split the project into two separate contracts:

- a first contract concluded between Company S and Company R covers the maintenance of equipment situated on two specific sites from 15 January to 30 June (i.e. 120 days of activity) ~~for a fee of 240.000 euros~~; and
- another contract between Company S and Company X, a member of the same Group as Company R and a resident of State R, covers the maintenance of equipment situated on a third site from 15 January to 31 May (i.e. 100 days of activity) ~~for a fee of 200.000 euros~~.

Even though the services performed through employees or other personnel of Company X may be deemed to be performed by Company R (and vice versa), all the services are performed within a period of 120 days. The 100 days during which activities are performed simultaneously through employees of both enterprises can

¹ In such case, the activities performed by Company X through its employees would be taken into consideration in applying Article 5(3)(b) of its treaty with State R to Company R, so that the 183-day threshold would be met as far as Company R is concerned and Company R would be deemed to have a permanent establishment in State S. However, in accordance with Article 7 of that treaty, State S would only have the right to tax Company R on the profits attributable to the activities performed through its own employees and not the profits attributable to the activities performed by Company X through its employees.

only be counted once in applying subparagraph b) to [Company R](#) and [Company X](#). As a result, neither [Company R](#) nor [Company X](#) has a permanent establishment in State [S](#) and State [S](#) has no right to tax their profits.

12.8 Under Article 5(3)(b) a permanent establishment ~~also exists where services are not carried on through a fixed place of business but are performed in a Contracting State over a substantial period of time for a particular project or for connected projects. Where such is the case, the permanent establishment~~ only encompasses the services performed for the particular project or for the connected projects and does not encompass other services carried on in that State during the relevant period. However, where other services are carried on in that State for unrelated projects and those other services do not of themselves create a permanent establishment but are of the same or similar nature as those effected through the permanent establishment, those other services may also be taxed in that State in accordance with Article 7(1)(c), which provides for a limited force of attraction.

5. While discussing the meaning of “the same or a connected project” some members of the Committee have suggested adding a final sentence in paragraph 12 of the UN Commentary on Article 5, as underlined below:

12. (...) However, some countries find the “project” limitation either too easy to manipulate or too narrow in that it might preclude taxation in the case of a continuous number of separate projects, each of 120 or 150 days’ duration. In order to avoid this issue and simplify the application of the permanent establishment concept to services, some countries prefer to eliminate this requirement in Article 5(3)(b) by deleting the expression: “(for the same or connected project)”.

They understand that the original main purpose of subparagraph b) was to avoid the difficulties of applying the requirements of paragraph 1 to the service activities. The “same or connected project” requirement implies limitations that undermine this objective (e.g. the commercial coherence limitation). For these reasons they consider that this view should be clearly stated in the Commentary.