

Permanent Establishment under OECD and UN Models

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OECD and UN Model joint provisions

- **The basic rule in OECD art 5(1) and UN art 5(1) are identical:**
 - *For the purposes of this Agreement, the term «permanent establishment» means a fixed place of business through which the business of an enterprise is wholly or partly carried on.*
- **The positive list in OECD and UN art 5(2) are identical**
- **The negative list in OECD and UN art 5(4) are identical:**
- **The controlled companies clause in OECD art 5(7) is identical with UN art 5(8)**

OECD and UN Model deviations

- **The construction PE clause in art 5(3)(a) is different:**
 - *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*
- **Inclusion of the “service PE” clause in UN art 5(3)(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.*

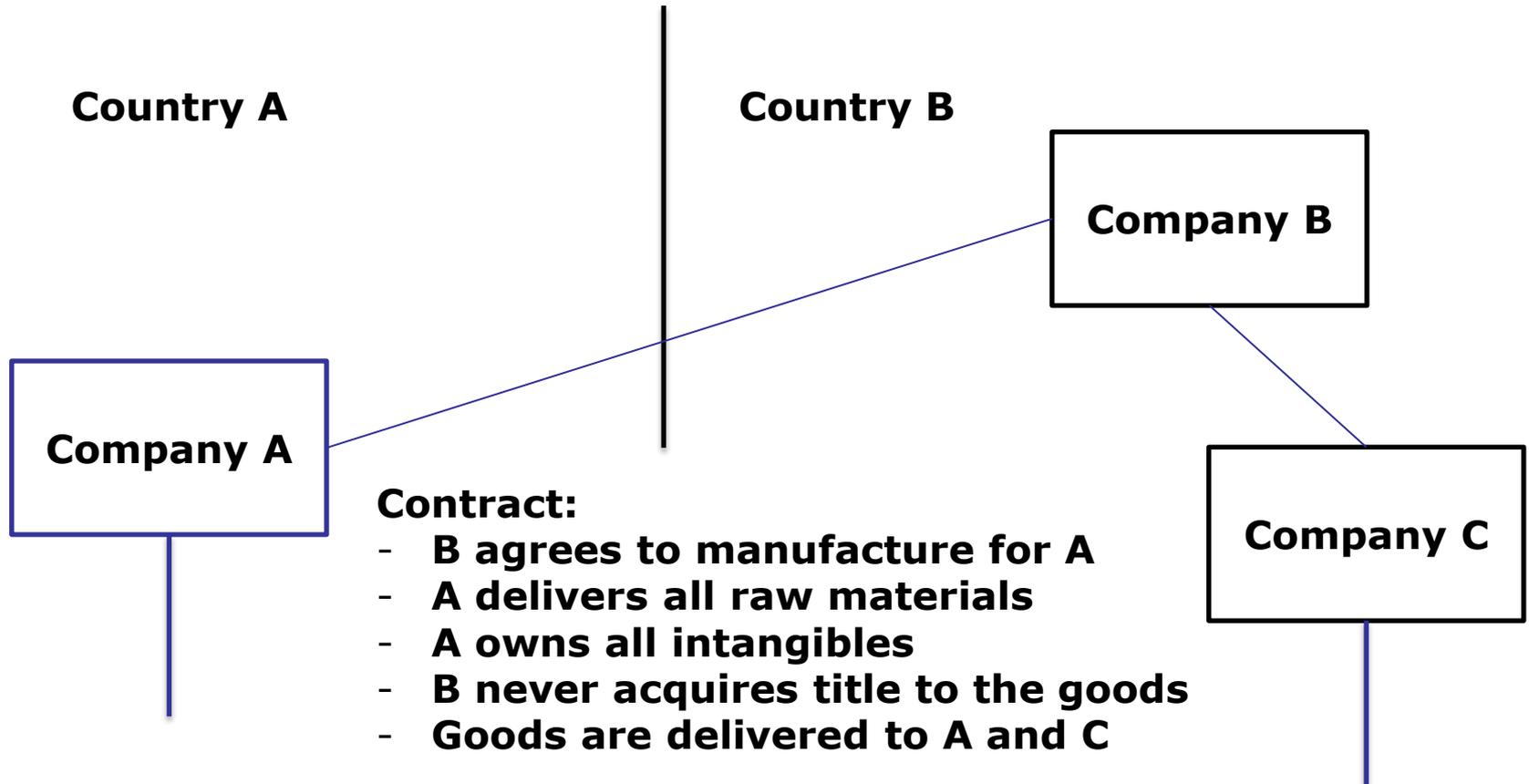
OECD and UN Model deviations - 2

- **Inclusion of the stock of goods provision in UN art 5(5)**
 - *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.*
- **Inclusion of the insurance provision in UN art 5(5)**
 - *Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.*

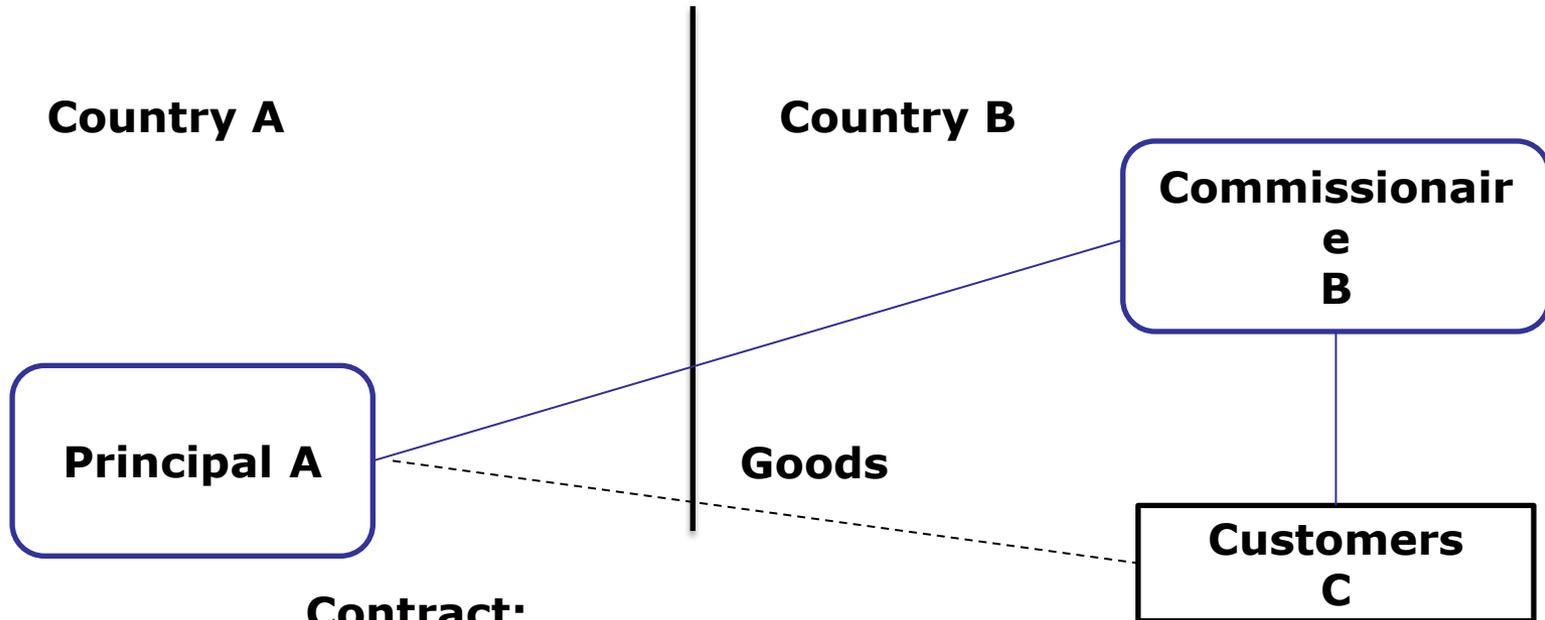
OECD and UN Model joint *PE conditions*

- **The requirement of a *fixed place of business***
 - Geographical and commercial coherence
 - Duration – typically six months
 - The one-shot project
- **The right of use test**
 - Formal right of use
 - Actual use of the place of business
- **The business test**
 - The enterprise must conduct the business itself
 - Core business activities create a PE
- **The business connection test**

Manufacturing of goods under a toll manufacturing agreement



Sale of goods under commissionnaire agreement



Contract:

- B agrees to sell for A as a commissionaire
- A delivers all stock of goods directly to the customers
- A owns all intangibles
- B never acquires title to the goods
- Goods are delivered from A to C
- No obligations upon A towards C

Conclusion

- **As far as important issues are concerned, the OECD and UN Models arrive at the same conclusions:**
 - **No basic rule PE for the toll manufacturing agreement**
 - **No agency PE for the commissionaire agreement**