

# **Tax and Treaty compliance under BEPS – Option B (UN session)**

**FIT International Taxation Conference  
December 8, 2017 – 2.00pm to 4.30pm**



# Agenda

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Introduction to UN Tax Committee's operations

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Importance of the UN Model

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UN work on BEPS – Discussion on certain Articles

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Grandfathering under BEPS

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Relevance of UN work in absence of MLI

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FTS article

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Update on UN TP Manual

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Update on UN work on Royalties

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UN work on MAP

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Update on the current work of the UN sub-committee

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Q & A

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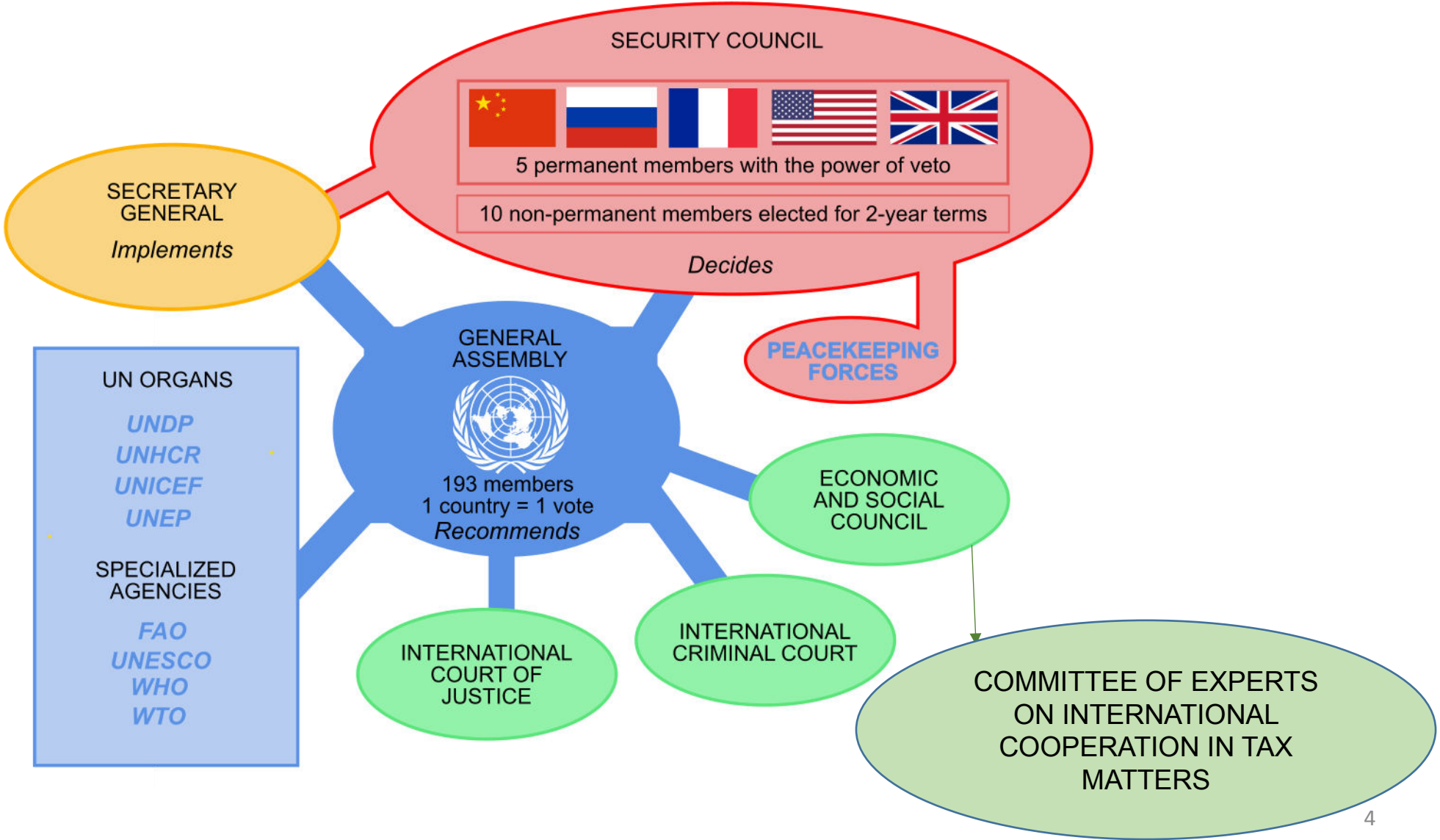
# The UN and OECD approach to BEPS issues and related allocation of taxing rights



UNITED NATIONS



# Introduction to UN Tax Committee's operations



# **Functioning of the UN Tax Committee**

# The UN Tax Committee



# **Importance of the UN Model**

# **UN work on BEPS: Discussion on certain Articles**



# UN approach

- UN Model 2017
- UN approach on BEPS

# **Title and Preamble**

- **Title of the Convention**

Convention between (State A) and (State B) for the elimination of double taxation with respect to taxes on income and on capital and the **prevention of tax avoidance and evasion**.

- **Preamble of the Convention**

(State A) and (State B),

Desiring to further develop their economic relationship and to enhance their cooperation in tax matters,

Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital **without creating opportunities for non-taxation or reduced taxation through tax avoidance or evasion** (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States) .....Have agreed as follows:

**Are the OECD and UN provisions same? - Yes**

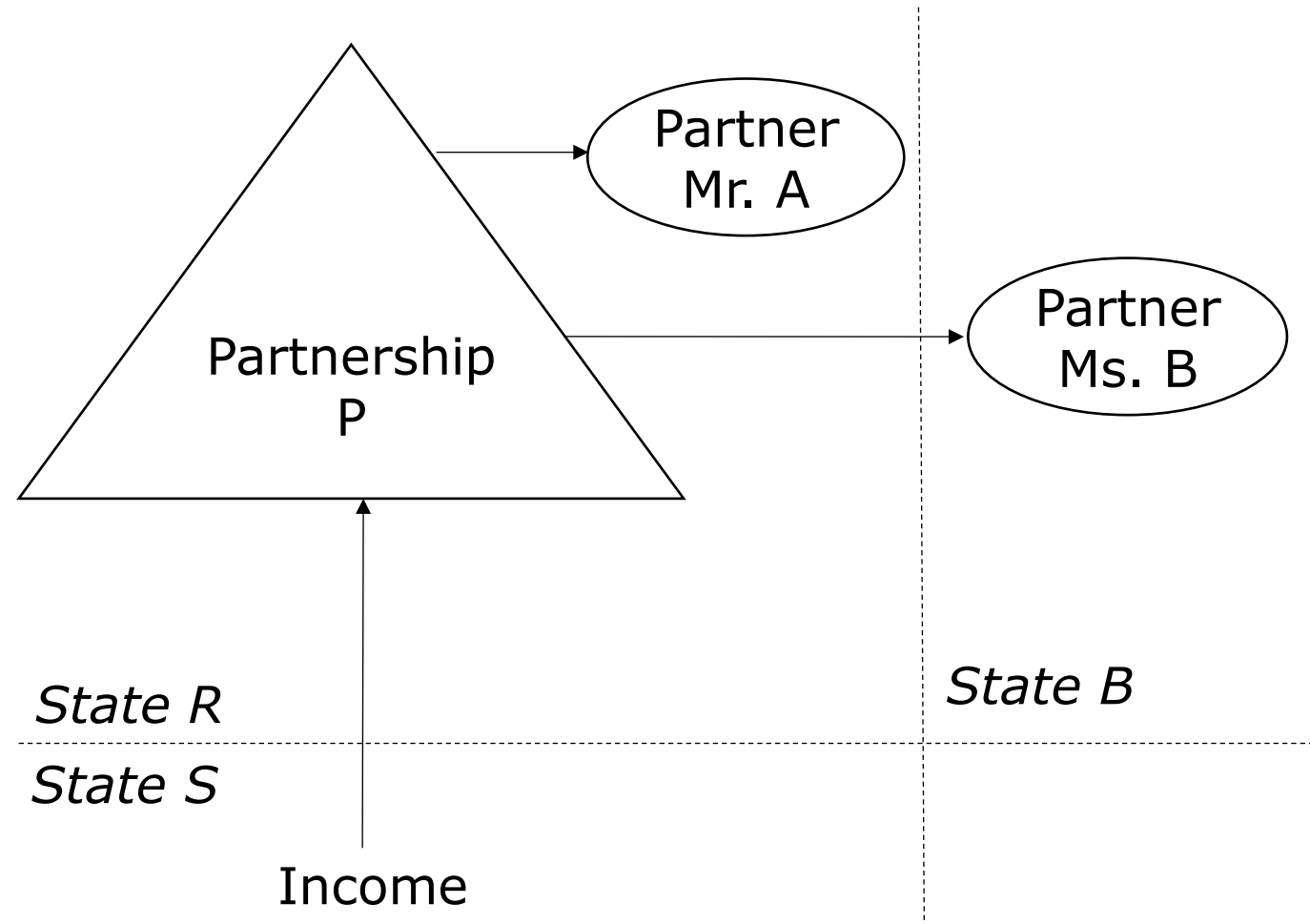
# Article 1

# New paragraph 2 of Article 1

- “2. For the purposes of this Convention, income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State. In no case shall the provisions of this paragraph be construed so as to restrict in any way the right of a Contracting State to tax the residents of that State.”

**Are the OECD and UN provisions same? – Broadly Yes**

# Example on Article 1(2)



Treaty benefit availability restricted to A's taxable income

# **Article 4**

# Changes to paragraph 3 of Article 4

- “3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, ~~then it shall be deemed to be a resident only of the State in which its place of effective management is situated.~~ ***the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, **having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors.** In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States.”***

**Are the OECD and UN provisions same? – Yes**



# **Article 5**

# Changes to paragraph 3 of Article 5

- “3. The term “permanent establishment” also encompasses:
  - (a) ...(anti-fragmentation provision)
  - (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.”

**Are the OECD and UN provisions same?**

**Article 5(3)(a)– Yes**

**Article 5(3)(b)- NA**

# Changes to paragraph 4 of Article 5

- 4. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:
  - (a) The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;
  - (b) ....(c)....(d)
  - (e) The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity ~~of a preparatory or auxiliary character.;~~
  - (f) The maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), ~~provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.~~

***provided that such activity or, in the case of subparagraph (f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.***



**Are the OECD and UN provisions same?  
Yes – Except for “delivery”**

# Commentary on Paragraph 4 of Article 5 – Relevant extracts

- New para in the UN Model Commentary

“19.3 Under this alternative formulation as under paragraph 4 as it read before 2017, a fixed place of business is deemed not to constitute a permanent establishment if the only activities carried on at that place are activities to which one of the subparagraphs a) to d) apply”.

- Existing UN Model Commentary (as reproduced from para 21 of the OECD Model Commentary 2014)

“This paragraph lists a number of business activities which are treated as exceptions to the general definition laid down in paragraph 1 and which are not permanent establishments, even if the activity is carried on through a fixed place of business. **The common feature of these activities is that they are, in general, preparatory or auxiliary activities.** This is laid down explicitly in the case of the exception mentioned in subparagraph e), which actually amounts to a general restriction of the scope of the definition contained in paragraph 1. Moreover subparagraph f) provides that combinations of activities mentioned in subparagraphs a) to e) in the same fixed place of business shall be deemed not to be a permanent establishment, provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character. **Thus the provisions of paragraph 4 are designed to prevent an enterprise of one State from being taxed in the other State, if it carries on in that other State, activities of a purely preparatory or auxiliary character.**”

# UN Model Convention – Changes to paragraph 5 of Article 5

- “5. Notwithstanding the provisions of paragraphs 1 and 2 **but subject to the provisions of paragraph 7**, where a person—~~other than an agent of an independent status to whom paragraph 7 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 Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person:

(a) ~~Has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise,~~ **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**

**(i) in the name of the enterprise, or**

**(ii) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or**

**(iii) for the provision of services by that enterprise,**

unless the activities of such person are limited to those mentioned in paragraph 4 which, 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; or

(b) ~~Has no such authority,~~ **but the person does not habitually conclude contracts nor plays the principal role leading to the conclusion of such contracts, 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.”

# OECD Model Convention 2017– Paragraph 5 of Article 5

- “5. Notwithstanding the provisions of paragraphs 1 and 2 **but subject to the provisions of paragraph 6**, where a person — ~~other than an agent of an independent status to whom paragraph 6 applies~~ — is acting **in a Contracting State** on behalf of an enterprise and has, ~~and habitually exercises, in a Contracting State, an authority to conclude contracts,~~ **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 right 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 permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business (**other than a fixed place of business to which paragraph 4.1 would apply**), would not make this fixed place of business a permanent establishment under the provisions of that paragraph.”

**Are the OECD and UN provisions same? : Broadly yes**

# Changes to paragraph 7 of Article 5

- ~~“7. 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.~~

***(a) Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other 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.*** ~~However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, and conditions are made or imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises, he will not be considered an agent of an independent status within the meaning of this paragraph.~~ ***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 purposes of this Article, a person is closely related to an enterprise if, .....***”

**Are the OECD and UN provisions same? : Broadly yes**

# **Article 13**



# New paragraph 4 and changes to paragraph 5 of Article 13

- ***"4. Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State."***

**Are the OECD and UN provisions same? : Yes**

# India-Zambia tax treaty – Article 13

- "1. Gains from the alienation of immovable property, as defined in paragraph (2) of article 6, may be taxed in the Contracting State in which such property is situated.  
  
2. (PE related).....3.....(ships aircrafts related)  
  
3. ....  
  
4. Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3 ) shall be taxable only in that State.  
  
5. The term "alienation" means ....."
- ***"Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State."***

# **Article 29**

# Article 29

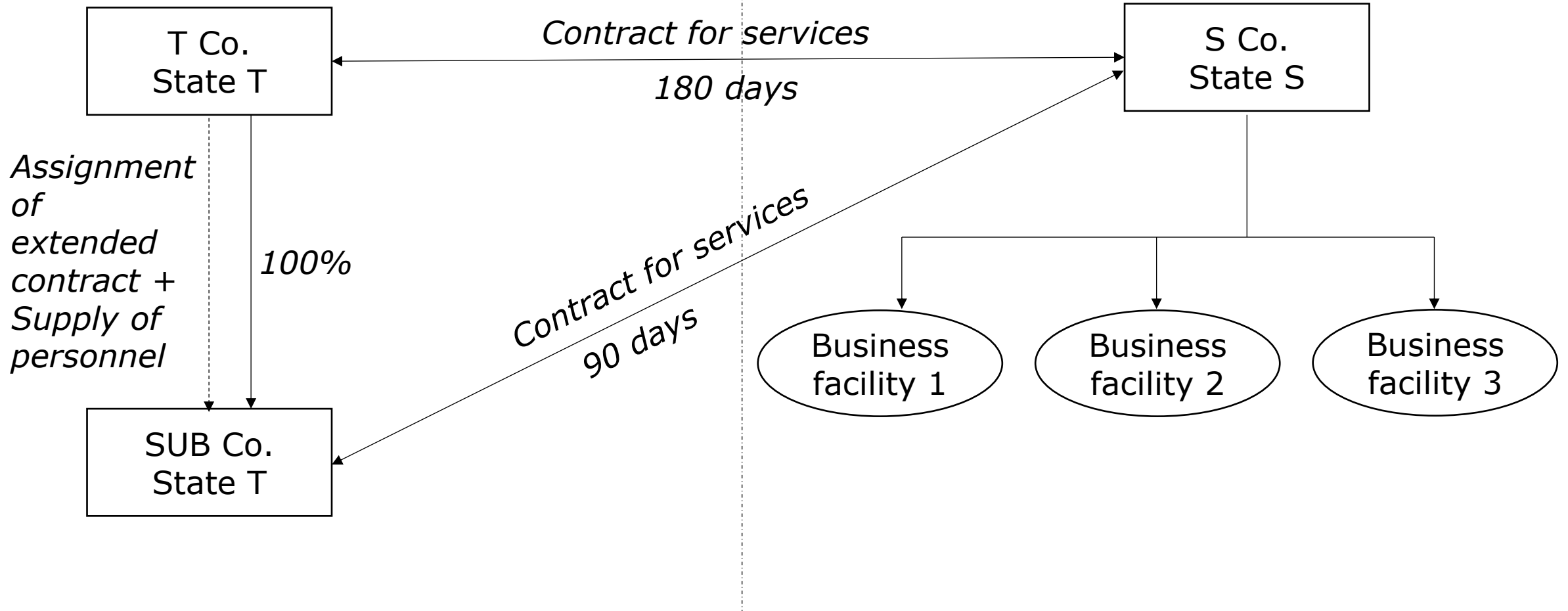
- Article 29(1) to 29(7) : Simplified / Detailed LOB
- Article 29(9) : Principal Purpose Test
- **Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.**

**Are the OECD and UN provisions same?  
UN adopts only detailed LOB  
PPT provision is same in both OECD and UN Models**

# Example

*State T*

*State S*



# Example

- TCo, a resident of State T, is a member of a multinational group of companies that provides various cleaning and waste management services to businesses in State T and also in other states.
- TCo enters into a contract with SCo, a company resident of State S to provide its services at three of SCo's business facilities in State S for a period of 180 working days.
- Subsequently, at a time when TCo has spent 150 working days in State S, TCo and SCo begin negotiations to extend the contract for an additional 90 days.
- As allowed by the amended contract, TCo assigns its rights and obligations under the contract to SUBCo, a wholly-owned subsidiary of TCo and also a resident of State T.
- SUBCo performs the required services to SCo for 90 days under the amended contract with the assistance of personnel supplied by TCo.
- The tax convention between State T and State S contains a provision identical to subparagraph (3)(b) of Article 5.
- Both TCo and SUBCo claim the benefit of subparagraph (3)(b) of Article 5 on the basis that neither of them furnishes services in State S for more than 183 days in any 12-month period.

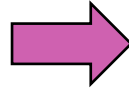
# **Grandfathering under BEPS**

# **Relevance of UN work in absence of MLI**



# Comparison between Article 5(4) of the UN Model and MLI

- Article 5(4) of the UN Model
- Corresponding Article 13 of MLI
  - Option A



“2. Notwithstanding the provisions of a Covered Tax Agreement that define the term “permanent establishment”, the term “permanent establishment” shall be deemed not to include:

a) the activities specifically listed in the Covered Tax Agreement (prior to modification by this Convention) as activities deemed not to constitute a permanent establishment, whether or not that exception from permanent establishment status is contingent on the activity being of a preparatory or auxiliary character;

b) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any activity not described in subparagraph a);

c) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) and b),

provided that such activity or, in the case of subparagraph c), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.”

# Overview of the recent developments in the UN Model on Taxation of Services and Transfer Pricing



# **FTS Article**

# New Article 12A in the UN Model

- “1. Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
  2. However, notwithstanding the provisions of Article 14 and subject to the provisions of Articles 8, 16 and 17, fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed \_\_\_\_ percent of the gross amount of the fees [*the percentage to be established through bilateral negotiations*].
  3. The term “fees for technical services” as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made:
    - (a) to an employee of the person making the payment;
    - (b) for teaching in an educational institution or for teaching by an educational institution; or
    - (c) by an individual for services for the personal use of an individual.
  4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment situated in that other State, or performs in the other Contracting State independent personal services from a fixed base situated in that other State, and the fees for technical services are effectively connected with a) such permanent establishment or fixed base, or b) business activities referred to in (c) of paragraph 1 of Article 7. In such cases the provisions of Article 7 or Article 14, as the case may be, shall apply.

# New Article 12A in the UN Model

5. For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the fees was incurred, and such fees are borne by the permanent establishment or fixed base.

6. For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State or a third State through a permanent establishment situated in that other State or the third State, or performs independent personal services through a fixed base situated in that other State or the third State and such fees are borne by that permanent establishment or fixed base.

7. Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other person, the amount of the fees, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

# **Update on UN TP Manual**

# **Update on UN work on Royalties**

# Royalties – View of majority and minority member countries

- Relevant extract of proposed UN Model Commentary

“13.4 With regard to satellite operators and their customers, the characterization of a payment by the customer to the satellite operator as a royalty will depend to a large extent on the specific contractual arrangements. If the owner of the satellite leases it to another person and that person operates it, the payment for the lease would be a royalty payment for the use of industrial, commercial or scientific equipment. However, in many cases the customer does not acquire the possession or control of the satellite, but makes use of part or all of its transmission capacity. The satellite would continue to be operated by the lessor. In such cases, **some/majority** members are of the opinion that the payments made would be in the nature of transmission services to which Article 7 or Article 12 A applies. **Some/Minority** members are of the opinion that a payment for the use of the transmission capacity (or transport or transmission capacity in the case of pipelines or cables) could be regarded as payments made for the leasing of industrial, commercial or scientific equipment.”



# Royalties – Software payments

- India-Russia tax treaty – Article 12(3)

“The term "royalties" as used in this Article means :

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematography films or recordings on any means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, know-how, **computer software programme**, secret formula or process, or for information concerning industrial, commercial or scientific experience ; and...”

# **UN work on MAP**

# **Update on the current work of the UN sub-committee**

**?** **Q & A**

# **Chairman's Comments**