防止人为规避构成常设机构
第7项行动计划

英文原作由OECD出版，标题如下；
Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project
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EXECUTIVE SUMMARY

Tax treaties generally provide that the business profits of a foreign enterprise are taxable in a State only to the extent that the enterprise has in that State a permanent establishment (PE) to which the profits are attributable. The definition of PE included in tax treaties is therefore crucial in determining whether a non-resident enterprise must pay income tax in another State.

The BEPS Action Plan called for a review of that definition to prevent the use of certain common tax avoidance strategies that are currently used to circumvent the existing PE definition, such as arrangements through which taxpayers replace subsidiaries that traditionally acted as distributors by commissionnaire arrangements, with a resulting shift of profits out of the country where the sales took place without a substantive change in the functions performed in that country. Changes to the PE definition are also necessary to prevent the exploitation of the specific exceptions to the PE definition currently provided for by Art. 5(4) of the OECD Model Tax Convention, an issue which is particularly relevant in the digital economy.

This report includes the changes that will be made to the definition of PE in Article 5 of the OECD Model Tax Convention, which is widely used as the basis for negotiating tax treaties, as a result of the work on Action 7 of the BEPS Action Plan.

Together with the changes to tax treaties proposed in the Report on Action 6 (Preventing the granting of treaty benefits in inappropriate circumstances), the changes recommended in this report will restore taxation in a number of cases where cross-border income would otherwise go untaxed or would be taxed at very low rates as result of the provisions of tax treaties. Taken together, these tax treaty changes will enable countries to address BEPS concerns resulting from tax treaties, which was a key focus of the work mandated by the BEPS Action Plan.

Artificial avoidance of PE status through commissionnaire arrangements and similar strategies.

A commissionnaire arrangement may be loosely defined as an arrangement through which a person sells products in a State in its own name but on behalf of a foreign enterprise that is the owner of these products. Through such an arrangement, a foreign enterprise is able to sell its products in a State without technically having a permanent establishment to which such sales may be attributed for tax purposes and without, therefore, being taxable in that State on the profits derived from such sales. Since the person that concludes the sales does not own the products that it sells, that person cannot be taxed on the profits derived from such sales and may only be taxed on the remuneration that it receives for its services (usually a commission). A foreign enterprise that uses a commissionnaire arrangement does not have a permanent establishment because it is able to avoid the application of Art. 5(5) of the OECD Model Tax Convention, to the extent that the contracts concluded by the person acting as a commissionnaire are not binding on the foreign enterprise. Since Art. 5(5) relies on the formal conclusion of contracts in the name of the foreign enterprise, it is possible to avoid the application of that rule by changing the terms of contracts without material changes in the functions performed in a State. Commissionnaire arrangements have been a major preoccupation of tax administrations in many countries, as shown by a number of cases dealing with such arrangements that were litigated in OECD countries. In most of the cases that went to court, the tax administration's arguments were
概 要

税收协议一般规定，外国企业只有在某国构成常设机构时，才能就其营业利润在该国征税，且税利归属该常设机构的利润为限。因此，在确定非居民企业在某国是否应缴纳所得税时，税收协议中常设机构的定义非常重要。

税收协定与利润转移行动计划要求对常设机构的定义进行审查，以防止企业使用新的、非既有的常设机构定义，以及某些避免税收策略。例如，纳税人以佣金代理人安排（commissionaire）代替传统子公司作为分销者的安排，从而将利润从销售发生地转移到低税国，但其在该国的活动职能并没有显著改变。此外，有必要通过修改常设机构的定义，防止企业滥用当前经合组织税收协议模板第 5 条第 4 款关于常设机构定义的规定，该问题与数字经济尤其相关。

作为税收协定与利润转移行动计划的工作成果，本项目包括了拟对经合组织税收协议模板第 5 条常设机构定义做出的修改。各国在税收协定的磋商过程中普遍以经合组织税收协议模板为基础。

结合第 6 项行动计划（防止税收协定优惠的不当授予）报告中对税收协定文本的修改建议，本报告提出的修改建议将使得许多国家根据税收协定规定不征税或按低税率征税的跨境所得被正当征税。总体而言，这些对税收协定文本的修改将有助于各国解决税收协定导致的税基侵蚀与利润转移问题，这是税基侵蚀与利润转移行动计划重点关注的问题。

通过佣金代理人或类似安排人为规避构成常设机构

佣金代理人安排可以被成功地定义为：一个人以自身的名义在某国代表一家外国企业销售该外国企业拥有的产品。通过该安排，一家外国企业可以在某国销售其产品，但技术上不在该国构成常设机构，因而销售所得利润不会归属于在该国的常设机构而在该国被征税。由于进行销售活动的人并不拥有其销售的货物，上述国家无法就销售利润对该人征税，而仅可就其提供服务取得的报酬（一般为佣金）征税。使用佣金代理人安排的外国企业之所以不会构成常设机构，是由于代理人的合同对外国企业并无约束力，从而导致该安排无法符合经合组织税收协定模板第 5 条第 5 款中对常设机构的定义。由于第 5 条第 5 款要求代理人以外国企业的名义正式订立合同，企业可以很容易通过修改合同条款规避该条文的适用，且无须显著改变其在该国的职能活动，许多经合组织国家的税务申诉案均涉及佣金代理人安排，可见这一安排在许多国家都是税务机关重点关注的事项。

还有一些类似安排也被用于规避第 5 条第 5 款的适用。其中包括，合同谈判主要在某国进行，但并不在该国正式订立，而是在境外定稿或授权；或者某人虽然经常行使订立合同的权利，且与其
rejected.

Similar strategies that seek to avoid the application of Art. 5(5) involve situations where contracts which are substantially negotiated in a State are not formally concluded in that State because they are finalised or authorised abroad, or where the person that habitually exercises an authority to conclude contracts constitutes an “independent agent” to which the exception of Art. 5(6) applies even though it is closely related to the foreign enterprise on behalf of which it is acting.

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. The changes to Art. 5(5) and 5(6) and the detailed Commentary thereon that are included in section A of the report address commisionnaire rearrangements and similar strategies by ensuring that the wording of these provisions better reflect this underlying policy.

Artificial avoidance of PE status through the specific exceptions in Art. 5(4)

When the exceptions to the definition of permanent establishment that are found in Art. 5(4) of the OECD Model Tax Convention were first introduced, the activities covered by these exceptions were generally considered to be of a preparatory or auxiliary nature.

Since the introduction of these exceptions, however, there have been dramatic changes in the way that business is conducted. This is outlined in detail in the Report on Action 1 (Addressing the tax challenges of the digital economy). Depending on the circumstances, activities previously considered to be merely preparatory or auxiliary in nature may nowadays correspond to core business activities. In order to ensure that profits derived from core activities performed in a country can be taxed in that country, Article 5(4) is modified to ensure that each of the exceptions included therein is restricted to activities that are otherwise of a “preparatory or auxiliary” character. The modifications are found in section B of the report.

BEPS concerns related to Art. 5(4) also arise from what is typically referred to as the “fragmentation of activities”. Given the ease with which MNEs may alter their structures to obtain tax advantages, it is important 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 anti-fragmentation rule proposed in section B will address these BEPS concerns.

Other strategies for the artificial avoidance of PE status

The exception in Art. 5(3), which applies to construction sites, has given rise to abuses through the practice of splitting-up contracts between closely related enterprises. The Principal Purposes Test (PPT) rule that will be added to the OECD Model Tax Convention as a result of the adoption of the Report on Action 6 (Preventing the granting of treaty benefits in inappropriate circumstances) will address the BEPS concerns related to such abuses. In order to make this clear, the example put forward in section C of this report will be added to the Commentary on the PPT rule. For States that are unable to address the issue through domestic anti-abuse rules, a more automatic rule will be included in the Commentary as a provision that should be used in treaties that do not include the PPT or as an alternative provision to be used by countries specifically concerned with the splitting-up of contracts issue.

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1 See paragraph 14 of the Commentary on the PPT rule included in paragraph 26 of that Report.
代表的境外企业紧密关联，但仍可适用第 5 条第 6 款规定的“独立代理人”的豁免规定。

比较合理的规则是，若其中企业在某国开展的活动是为了解决其在该国的合规性问题（taxable presence），除非该中介所开展的活动是其独立经营的一部分。本报告第一章包含了对第 5 条第 5 款和第 6 款以及相关具体注释的修改，这些修改保证条款的表述可以更好地反映相关政策意图，以解决佣金代理人和类似安排所产生的问题。

**通过第 5 条第 4 款规定的特定活动常设机构豁免条款人为规避构成常设机构**

在经合组织税率协议模板第 5 条第 4 款关于特定活动豁免构成常设机构的规定最初发布时，符合豁免条件的活动一般被认为属于准备性质或辅助性质。

然而，在这些豁免条款发布以来，企业开展经营活动的方式发生了显著的变化。经合组织在第 1 项行动计划（应对数字经济下的税收挑战）报告中有详细阐述。在某些情形下，过去被认为仅仅是准备性或辅助性活动，现在可能属于核心业务活动。为了确保在某国开展的核心业务活动所产生的利润可在该国征税，对第 5 条第 4 款进行了修改，以确保这些豁免条款仅适用于准备性或辅助性活动。具体修改内容请参见本报告第二章。

与第 5 条第 4 款规定的税基侵蚀与利润转移问题也可能源于所谓的“活动拆分”。由于跨国企业可以改变架构或者采取税收筹划，有必要明确企业不能将整体业务拆分成不同的业务，使得每个业务满足准备性或辅助性的要求，从而根据第 5 条第 4 款的规定豁免构成常设机构。本报告第二章中提到的反拆分规则将解决这一税基侵蚀与利润转移问题。

**人为规避构成常设机构的其他安排**

第 5 条第 3 款中关于建筑工地的规定也由于紧密关联企业之间拆分合同而被滥用。如果第 6 项行动计划（防止税收协定优惠的不当授予）报告被采纳，经合组织税率协议模板将加入“主要目的测试”规则。上述滥用第 5 条第 3 款带来的税基侵蚀与利润转移问题将得以解决。为进一步解释说明，本报告第三章中的案例将包括在“主要目的测试”条款注释中。对于无法通过国内反避税规则应对这个问题的国家，注释要求未包含主要目的测试条款的税收协议中必须加入一项更为简易的判断规则，对拆分合同问题特别关注的国家也可以将该规则作为可选规则。

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1. 请参见报告第 26 段关于主要目的测试条款的注释第 14 段。
Follow-up, including on issues related to attribution of profits to PEs

The changes to the definition of PE that are included in this report will be among the changes proposed for inclusion in the multilateral instrument that will implement the results of the work on treaty issues mandated by the BEPS Action Plan.

Also, in order to provide greater certainty about the determination of profits to be attributed to the PEs that will result from the changes included in this report and to take account of the need for additional guidance on the issue of attribution of profits to PEs, follow-up work on attribution of profits issues related to Action 7 will be carried on with a view to providing the necessary guidance before the end of 2016, which is the deadline for the negotiation of the multilateral instrument.
后续事项，包括常设机构利润归属问题

本报告对于常设机构定义的修改，将和税收侵权与利润转移行动计划中与税收协议相关的其他工作成果一并使用多边工具进行实施。

同时，本报告修改内容将导致构成常设机构，为了给这些常设机构的利润归属提供更多确定性。同时考虑到常设机构利润归属问题本身对进一步指引的需求，经合组织第7 项行动计划相关的利润归属问题开展后续工作，目标在2016年年底多边工具磋商截止前提供必要的指引。
REPORT ON ACTION 7: PREVENTING THE ARTIFICIAL AVOIDANCE OF PE STATUS

Background

1. At the request of the G20, the OECD published the report *Addressing Base Erosion and Profit Shifting* (the "BEPS Report") in February 2013. The BEPS Report identifies the root causes of BEPS and notes that tax planning leading to BEPS turns on a combination of coordinated strategies. The following paragraph from the BEPS Report relates to the current treaty definition of permanent establishment:

   It had already been recognised way in the past that the concept of permanent establishment referred not only to a substantial physical presence in the country concerned, but also to situations where the non-resident carried on business in the country concerned via a dependent agent (hence the rules contained in paragraphs 5 and 6 of Article 5 of the OECD Model). Nowadays it is possible to be heavily involved in the economic life of another country, e.g. by doing business with customers located in that country via the internet, without having a taxable presence therein (such as substantial physical presence or a dependent agent). In an era where non-resident taxpayers can derive substantial profits from transactions with customers located in another country, questions are being raised as to whether the current rules ensure a fair allocation of taxing rights on business profits, especially where the profits from such transactions go untaxed anywhere.

2. Following up on the BEPS Report, the OECD published its *Action Plan on Base Erosion and Profit Shifting* (BEPS Action Plan) in July 2013. The BEPS Action Plan identifies 15 actions to address BEPS in a comprehensive manner and sets deadlines to implement these actions. It deals with avoidance strategies related to the permanent establishment concept as follows:

   (ii) Restoring the full effects and benefits of international standards

   [...] 

   *The definition of permanent establishment (PE) must be updated to prevent abuses.* In many countries, the interpretation of the treaty rules on agency-PE allows contracts for the sale of goods belonging to a foreign enterprise to be negotiated and concluded in a country by the sales force of a local subsidiary of that foreign enterprise without the profits from these sales being taxable to the same extent as they would be if the sales were made by a distributor. In many cases, this has led enterprises to replace arrangements under which the local subsidiary traditionally acted as a distributor by "commissionnaire arrangements" with a resulting shift of profits out of the country where the sales take place without a substantive change in the functions performed in that country. Similarly, MNEs may artificially fragment their operations among multiple group entities to qualify for the exceptions to PE status for preparatory and ancillary activities.

   **ACTION 7 – Prevent the Artificial Avoidance of PE Status**

   Develop changes to the definition of PE to prevent the artificial avoidance of PE status in relation

第 7 项行动计划报告：防止人为规避构成常设机构

背景

1. 应二十国集团（G20）的要求，经合组织于 2013 年 2 月发布了关于解决税基侵蚀与利润转移问题的报告。该报告指出了税基侵蚀与利润转移问题的根源，并提出导致税基侵蚀与利润转移的税收筹划是一系列相互配合的策略的组合。该报告对现行税收协议中常设机构的定义描述如下：

很久以前人们已经认识到，常设机构的定义不仅包括在某一国具有显著的物理存在，也包括非居民通过非独立代理人在该国开展业务活动（这也是经合组织税收协议模板中加入了第 5 条第5款和第 6 款的原因）。近年来，企业可以在很大程度上参与另一国的经济活动（例如通过互联网与该国客户交易），但不依该国构成应税机构场所（taxable presence）（如显著物理存在或非独立代理人）。许多人提出质疑，如果非居民纳税人可以与另一国客户进行交易并获取大量利润，那么现行规则是否仍然确保对营业利润征税权的公平划分，特别是在这些利润在任何地方都不征收的情况下。

2. 税基侵蚀与利润转移报告发布后，经合组织于 2013 年 7 月发布了税基侵蚀与利润转移行动计划。该行动计划包括 15 项具体的行动计划，以全面解决税基侵蚀与利润转移问题。同时规定了计划实施时间表。行动计划针对常设机构相关的避税安排提出了以下建议：

(ii) 全面恢复国际标准的效力和作用

[...]

必须更新常设机构的定义，以应对协议滥用。根据许多国家对代理人常设机构相关税收协议条款的解读，若外国企业通过其在某一国子公司的销售人员在该国销售并签订销售该外国公司货物的合同，相关销售利润在该国需缴纳的税款少于外国企业通过分销商在该国进行销售时相关销售利润在该国应缴纳的税款。许多情况下，这导致企业以佣金代理人安排(commissionnaire)代替传统以子公司作为分销商的安排。从而将利润从销售发生地所在国转出，同时又不显著改变在该国开展的职能活动。同样，跨国公司可能将其整体商业运营在集团内多个公司间进行人为拆分，以满足作为准备性或辅助性活动豁免构成常设机构的要求。

第 7 项行动计划：防止人为规避构成常设机构

研究对常设机构定义的修改建议，以解决人为规避构成常设机构相关的税基侵蚀与利润转移问题，包括通过佣金代理人安排，以及特定活动豁免条款规避常设机构问题。针对这些问题的研究工作也将解决相关利润归属问题。

3. 税基侵蚀与利润转移报告及行动计划指出，为应对税基侵蚀与利润转移安排，必须对现有的常设机构定义进行修订。税基侵蚀与利润转移行动计划同时指出，在不断变化的国际税收环境下，
to BEPS, including through the use of commissionaire arrangements and the specific activity exemptions. Work on these issues will also address related profit attribution issues.

3. The BEPS Report and the BEPS Action Plan recognise that the current definition of permanent establishment must be changed in order to address BEPS strategies. The BEPS Action Plan also recognises that in the changing international tax environment, a number of countries have expressed a concern about how international standards on which bilateral tax treaties are based allocate taxing rights between source and residence States. The BEPS Action Plan indicates that whilst actions to address BEPS will restore both source and residence taxation in a number of cases where cross-border income would otherwise go untaxed or would be taxed at very low rates, these actions are not directly aimed at changing the existing international standards on the allocation of taxing rights on cross-border income.

4. This report includes the changes that will be made to Article 5 of the OECD Model Tax Convention and the Commentary thereon as a result of the work on Action 7 of the BEPS Action Plan. It should be noted that these changes 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.

A. Artificial avoidance of PE status through commissionaire arrangements and similar strategies

5. A commissionaire arrangement may be loosely defined as an arrangement through which a person sells products in a given State in its own name but on behalf of a foreign enterprise that is the owner of these products. Through such an arrangement, a foreign enterprise is able to sell its products in a State without having a permanent establishment to which such sales may be attributed for tax purposes; since the person that concludes the sales does not own the products that it sells, it cannot be taxed on the profits derived from such sales and may only be taxed on the remuneration that it receives for its services (usually a commission).

6. BEPS concerns arising from commissionaire arrangements may be illustrated by the following example, which is based on a court decision that dealt with such an arrangement and found that the foreign enterprise did not have a permanent establishment:
   - XCO is a company resident of State X. It specialises in the sale of medical products.
   - Until 2000, these products are sold to clinics and hospitals in State Y by YCO, a company resident of State Y. XCO and YCO are members of the same multinational group.
   - In 2000, the status of YCO is changed to that of commissionaire following the conclusion of a commissionaire contract between the two companies. Pursuant to the contract, YCO transfers to XCO its fixed assets, its stock and its customer base and agrees to sell in State Y the products of XCO in its own name, but for the account of and at the risk of XCO.
   - As a consequence, the taxable profits of YCO in State Y are substantially reduced.

7. Similar strategies that seek to avoid the application of Art. 5(5) involve situations where contracts which are substantially negotiated in a State are not concluded in that State because they are finalised or authorised abroad, or where the person that habitually exercises an authority to conclude contracts constitutes an “independent agent” to which the exception of Art. 5(6) applies even though it is closely related to the foreign enterprise on behalf of which it is acting.

8. It is clear that in many cases commissionaire arrangements and similar strategies were put in place primarily in order to erode the taxable base of the State where sales took place. Changes to the wording of Art. 5(5) and 5(6) are therefore needed in order to address such strategies.
一些国家对作为双边税收协议基础的国际标准应如何分配来源国和居民国之间的征税权提出了质疑。税收协定的签署和谈判是解决这些问题的关键。更新和修订税收协定是为了确保这些协定的现代性和国际化程度，以适应当前的全球经济环境。

4. 作为税基侵蚀与利润转移第7项行动计划的工作成果，本报告包括了将对经合组织税收协定模板第5条及其注释做出的修改。值得注意的是，这些修改仅适用于未来，因此并不影响对协议模板原有条款以及包括这些条款的税收协定的解读，特别是不影响对现有第5条第4款及第5款的解读。

第一章 通过佣金代理人或者类似安排人为规避构成常设机构

5. 佣金代理人安排可以定义为，一个人以自身的名义在某国销售他国企业的商品。通过这种安排，该外国企业可以在某国销售其产品，但技术上不构成常设机构，因为销售利润不会因归属于在该国的常设机构而在该国征税。由于从事销售活动的人并不拥有其销售的货物，上述国家无法就销售利润对该人征税，而仅能就其提供服务取得的报酬（一般为佣金）征税。

6. 以下案例说明了佣金代理人安排可能导致的税基侵蚀与利润转移问题。该案例基于一则针对佣金代理人安排的法院判决，根据该判决外国企业不构成常设机构：

- X公司为Y国居民公司，主要从事医药产品的销售。
- 2000年之前，X公司通过Y公司向Y国的诊所和医院销售医药产品。Y公司是Y国的居民公司，X公司和Y公司都是同一家跨国集团的成员。
- 2000年，Y公司与X公司签订了佣金代理人合同，由此为X公司的佣金代理人。根据合同，Y公司向X公司转让其固定资产、存货和客户关系，并同意在Y国以其自身名义销售X公司的产品，但责任和风险由X公司承担。
- 通过上述安排，Y公司在Y国的应税利润显著减少。

7. 还有一些类似安排被用于规避第5条第5款的适用，其中包括，合同主要在某国协商而在境外完成或者授权，即合同并不在该国正式订立；或者某人虽然经常行使合同订立的权利，但与代表的境外企业紧密关联，但仍可以适用第5条第6款关于“独立代理人”的豁免规定。

8. 很明显，在许多情况下，佣金代理人安排或者类似安排主要是为了侵蚀销售发生国的税基。为了应对这类安排导致的税基侵蚀与利润转移问题，需要对协议范本第5条第5款及第6款的表述进行修改。
9. 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 sufficient taxable nexus in that country unless the intermediary is performing these activities in the course of an independent business. The changes to Art. 5(5) and 5(6) and the detailed Commentary that appear below will address commissionaire arrangements and similar strategies by ensuring that the wording of these provisions better reflect this policy. Such changes, however, are not intended to address BEPS concerns related to the transfer of risks between related parties through low-risk distributor arrangements. In those arrangements, sales generated by a local sales workforce are attributed to a resident taxpayer, which is not the case in the situations that the changes to Art. 5(5) and 5(6) are intended to address. Given this difference, BEPS concerns related to low-risk distributor arrangements are best addressed through the work on Action 9 (Risks and Capita) of the BEPS Action Plan.

CHANGES TO PARAGRAPHS 5 AND 6 OF ARTICLE 5

Replace paragraphs 5 and 6 of Article 5 by the following (changes to the existing text of Article 5 appear in bold Italic for additions and strikethrough for deletions):

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, 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 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. 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, 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 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate value and value of the company’s shares or of the beneficial equity interest in the company) or if another person
9. 比较合理的规则是，若某中介在某国开展的活动是为了经营性设立或一家境外企业履行的合同，则应认定该境外企业在中国构成充分的应税联结，除非该中介所开展的活动是其独立经营的一部分。以下对第 5 条第 5 款、第 6 款以及相关具体注释的修改通过确保相关条款的表述可以更好地反映相关政策意图，以应对佣金代理人安排和类似安排。然而，这些修改并不旨在解决关联交易方通过“低风险分销商安排”进行风险管理所导致的税基侵蚀与利益转移问题。在这种安排中，当地销售团队取得的销售收入归属于居民纳税人（而不是非居民纳税人），这不是修改第 5 条第 5 款和第 6 款所针对的情形。考虑到这一差异，低风险分销商安排相关的税基侵蚀与利益转移问题应通过税基侵蚀与利益转移第 9 项行动计划（风险与资本）进行解决。”

对第 5 条第 5 款和第 6 款的修订

以下条款替换第 5 条第 5 款和第 6 款（增加内容用粗体斜体表示，删除部分用删除线表示）：

5. 虽有本条第 1 款和第 2 款的规定，如果一个人（除第 6 款另有规定外）（除适用第 6 款规定外的独立代理人以外）在缔约国一方代表缔约国另一方的企业进行活动，有权并经常行使此种权力在首先提及的缔约国以该企业的名义签订合同，经常签订合同或在合同签订过程中拥有决定作用，企业对合同不进行实质性修改，且该合同：

（一）以该企业的名义签订，或

（二）涉及该企业拥有或有权使用的财产之所有权的转让或使用权的授予，或

（三）涉及该企业提供的劳务，

为该人为该企业进行的任何活动，应认为该企业在该缔约国一方，除非这个人在该进行的活动限于第 4 款所列活动，这些活动如能通过固定营业场所进行，都不会导致该固定营业场所构成常设机构。

6. 一家企业仅通过按常规经营本身业务的经纪人，一般佣金代理人或者任何其他独立代理人在中国设立一家常设机构进行经营，不应认为该企业在该缔约国设有常设机构。

（一）在缔约国一方代表另一方的企业进行活动的人，如果作为独立代理人，且代理行为是其常设机构的一部分，则不适用第 5 款的规定。但是，如果某人专门或其主要代表一个或多个与之紧密关联的企业，不应认为该人是这些企业中任何一个的总代理人意义上的独立代理人。

（二）在本条中，如果基于所有相关事实和情况，认定某人和某企业中的一方控制另一方，或双方被同一方或企业控制，则应认为该人与该企业紧密关联。在这种情况下，如果一方直接或间接拥有另一方至少 50% 的权益（或，在特殊情况下，至少 50% 的表决权和股权或重大权的价值），或者第三方直接或间接拥有该
possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

Proposed changes to the Commentary on Article 5

Replace paragraphs 31 to 39 of the Commentary on Article 5 by the following (changes to the existing text of the Commentary appear in bold italics for additions and strikethrough for deletions):

Paragraph 5

31. It is a generally accepted principle that an enterprise should be treated as having a permanent establishment in a State if there is under certain conditions a person acting for it, even though the enterprise may not have a fixed place of business in that State within the meaning of paragraphs 1 and 2. This provision intends to give that State the right to tax in such cases. Thus paragraph 5 stipulates the conditions under which an enterprise is deemed to have a permanent establishment in respect of any activity of a person acting for it. The paragraph was redrafted in the 1977 Model Convention to clarify the intention of the corresponding provision of the 1963 Draft Convention without altering its substance apart from an extension of the concept of activities of the person.

32. Persons whose activities may create a permanent establishment for the enterprise are so-called dependent agents i.e. persons, whether or not employees of the enterprise, who act on behalf of the enterprise and are not doing so in the course of carrying on a business as an independent agent falling under paragraph 6. Such persons may be either individuals or companies and need not be residents of, nor have a place of business in, the State in which they act for the enterprise. It would not have been in the interest of international economic relations to provide that the maintenance of any dependent person—any person undertaking activities on behalf of the enterprise—would lead to a permanent establishment for the enterprise. Such treatment is to be limited to persons who in view of the scope of their authority or the nature of their activity involve the enterprise to a particular extent in business activities in the State concerned. Therefore, paragraph 5 proceeds on the basis that only persons habitually concluding contracts that are in the name of the enterprise or that are to be performed by the enterprise, or habitually playing the principal role leading to the conclusion of such contracts which are routinely concluded without material modification by the enterprise, having the authority to conclude contracts, can lead to a permanent establishment for the enterprise maintaining them. In such a case the person’s actions on behalf of the enterprise, since they result in the conclusion of such contracts and go beyond the mere promotion or advertising, are sufficient to conclude that that person’s authority to bind the enterprise participates in the business activity in the State concerned. The use of the term “permanent establishment” in this context presupposes, of course, that the conclusion of contracts by that person, or as a direct result of the actions of that person, makes use of this authority takes place repeatedly and not merely in isolated cases.

32.1 For paragraph 5 to apply, all the following conditions must be met:
- a person acts in a Contracting State on behalf of an enterprise;
- in doing so, that person 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 either in the name of the enterprise or 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 for the provision of services by that enterprise.
人和该企业至少50%的受益权（或，在公司的情况下，至少50%的表决权和股权或
受益权的价值），则应认为该人和该企业紧密关联。

拟对第5条注释进行的修改

以下条款替换第5条注释第31段至第39段（增加内容用粗体斜体表示，删除部分以
删除线表示）：

第5款

31. 在某些条件下，当某个企业设有代理人为其活动时，即使该企业在一国没
有第1款和第2款所述的常设营业场所，也应认为该企业在该国设有常设机构，这一
项被普遍接受的原则。第5款的规定意在给予该国在何种情况下征税权。因
此，第5款对为进行活动的代理人在什么情况下构成常设机构的问题，规定了
相关的要求。1977年协议框架对本款进行了修正，对1963年协议框架草案中相
应条款的立法意图加以明确，故扩大了代理人除商业活动范围外，未作实质变动。

32. 可能因其活动使企业构成常设机构的人是所谓的企业法人，这些人
是代表企业从事活动，且不构成第6款规定的独立代理人的人。无论该人是否是
该企业的雇员，都不是第6款规定的独立代理人。非独立代理人可能是个人
或者公司。无论它们是否从事代理活动所取得的利润或所取得的营业场所，企
业拥有任何非独立代理人将任何代表企业从事活动的人都认为是该企业的
常设机构，不利于国际贸易关系的发展。只有那些由于其职能范围或活动性质使
所代理的企业在一定程度上参与了与相关国家的经济活动的代理人，才应视为构成
常设机构。因此，第5款规定，代理人只有在经常以被企业的名义订立合同、经常订
立与企业履行的合同，且经常在合同订立过程中起主要作用，且企业对合同不
进行实质修改或与代理合同同时，才构成该企业的常设机构。在这种情况下，这种
人员有足够的权利约束代表企业进行的活动导致了合同的订立，且不仅限于广
告宣传活动的范围，因此可以判断其所代理的企业参与了相关国家的经济活动。当
然，在这种情况下使用“常设机构”一词，是假定这些人员经常行使这种权力订立合
同或通过其活动直接导致合同的订立，而非仅仅是个别的情况。

32.1. 为适用第5款，应同时满足下列条件：
- 某人在约国一方代表一家企业进行活动；
- 在此过程中，该企业经常订立合同，且经常在合同订立过程中起主要作用，
  且企业对合同不进行实质修改；且
- 该些合同是以该企业的名义订立，或涉及该企业或有权使用的财产之
  所有权的转让或使用权的授予，或涉及该企业提供的劳务。
32.2 Even if these conditions are met, however, paragraph 5 will not apply if the activities performed by the person on behalf of the enterprise are covered by the independent agent exception of paragraph 6 or are limited to activities mentioned in paragraph 4 which, if exercised through a fixed place of business, would be deemed not to create a permanent establishment. This last exception is explained by the fact that since, by virtue of paragraph 4, the maintenance of a fixed place of business solely for the purposes of preparatory or auxiliary activities is deemed not to constitute a permanent establishment, a person whose activities are restricted to such purposes should not create a permanent establishment either. Where, for example, a person acts solely as a buying agent for an enterprise and, in doing so, habitually concludes purchase contracts in the name of that enterprise, paragraph 5 will not apply even if that person is not independent of the enterprise as long as such activities are preparatory or auxiliary (see paragraph 22.5 above).

32.3 A person is acting in a Contracting State on behalf of an enterprise when that person involves the enterprise to a particular extent in business activities in the State concerned. This will be the case, for example, where an agent acts for a principal, where a partner acts for a partnership, where a director acts for a company or where an employee acts for an employer. A person cannot be said to be acting on behalf of an enterprise if the enterprise is not directly or indirectly affected by the action performed by that person. As indicated in paragraph 32, the person acting on behalf of an enterprise can be a company; in that case, the actions of the employees and directors of that company are considered together for the purpose of determining whether and to what extent that company acts on behalf of the enterprise.

32.4 The phrase “concludes contracts” focusses on situations where, under the relevant law governing contracts, a contract is considered to have been concluded by a person. A contract may be concluded without any active negotiation of the terms of that contract; this would be the case, for example, where the relevant law provides that a contract is concluded by reason of a person accepting, on behalf of an enterprise, the offer made by a third party to enter into a standard contract with that enterprise. Also, a contract may, under relevant law, be concluded in a State even if that contract is signed outside that State; for example, the conclusion of a contract results from the acceptance, by a person acting on behalf of an enterprise, of an offer to enter into a contract made by a third party, it does not matter that the contract is signed outside that State. In addition, a person who negotiates a State all elements and details of a contract in a way binding on the enterprise can be said to conclude the contract in that State even if that contract is signed by another person outside that State.

32.5 The phrase “or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise” is aimed at situations where the conclusion of a contract directly results from the actions that the person performs in a Contracting State on behalf of the enterprise even though, under relevant law, the contract is not concluded by that person in that State. Whilst the phrase “concludes contracts” provides a relatively well-known test based on contract law, it was found necessary to supplement that test with a test focusing on substantive activities taking place in one State in order to address cases where the conclusion of contracts is clearly the direct result of these activities although the relevant rules of contract law provide that the conclusion of the contract takes place outside that State. The phrase must be interpreted in the light of the object and purpose of paragraph 5, which is to cover cases where the activities that a person exercises in a State are intended to result in the regular conclusion of contracts to be performed by a foreign enterprise, i.e. where that person acts as the sales force of the enterprise. The principal role leading to the conclusion of the contract will therefore typically be associated with the actions of the person who convinced the third party to enter into a contract with the enterprise. The phrase therefore applies where, for example, a person solicits and receives (but
32.2 然而，即使满足上述条件，如果该人代表企业从事的活动符合第6款规定的“独立代理人”的豁免规定，或者虽通过固定营业场所进行活动，但仅从事第4款规定的活动而不被认定为常设机构，则第5款不适用。上述第二种豁免情形应理解为，根据第4款的规定，仅为准备性或辅助性活动所设的固定营业场所不构成常设机构，因此，如果一人的活动仅限于准备性质或辅助性质，也不应构成常设机构。例如，如果一个人由一家企业的采购代理，经常以该企业的名义签订采购合同。则这个人不是该企业的独立代理人，只要其从事的活动是准备性质或辅助性质（请见上述第22.5段），则不适用第5款的规定。

32.3 如果一个人的活动使一家企业在一定程度上参与了缔约国一方的营业活动，则这个人是该国代表该企业进行营业活动，例如，代理人代表该企业的或其他如合伙人代表合伙企业、理事会代表代表公司或雇员代表雇主开展活动。如果企业不直接或间接通过某人的活动的影响，亦不应认为这个人代表该企业进行营业活动。如第32段所述，代表企业进行营业活动的人可能是一家公司；在这种情况下，该公司的代理人或雇员的活动应一并纳入考虑，以判断该公司是否以及在多大程度上代表该企业进行营业活动。

32.4 “订立合同”主要是指根据合同适用法律，相关合同被认定为由某人订立的情形。合同可能没有对合同条款做出任何预先协议的情况下订立；例如，根据相关法律及习惯，某人代表企业接受第三方提出的要求从而使得该企业订立一项标准合同的情况。同样，根据相关法律及习惯，即使合同在某国签署，也可能被认定为在该国订立；例如，某人代表一家企业接受第三方提供的建议从而订立一项合同的情况下，合同的签署地点在境外并不影响合同订立地点的确定。另外，如果一个人在某国协议合同的所有条款和细节，而该合同对企业具有约束力，即使该合同由其他人在该国境外签订，也可被认定为在该国订立。

32.5 “经常在合同订立过程中起主要作用，且对企业之间合同不进行实质性修改”这一语句所针对的情形，某人在缔约国一方代表一家企业进行的活动直接导致合同订立（即使根据相关法律该合同并非由该人在该国签订）。尽管“订立合同”一词具有基于合同法对合同适用法律的判断标准，还需要一项第三方向某国发生的实质性活动的辅助性或辅助性质的活动，以应对合同的订立明显由上述活动直接导致，但根据合同法，该合同应由在境内订立。因此，订立合同的主要作用通常与上述一个有第三方与该企业达到合同的活动紧密相关。前述的“经常在合同订立过程中起主要作用，且对企业之间合同不进行实质性修改”的语句适用于
does not formally finalise) orders which are sent directly to a warehouse from which goods belonging to the enterprise are delivered and where the enterprise routinely approves these transactions. It does not apply, however, 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. Where, for example, representatives of a pharmaceutical enterprise actively promote drugs produced by that enterprise by contacting doctors that subsequently prescribe these drugs, that marketing activity does not directly result in the conclusion of contracts between the doctors and the enterprise so that the paragraph does not apply even though the sales of these drugs may significantly increase as a result of that marketing activity.

32.6 The following is another example that illustrates the application of paragraph 5. RCO, a company resident of State R, distributes various products and services worldwide through its websites. SCO, a company resident of State S, is a wholly-owned subsidiary of RCO. SCO’s employees send emails, make telephone calls to, or visit large organisations in order to convince them to buy RCO’s products and services and are therefore responsible for large accounts in State S; SCO’s employees, whose remuneration is partially based on the revenues derived by RCO from the holders of these accounts, use their relationship building skills to try to anticipate the needs of these account holders and to convince them to acquire the products and services offered by RCO. When one of these account holders is persuaded by an employee of SCO to purchase a given quantity of goods or services, the employee indicates the price that will be payable for that quantity, indicates that a contract must be concluded online with RCO before the goods or services can be provided by RCO and explains the standard terms of RCO’s contracts, including the fixed price structure used by RCO, which the employee is not authorised to modify. The account holder subsequently concludes that contract online for the quantity discussed with SCO’s employee and in accordance with the price structure presented by that employee. In this example, SCO’s employees play the principal role leading to the conclusion of the contract between the account holder 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 account holder to accept these standard terms being the crucial element leading to the conclusion of the contracts between the account holder and RCO.

32.7 The wording of subparagraphs a), b) and c) ensures that paragraph 5 applies not only to contracts that create rights and obligations that are legally enforceable between the enterprise on behalf of which the person is acting and the third parties with which these contracts are concluded but also to contracts that create obligations that will effectively be performed by such enterprise rather than by the person contractually obliged to do so.

32.8 A typical case covered by these subparagraphs is where contracts are concluded with clients by an agent, a partner or an employee of an enterprise so as to create legally enforceable rights and obligations between the enterprise and these clients. These subparagraphs also cover cases where the contracts concluded by a person who acts on behalf of an enterprise do not legally bind that enterprise to the third parties with which these contracts are concluded but are contracts 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 for the provision of services by that enterprise. A typical example would be the contracts that a "commissionnaire" would conclude with third parties under a commissionnaire arrangement with a foreign enterprise pursuant to which that commissionnaire would act on behalf of the enterprise but in doing so, would conclude in its own name contracts that do not create rights and obligations that are legally enforceable between the foreign enterprise and the third parties even though the results of the arrangement between the commissionnaire and the
某些情况下，一个国家的法律并不适用于直接向外国企业提供服务或批准交易。然而，这并不适用于个人或企业，但并不适用于这个国家。例如，一个制药公司的销售代表通过联系代理商，积极推广该企业的产品，这样推广活动并不直接导致医疗或商业之间的合同。所以，即使推广活动可能显著提升产品的销量，上述规定也并不适用。

32.6 下述案例也能说明如何适用第5款规定。R公司是德国的公司，通过其网站在全球范围内提供各种产品和服务。S国居民公司S公司是R公司的全资子公司。S公司的员工通过向全球组织发送邮件，打电话或访问等方式说服他们购买R公司的产品和服务，并因此获取R公司在S国的收入；S公司员工运用社交技巧，通过日常交流与S公司的大客户，说服他们购买R公司的产品和服务，其收入部分基于R公司从客户取得的收入。如果通过S公司员工的推销，其中一个客户同意购买一定数量的产品或服务，则该员工需向客户说明受益支付的价款，并说明在R公司提供的产品和服务在购买以前客户需向R公司回答合同，该员工还需向客户解释R公司合同的标准条款，包括R公司提供的产品和服务，S公司员工有权对合同条款进行修改。之后客户根据与S公司员工协商的数量以及S公司员工提供的价格条款在合同订立后。在这个例子中，S公司的员工对客户与R公司之间订立合同起到重要作用，且R公司未对这些合同做出实质性修改。S公司的员工无权修改合同条款的事实并不意味着他们代表R公司所进行的商业活动没有直接导致合同的订立。事实上，说服客户接受标准合同条款是客户与R公司订立合同过程中的一个重要环节。

32.7 第（一）项、第（二）项和第（三）项的内容确保第5款不仅仅适用于代理人的代表的企业和第三方订立具有法律效力且确定双方权利和义务的合同，也适用于实际上需由该企业承担义务（而不是由代理人根据合同承担义务）的合同。

32.8 这三项涵盖的典型情况是企业通过代理人、合伙人或雇员与客户订立合同，同时在企业与客户之间建立了具有法律效力的关系。这三项涵盖另外一种情形，即某人代表一家企业订立合同。该合同并不导致企业对与订立合同的第三方负有法律约束力，但合同涉及该企业拥有或有权使用的产品等所有权的转让或使用权的授予，或涉及该企业提供的劳务。一个典型的例子是在与某个外国企业之间的佣金代理安排下，佣金代理人与第三方订立合同。根据该佣金代理安排，佣金代理人代表某企业进行商业活动，但以自身的名义订立合同。即使根据佣金代理的条件，外国企业并未导致该外国企业与第三方之间产生具有法律效力的权利和义务。
foreign enterprise would be such that the foreign enterprise would directly transfer to these third parties the ownership or use of property that it owns or has the right to use.

32.9 The reference to contracts "in the name of" in subparagraph a) does not restrict the application of the subparagraph to contracts that are literally in the name of the enterprise; it may apply, for example, to certain situations where the name of the enterprise is undisclosed in a written contract.

32.10 The crucial condition for the application of subparagraphs b) and c) is that the person who habitually concludes the contracts, or habitually plays the principal role leading to the conclusion of the contract that are routinely concluded without material modification by the enterprise, is acting on behalf of an enterprise in such a way that the parts of the contracts that relate to the transfer of the ownership or use of property, or the provision of services, will be performed by the enterprise as opposed to the person that acts on the enterprise's behalf.

32.11 For the purposes of subparagraph b), it does not matter whether or not the relevant property existed or was owned by the enterprise at the time of the conclusion of the contracts between the person who acts for the enterprise and the third parties. For example, a person acting on behalf of an enterprise might sell property that the enterprise will subsequently produce before delivering it directly to the customers. Also, the reference to "property" covers any type of tangible or intangible property.

32.12 The cases to which paragraph 5 applies must be distinguished from situations where a person concludes contracts on its own behalf and, in order to perform the obligations deriving from these contracts, obtains goods or services from other enterprises or arranges for other enterprises to deliver such goods or services. In these cases, the person is not acting "on behalf" of these other enterprises and the contracts concluded by the person are neither in the name of these enterprises nor for the transfer to third parties of the ownership or use of property that these enterprises own or have the right to use or for the provision of services by these other enterprises. Where, for example, a company acts as a distributor of products in a particular market and, in doing so, sells to customers products that it buys from an enterprise (including an associated enterprise), it is neither acting on behalf of that enterprise nor selling property that is owned by that enterprise since the property that is sold to the customers is owned by the distributor. This would still be the case if that distributor acted as a so-called "low-risk distributor" (and not, for example, as an agent) but only if the transfer of the title to property sold by that "low-risk" distributor passed from the enterprise to the distributor and from the distributor to the customer (regardless of how long the distributor would hold title in the product sold) so that the distributor would derive a profit from the sale as opposed to a remuneration in the form, for example, of a commission.

32.13 Also, the phrase "authority to conclude contracts in the name of the enterprise" does not confine the application of the paragraph to an agent who enters into contracts literally in the name of the enterprise; the paragraph applies equally to an agent who concludes contracts which are binding on the enterprise even if those contracts are not actually in the name of the enterprise. Lack of active involvement by an enterprise in transactions may be indicative of a grant of authority to an agent. For example, an agent may be considered to possess actual authority to conclude contracts where he solicits and receives (but does not formally finalise) orders which are sent directly to a warehouse from which goods are delivered and where the foreign enterprise routinely approves the transactions.

33. The authority to conclude contracts referred to in paragraph 5 must cover contracts relating to operations which constitute the business proper of the enterprise. It would be irrelevant, for instance, if the person had authority to concluded employment contracts to engage employees for the enterprise to assist that person's activity for the enterprise or if the person were authorised to conclude, in the
32.9 第（一）项提到的“以企业的名义”并不意味着该项仅适用于形式上以该企业的名义订立的合同，也可能适用于某些情况下并未披露该企业名称的书面合同。

32.10 第（二）项和第（三）项适用的关键条件是经常订立合同或经常在合同订立过程中起主要作用，企业不对合同作出实质性修改的人，在代表企业进行活动时，没有义务履行合同中与转让财产所有权、授予财产使用权或提供劳务相关的义务，这些义务由该企业履行。

32.11 在适用第（二）项时，企业的代理人和第三方订立合同时，企业是否拥有相关财产或相关财产是否存在并不重要。例如，企业的代理人可能向客户销售企业将随后生产并直接向客户交付的财产。另外，“财产”一词包括各种有形或无形财产。

32.12 第 5 款不适用于一个人以自身名义订立合同后，为履行其合同义务，从其他企业取得货物或劳务，或安排其他企业提供货物或劳务的情形。在这些情形下，这个人并不是“代表”其他企业进行营业活动，且这个人订立的合同也并不是以其他企业的名义订立，不涉及向第三方转移或授予其他企业拥有或有权使用的财产之所有权或使用权，也不涉及其他企业提供的劳务。例如，一家公司是某个特定市场的货物分销商，向客户销售其从某个企业（包括关联企业）购买的货物。它既不是代表这个企业进行活动，也不是在销售这个企业拥有的财产，因为货物在向客户销售时为该分销商所有。即使这个分销商是所谓的“低风险分销商”（且并不是代理人），只要该“低风险分销商”销售的货物的所有权是从企业转移到该分销商，再转移至客户（无论该分销商拥有货物所有权的时间长短），该分销商应得的销售利润而不是服务报酬（如佣金），那么上述结论将不成立。

32.1 同样，“以企业的名义签订合同的权利”一词并非将本款的适用限于严格意义上的以企业名义签订合同的代理人，本款还适用于那些虽然不是以企业的名义签订合同，但其受合同约束对其他企业具有约束力的代理人，企业并未积极参与交易可能表明其对代理人的授权。例如，如果一个代理人被授权并取得（但并未正式确定）那些被直接送到用于交付货物的仓库的订单，并且外国企业通常都会批准交易，那么他可以被认为拥有签订合同的实际权利。

33. 第5款提到的年权签订合同是指有权签订与企业经营活动本身相关的业务合同。以下两例不构成常设机构：某人有权为企业雇佣职员签订雇佣合同以协助其为工作，或仅有时以企业名义签订其他类似的与企业内部运作相关的合同。另外，一个人转让这种权力必须：被经常性的在另一国行使签订合同，或经常在合同...
name of the enterprise, similar contracts relating to internal operations only. Moreover, whether or not the person habitually exercised concludes contracts or played the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise in the State, should be determined on the basis of the commercial realities of the situation. A person who is authorised to negotiate all elements and details of a contract in a way binding on the enterprise can be said to exercise this authority "in that State", even if the contract is signed by another person in the State in which the enterprise is situated or if the first person has not formally been given a power of representation. The mere fact, however, that a person has attended or even participated in negotiations in a State between an enterprise and a client will not be sufficient, by itself, to conclude that the person has exercised an authority to concluded contracts or played the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise in the name of the enterprise. The fact that a person has attended or even participated in such negotiations could, however, be a relevant factor in determining the exact functions performed by that person on behalf of the enterprise. Since, by virtue of paragraph 4, the maintenance of a fixed place of business solely for purposes listed in that paragraph is deemed not to constitute a permanent establishment, a person whose activities are restricted to such purposes does not create a permanent establishment either.

33.1 The requirement that an agent must "habitually" exercise an authority to conclude contracts or play the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise reflects the underlying principle in Article 5 that the presence which an enterprise maintains in a Contracting State should be more than merely transitory if the enterprise is to be regarded as maintaining a permanent establishment, and thus a taxable presence, in that State. The extent and frequency of activity necessary to conclude that the agent is "habitually exercising" concludes contracts or playing the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise will depend on the nature of the contracts and the business of the principal. It is not possible to lay down a precise frequency test. Nonetheless, the same sorts of factors considered in paragraph 5 would be relevant in making that determination.

34. Where the requirements set out in paragraph 5 are met, a permanent establishment of the enterprise exists to the extent that the person acts for the latter, i.e. not only to the extent that such a person exercises the authority to concludes contracts or plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise in the name of the enterprise.

35. Under paragraph 5, only those persons who meet the specific conditions may create a permanent establishment; all other persons are excluded. It should be borne in mind, however, that paragraph 5 simply provides an alternative test of whether an enterprise has a permanent establishment in a State. If it can be shown that the enterprise has a permanent establishment within the meaning of paragraphs 1 and 2 (subject to the provisions of paragraph 4), it is not necessary to show that the person in charge is one who would fall under paragraph 5.

35.1 Whilst one effect of paragraph 5 will typically be that the rights and obligations resulting from the contracts to which the paragraph refers will be allocated to the permanent establishment resulting from the paragraph (see paragraph 21 of the Commentary on Article 7), it is important to note that this does not mean that the entire profits resulting from the performance of these contracts should be attributed to the permanent establishment. The determination of the profits attributable to a permanent establishment resulting from the application of paragraph 5 will be governed by the rules of Article 7; clearly, this will require that activities performed by other enterprises and by the rest of the enterprise to which the permanent establishment belongs be properly remunerated so that the
33.1 代理人在行使订立合同的权力时，在订立合同过程中起主要作用，且企业不对合同进行实质性修改。这一要求反映了第5条的基本原则，即如果认定某企业在该国设有常设机构，并因此在该国构成应税机构场所（taxable presence），那么该企业在该国就不能只是暂时地存在。认定代理人是否“经常”行使订立合同或在合同订立过程中起主要作用，且企业不对合同进行实质性修改的权力，其所依据的活跃期的长度和频率的标准应取决于合同的性质以及委托方企业的业务特点。设定一个精确的频率测试标准是不可行的。尽管如此，可以参考第6款中考虑的类似因素进行判定。

34. 如果满足第5款的条件，则这个人代表该企业进行的所有商业活动被视为构成常设机构。即常设机构的范围不仅限于这个代理人以企业名义订立合同，或在合同订立过程中起主要作用，且企业不对合同进行实质性修改的权利。

35. 按照第5款的规定，只有那些符合特定条件的人才能构成常设机构，而所有其他人都排除在外。然而需要注意的是，第5款仅提供了判断企业是否在该国设有常设机构的可选标准。如果根据第1款和第2款的规定（即适用第4款的豁免规定），即可判定某企业设有常设机构，则不必考虑第3款涉及的人是否符合第5款的规定。

35.1 虽然第5款中提及的合同所确定的权利和义务一般归属于根据第5款确定的常设机构（参见第7条注释的第21段），但值得注意的是，这并不意味着通过履行合同取得的全部利润将归属于常设机构。应根据第7条的规定确定归属于根据第5款确定的常设机构的利润。显然，这要求设立常设机构的企业除常设机构以外
profits to be attributed to the permanent establishment in accordance with Article 7 are only those that the permanent establishment would have derived if it were a separate and independent enterprise performing the activities that paragraph 5 attributes to that permanent establishment.

Paragraph 6

36. Where an enterprise of a Contracting State carries on business dealings through a broker, general commission agent or any other agent of an independent status agent carrying on business as such, it cannot be taxed in the other Contracting State in respect of those dealings if the agent is acting in the ordinary course of his that business (see paragraph 32 above). Although it stands to reason that the activities of such an agent, who representing a separate and independent enterprise, cannot constitute a should not result in the finding of a permanent establishment of the foreign enterprise, paragraph 6 has been inserted in the Article for the sake of clarity and emphasis.

37. A person will come within the scope of paragraph 6, i.e. he will not constitute a permanent establishment of the enterprise on whose behalf he acts only if:

- he is independent of the enterprise both legally and economically, and
- he acts in the ordinary course of his business when acting on behalf of the enterprise.

37. The exception of paragraph 6 only applies where a person acts on behalf of an enterprise in the course of carrying on a business as an independent agent. It would therefore not apply where a person acts on behalf of an enterprise in a different capacity, such as where an employee acts on behalf of her employer or a partner acts on behalf of a partnership. As explained in paragraph 8.1 of the Commentary on Article 15, it is sometimes difficult to determine whether the services rendered by an individual constitute employment services or services rendered by a separate enterprise and the guidance in paragraphs 8.2 to 8.28 of the Commentary on Article 15 will be relevant for that purpose. Where an individual acts on behalf of an enterprise in the course of carrying on his own business and not as an employee, however, the application of paragraph 6 will still require that the individual do so as an independent agent; as explained in paragraph 38.7 below, this independent status is less likely if the activities of that individual are performed exclusively or almost exclusively on behalf of one enterprise or closely related enterprises.

38. Whether a person acting as an agent is independent of the enterprise represented depends on the extent of the obligations which this person has vis-à-vis the enterprise. Where the person's commercial activities for the enterprise are subject to detailed instructions or to comprehensive control by it, such person cannot be regarded as independent of the enterprise. Another important criterion will be whether the entrepreneurial risk has to be borne by the person or by the enterprise the person represents. In any event, the last sentence of subparagraph a) of paragraph 6 provides that in certain circumstances a person shall not be considered to be an independent agent (see paragraphs 38.6 to 38.11 below). 38.2: The following considerations should be borne in mind when determining whether an agent to whom that last sentence does not apply may be considered to be independent.

38.1 It should be noted that, where the last sentence of subparagraph a) of paragraph 6 does not apply because a subsidiary does not act exclusively or almost exclusively for closely related enterprises, the control which a parent company exercises over its subsidiary in its capacity as shareholder is not relevant in a consideration of the dependence or otherwise of the subsidiary in its capacity as an agent for the parent. This is consistent with the rule in paragraph 7 of Article 5 (see also paragraph 38.11 below). But as paragraph 41 of the Commentary indicates, the subsidiary may be considered a dependent agent of its parent by application of the same tests which are applied to
开展的活动以及其他企业开展的活动均获取了合理的回报。这这样，根据第7条确认的归属于常设机构的利润应包括假设永久常设机构为独立企业且从事第5款规定的归属于该常设机构的活动时应取得的利润。

第6款

36. 经营一企业通过经纪人、一般佣金代理人或其他具有独立地位的代理人进行业务往来，如果上述业务往来属于该代理人自身的常规业务活动，则缔约国另一方不应对该企业征税（参见上述第32段）。这种代理人作为一家单独和独立企业的开展活动，不应导致外国企业构成常设机构。这一原则本身已经合乎情理，但本条第6款还是对此特别加以明确和强调。

37. 当且仅当——个人的活动符合下列条件，他将符合第6款的规定而不会构成其所代表企业的常设机构——

— 这个人在法律上和经济上均独立于该企业，并且
— 这个人在代表该企业进行活动时，是在开展其常规经营活动。

37. 第6款的豁免规定仅适用于一个人以独立代理人的身份代表企业进行商业活动的情况。因此，不适用于以其他身份代表企业进行商业活动的人，如雇员代表雇主或合伙人代表合伙企业开展活动。第5条注释第8.1段指出，有时难以判定自然人提供的劳务是雇佣劳务，还是作为独立经营的企业提供的劳务。第5条注释第8.2段及第8.28段对此提供了指引。当一个自然人在从事自身经营活动的过程中代表一家企业进行商业活动，而非作为雇员进行工作时，第6款仍要求该自然人作为独立代理人进行相关活动，否则豁免规定不适用。下文第38.7段指出，如果该自然人仅代表或几乎仅代表一家或多家紧密关联企业进行活动，则其被认定为独立代理人的可能性相对较低。

38. 代理人是否独立于其所代表的企业，取决于他对其企业承担责任的程度。如果这个人是在企业的决策和控制中处于商业活动的位置，那么不应断定他独立于这个企业。另一个重要判断标准是，经风险成因是该代理人还是该代理人所代表的企业承担。无论如何，第6款第(一)项最后一句规定，在某些情况下，一个人不应被确认为独立代理人（参见下文38.6至38.11段）。38.2在判断不适用该最后一句规定的代理人是否是独立代理人时，应考虑以下因素。

38.1 应注意，如果由于一个子公司并非全部或几乎全部代表紧密关联企业的商业活动，而导致不适用第6款第(一)项的最后一句话，那么母公司作为股东对子公司进行的控制，对于判断子公司作为母公司的代理人开展活动时是否属于独立代理人并不相关。这与第5条第7款的规定是一致的（也请见下文38.11段）。然而，正如注释41段所指出的，通过适用同样的适用于非关联公司间代理安排的判断标准，子公司有可能被确认为母公司的非独立代理人。

38.23 独立代理人一般就不其工作结果向委托人负责，但其在工作执行方式方面不受委托人的重大控制。关于如何进行工作，他并不需要听从委托人的具体指示。委
unrelated companies.

38.29 An independent agent will typically be responsible to his principal for the results of his work but not subject to significant control with respect to the manner in which that work is carried out. He will not be subject to detailed instructions from the principal as to the conduct of the work. The fact that the principal is relying on the special skill and knowledge of the agent is an indication of independence.

38.34 Limitations on the scale of business which may be conducted by the agent clearly affect the scope of the agent's authority. However, such limitations are not relevant to dependency which is determined by consideration of the extent to which the agent exercises freedom in the conduct of business on behalf of the principal within the scope of the authority conferred by the agreement.

38.45 It may be a feature of the operation of an agreement that an agent will provide substantial information to a principal in connection with the business conducted under the agreement. This is not in itself a sufficient criterion for determination that the agent is dependent unless the information is provided in the course of seeking approval from the principal for the manner in which the business is to be conducted. The provision of information which is simply intended to ensure the smooth running of the agreement and continued good relations with the principal is not a sign of dependence.

38.5 Another factor to be considered in determining independent status is the number of principals represented by the agent. As indicated in paragraph 38.7, independent status is less likely if the activities of the agent are performed wholly or almost wholly on behalf of only one enterprise over the lifetime of the business or a long period of time. However, this fact is not by itself determinative. All the facts and circumstances must be taken into account to determine whether the agent's activities constitute an autonomous business conducted by him in which he bears risk and receives reward through the use of his entrepreneurial skills and knowledge. Where an agent acts for a number of principals in the ordinary course of his business and none of these is predominant in terms of the business carried on by the agent, dependence may exist if the principals act in concert to control the acts of the agent in the course of his business on their behalf.

38.67 An independent agent cannot be said to act in the ordinary course of their own business as such when it performs activities that are unrelated to the business of an agent if, in place of the enterprise, such persons perform activities which, economically, belong to the sphere of the enterprise rather than to that of their own business operations. Where, for example, a commission agent not only sells the goods or merchandise of the enterprise in his own name but also habitually acts, in relation to that enterprise, as a permanent agent having an authority to conclude contracts, he would be deemed in respect of this particular activity to be a permanent establishment, since he is thus acting outside the ordinary course of his own trade or business (namely that of a commission agent), unless his activities are limited to those mentioned at the end of paragraph 5 company act as a distributor for a number of companies to which it is not closely related also acts as an agent for a closely related enterprise, the activities that the company undertakes as a distributor will not be considered to be part of the activities that the company carries on in the ordinary course of its business as an agent and will therefore not be relevant in determining whether the company is independent from the closely related enterprise on behalf of which it is acting.

38.8 In deciding whether or not particular activities fall within or outside the ordinary course of business of an agent, one would examine the business activities customarily carried out within the agent's trade as a broker, commission agent or other independent agent rather than the other business activities carried out by that agent. Whilst the comparison normally should be made with the activities customarily to the agent's trade, other supplementary tests may in certain circumstances be used.
托人对代理人的专门技能和知识的依赖性是一个独立性的标志。

38.34 对代理人经营范围进行限制会明显影响代理人的权限范围。然而，这种限制与独立性无关，因为独立性是根据代理人在合同授予的权限范围内，代表委托人进行商业活动的自由程度来判断的。

38.45 履行代理协议时，一种可能的情况是代理人向委托人提供关于根据协议进行的营业活动的大量信息。这种情况本身不足以充分判定代理人不具有独立性，除非该信息的提供是为了寻求委托人对营业活动进行方式的批准。仅仅是为了确保协议的顺利执行，以及维持与委托人之间的良好关系而提供信息，不能视为非独立性的标志。

38.5 在判断代理人是否具有独立性时应该考虑的另一个因素，是该代理人所代表的委托人的数量。如下文第38.7段所述，如果在该整个营业期间或很长一段时间内，代理人仅代表或几乎仅代表一家企业进行活动，则被认定为独立代理人相对可能性较低。然而，这种情况本身并不是决定性的。在判断代理人的独立性是否构成一项由其利用自身的经营技能和知识进行的，自负盈亏的自主性营利主体时，应该考虑所有的事实和情况。即使代理人正在正常营业过程中为多个委托人工作，并且任何委托人在该代理人进行的营业活动中不具有支配性，如果这些委托人在控制该代理人的代理经活动行为和方式一致，则该代理人仍可能被认定为非独立代理人。

38.6 独立代理人在从事与代理业务无关的活动时如果某些人代替某企业从事于经济上属于该企业的非其自身业务范围的活动，那么，这些就不能被视为是在从事其常规经营活动。例如，若某佣金代理人不仅依靠自己的名义出售企业的货物或商品，还经常作为该企业的代理人进行活动，那么在这种情况中，代理人将被视为常设机构。同样，他或她在银行或信用营业中（即那些佣金代理人的常规活动）的活动，除非其活动仅限于第8条所界定的活动，一家公司是与该关系不紧密的公司的分销商，同时是一家与其紧密关联公司的代理人。该公司从事的分销商业务活动将不被认定为作为代理人的常规经营活动的一部分，因此对于确定该公司是否独立于其代表的紧密关联公司并不相关。

38.8 在判断特定的活动是否属于或超出了某个代理人的常规经营活动时，需要考虑的是那些作为经纪人、佣金代理人或者其他的独立代理人所通常从事的商业活动，而非该代理人进行的其他商业活动。虽然一般以代理人行业通常从事的活动作为比较对象，但是这些情形下，例如在代理人的活动与该行业常见活动有关时，可以
concurrently or alternatively, for example where the agent’s activities do not relate to a common trade.

38.7 The last sentence of subparagraph a) provides that a person is not considered to be an independent agent where the person acts exclusively or almost exclusively for one or more enterprises to which it is closely related. That last sentence does not mean, however, that paragraph 6 will apply automatically where a person acts for one or more enterprises to which that person is not closely related. Paragraph 6 requires that the person must be carrying on a business as an independent agent and be acting in the ordinary course of that business. Independent status is less likely if the activities of the person are performed wholly or almost wholly on behalf of only one enterprise (or a group of enterprises that are closely related to each other) over the lifetime of that person’s business or over a long period of time. Where, however, a person is acting exclusively for one enterprise, to which it is not closely related, for a short period of time (e.g. at the beginning of that person’s business operations), it is possible that paragraph 6 could apply. As indicated in paragraph 38.5, all the facts and circumstances would need to be taken into account to determine whether the person’s activities constitute the carrying on of a business as an independent agent.

38.8 The last sentence of subparagraph a) applies only where the person acts “exclusively or almost exclusively” on behalf of closely related enterprises. This means that 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, that person will not qualify as an independent agent. Where, for example, the sales that an agent concludes for enterprises to which it is not closely related represent less than 10 per cent of all the sales that it concludes as an agent acting for other enterprises, that agent should be viewed as acting “exclusively or almost exclusively” on behalf of closely related enterprises.

38.9 Subparagraph b) explains the meaning of the concept of a “person closely related to an enterprise” for the purpose of the Article. That concept is to be distinguished from the concept of “associated enterprises” which is used for the purposes of Article 9; although the two concepts overlap to a certain extent, they are not intended to be equivalent.

38.10 The first part of subparagraph b) includes the general definition of “a person closely related to an enterprise”. It provides that 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. This general rule would cover, for example, situations where a person or enterprise controls an enterprise by virtue of a special arrangement that allows that person to exercise rights that are similar to those that it would hold if it possessed directly or indirectly more than 50 per cent of the beneficial interests in the enterprise. As in most cases where the plural form is used, the reference to the “same persons or enterprises” at the end of the first sentence of subparagraph b) covers cases where there is only one such person or enterprise.

38.11 The second part of subparagraph b) provides that the definition of “person closely related to an enterprise” is automatically satisfied in certain circumstances. Under that second part, a person is considered to be closely related to an enterprise if either one possesses directly or indirectly more than 50 per cent of the beneficial interests in the other or if a third person possesses directly or indirectly more than 50 per cent of the beneficial interests in both the person and the enterprise. In the case of a company, this condition is satisfied where a person holds directly or indirectly more than 50 per cent of the aggregate vote and value of the company’s shares or of the beneficial equity interest in the company.

38.12 The rule in the last sentence of subparagraph a) and the fact that subparagraph b) covers situations where one company controls or is controlled by another company does not restrict in any way the scope of paragraph 7 of Article 5. As explained in paragraph 41.1 below, it is possible that a
同时或选择性地使用其他补充性的判断标准。

38.7 第（一）项最后一句话指出，如果某人全部或几几乎全部代表一家或多家与
其紧密关联的企业进行活动，则其不能被认定为独立代理人。然而，这句话并不意
味着，当某人代表一家或多间与其关系不紧密的企业进行活动时，第6款可以
自动适用。第6款要求这个人必须作为独立代理人，且在其常規经营范围内进行
商业活动。如果在其整个营业期间或很长一段时间内，这个人全部或几乎全部代表
一家企业（或多家紧密关联的企业组成的集团）进行活动，则被认定为独立代
理人的可能性相对较低。但当，当某人短时间内代表一家与其关系不紧密的企业
进行活动时（例如在其经营的初期），第6款可能适用。第38.5指出，在确定这
个人的活动能否被认定为作为独立代理人进行的商业活动时，应该考虑所有的事
实和情况。

38.8 第（一）项最后一句话适用于某人“全部或几乎全部代表”紧密关联企
业的情况。这意味着如果某人代表关系不紧密的企业活动不构成其经营活动的
重大组成部分，则这个人不是独立代理人。例如，一个代理人代表关系不紧密的
企业签订的销售合同金额不到其作为代理人为其他企业签订的所有销售合同金额
的10%。这个代理人应被认为是“全部或几乎全部代表”紧密关联的企业进行商
业活动。

38.9 第（二）项解释了该款规定下“一个人与一家企业紧密关联”这个概念的
含义。这个概念与“关联企业”的概念不同，后者是第9条适用的概念。这两个概
念的意义虽然有重叠，但并不应完全一致。

38.10 第（二）项第一部分提出了“一个人与一家企业紧密关联”的一般定
义。基于所有相关事实和情况，如果某人和一家企业之间一方控制另一方，或者
双方受到同一人或企业的控制，则该人与该企业紧密关联。举例而言，这个一般
定义也适用于一个人或一家企业通过特殊安排控制另一家企业，且其可行使的相
关权利类似于其直接或间接持有该企业百分之五十以上的受益权的情形。

38.11 第（二）项第二部分指出，在特定情况下可自动符合“一个人与一家企
业紧密关联”的定义。在第二部分，对于一个人和一家企业，如果一方直接或间接
持有另一方百分之五十以上的受益权，或第三人直接或间接持有该人及该企业百
分之五十以上的受益权，则该人和该企业将被视为紧密关联。如果被持有方为公
司，某人直接或间接持有其百分之五十以上的表决权和百分之五十以上的公司股
权或受益权的价值，也可认定该人和该企业紧密关联。

38.12 第（一）项最后一句话的规定和第（二）项适用于一家公司控制或受控于另
一家公司的情形，并不在任何方面限制第5条第7款的适用范围，如下文第41.1
subsidiary will act on behalf of its parent company in such a way that the parent will be deemed to have a permanent establishment under paragraph 5; if that is the case, a subsidiary acting exclusively or almost exclusively for its parent will be unable to benefit from the "independent agent" exception of paragraph 6. This, however, does not imply that the parent-subsidiary relationship eliminates the requirements of paragraph 5 and that such a relationship could be sufficient in itself to conclude that any of these requirements are met.

39. According to the definition of the term “permanent establishment,” an insurance company of one State may be taxed in the other State on its insurance business, if it has a fixed place of business within the meaning of paragraph 1 or if it carries on business through a person within the meaning of paragraph 5. Since agencies of foreign insurance companies sometimes do not meet either of the above requirements, it is conceivable that these companies do large-scale business in a State without being taxed in that State on their profits arising from such business. In order to obviate this possibility, various conventions concluded by OECD member countries before [next update] include a provision which stipulates that insurance companies of a State are deemed to have a permanent establishment in the other State if they collect premiums in that other State through an agent established there — other than an agent who already constitutes a permanent establishment by virtue of paragraph 5 — or insure risks situated in that territory through such an agent. The decision as to whether or not a provision along these lines should be included in a convention will depend on the factual and legal situation prevailing in the Contracting States concerned. Also, the changes to paragraphs 5 and 6 made in [next update] have addressed some of the concerns that such a provision is intended to address. Frequently, therefore, such a provision will not be contemplated. In view of this fact, it did not seem advisable to insert a provision along these lines in the Model Convention.

B. Artificial avoidance of PE status through the specific activity exemptions

10. Art. 5(4) of the OECD Model Tax Convention includes a list of exceptions (the “specific activity exemptions”) according to which a permanent establishment is deemed not to exist where a place of business is used solely for activities that are listed in that paragraph.

1. List of activities included in Art. 5(4)

11. The October 2011 and 2012 discussion drafts on the clarification of the PE definition included a proposed change to paragraph 21 of the Commentary on Article 5 according to which, under the current wording of Article 5, paragraph 4 applies automatically where one of the activities listed in subparagraphs a) to d) is the only activity carried on at a fixed place of business. The Working Group that produced that proposal, however, invited Working Party 1 to examine whether the conclusion that subparagraphs a) to d) are not subject to the extra condition that the activities referred thereto be of a preparatory or auxiliary nature is appropriate in policy terms. This reflected the views of some delegates who argued that the proposed interpretation 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.

12. Regardless of the original purpose of the exceptions included in subparagraphs a) to d) of paragraph 4, it is important to address situations where these subparagraphs give rise to BEPS concerns. It is therefore agreed to modify Art. 5(4) as indicated below so that each of the exceptions included in that provision is restricted to

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第二章. 通过适用特定活动豁免条款规避构成常设机构

10. 综合组织协议模板第 5 条第 4 款规定了一系列常设机构的例外情形（"特定活动豁免条款"）。根据该条款，若某营业场所仅从事该条款中列示的活动，则该营业场所不应被视为构成常设机构。

1. 第 5 条第 4 款所列示的活动

11. 2011 年 10 月和 2012 年讨论稿在澄清常设机构定义时，提出了针对协议范本第 5 条注释第 21 段的修改建议。根据该建议，基于目前第 5 条的文本，当某固定营业场所的活动仅限于第 4 款 a) 至 d)项中所列示的活动之一时，第 4 款所规定的豁免自动适用。然而，起草该修改建议的工作组邀请工作组对 "无需对 a) 至 d)项所列活动增设准备工作或辅助性的额外条件这一结论从政策角度是否合适" 进行研究。这反映了一些代表的意见，他们认为该修改建议与他们认为的第 4 款的本意不一致。他们认为第 4 款的豁免条款仅适用于准备性与辅助性活动。

12. 无论第 4 款 a) 至 d)项的本意如何，这些项目所导致的税收侵蚀与利润转移问题必须解决。因此，

activities that are otherwise of a "preparatory or auxiliary" character. It is also recommended to provide the additional Commentary guidance below which clarifies the meaning of the phrase "preparatory or auxiliary" using a number of examples.

13. Some States, however, consider that BEPS concerns related to Art. 5(4) essentially arise where there is fragmentation of activities between closely related parties and that these concerns will be appropriately addressed by the inclusion of the anti-fragmentation rule in section 2 below. These States therefore consider that there is no need to modify Art. 5(4) as suggested below 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. As indicated in the Commentary below, States that share that view may adopt a different version of Art. 5(4) as long as they include the anti-fragmentation rule referred to in section 2.

**MAKING ALL THE SUBPARAGRAPHS OF ART. 5(4) SUBJECT TO A "PREPARATORY OR AUXILIARY" CONDITION**

Replace paragraph 4 of Article 5 by the following (changes to the existing text of the paragraph appear in **bold italics** of additions and **strikethrough** for deletions):

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, display or 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 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 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.

Replace paragraphs 21 to 30 of the existing Commentary on Article 5 (changes to the existing text of the Commentary appear in **bold italics** of additions and **strikethrough** for deletions):

**Paragraph 4**

21. 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, when carried on through fixed places of business, are not sufficient for these places to constitute permanent establishments, even if the activity is carried on through a fixed place of business. The final part of the paragraph provides that these exceptions only apply if the listed activities have a preparatory or auxiliary character. 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) applies to any activity that is not otherwise listed in the paragraph (as long as that activity has a preparatory or auxiliary character), the provisions of the paragraph actually amounts to a general restriction of
工作组同意按上文所示修改第5条第4款的内容，确保各项税制情形均仅限于“准备性或辅助性”的活动。同时，工作组建议新增以下注释，通过一些案例澄清“准备性或辅助性”的含义。

13. 然而，一些国家认为，与第5条第4款相关的税收优惠与利转问题主要是由于紧密关联方通过拆分活动规避或设定条件。这些问题将通过以下两部分提出的反拆分条款来具体解决。因此，这些国家认为无须根据以下建议修改第5条第4款，且第4款a)项所列的适用也无须满足准备性或辅助性的额外条件。如以下注释所述，持上述观点的国家可以采用不同版本的第5条第4款，前提是加入第二部分提出的反拆分条款。

第5条第4款所有项目均需满足“准备性或辅助性”条件

以如下条款替换原第5条第4款（增加内容用粗体斜体表示，删除内容用删除线表示）

4. 尽管本条上述规定，“常设机构”一词应认为不包括：
   a) 专为企业、机构或联营体企业的货物和商品的目的而使用的设备；
   b) 专为企业、机构或联营体企业的目的而保存的本企业货物或商品的库存；
   c) 专为企业或联营体企业的目的而保存的本企业货物或商品的库存；
   d) 专为本企业采购货物或商品，或者搜集情报的目的所设的固定营业场所；
   e) 专为本企业进行其他准备性或辅助性活动的目的所设的固定营业场所；
   f) 专为本款a)项至e)项活动的结合所设的固定营业场所，如果由于这种结合使该固定营业场所的全部活动属于准备性或辅助性。

条件是以上活动或f)项所述的固定营业场所的全部活动属于准备性或辅助性。

以下列内容替换现有第5条注释第21-30段（增加内容用粗体斜体表示，删除内容用删除线表示）：

第4款

21. 本款列举了若干营业活动作为第1款中常设机构一般定义的例外情形。当这些活动虽然通过固定营业场所进行时，不足以被认为但不会被视为构成常设机构。本款最后一部分规定这些例外情形仅在所列示活动具有准备性或辅助性的情况下才适用。它们的共同特征
the scope of the definition of permanent establishment contained in paragraph 1 and, when read with that paragraph, provide a more selective test by which to determine what constitutes a permanent establishment. To a considerable degree, these provisions limit the definition in paragraph 1 and excludes from its rather wide scope a number of forms of business organisations which, although they are carried on through fixed places of business which, because the business activities exercised through these places are merely preparatory or auxiliary should not be treated as permanent establishments. It is recognised 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 profit to the fixed place of business in question. [the last two sentences and the last part of the preceding one have been moved from paragraph 23 to this paragraph] 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, subject to the condition, expressed in the final part of the paragraph, 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 for only activities of purely preparatory or auxiliary character in that State. The provisions of paragraph 4.1 (see below) complement that principle by ensuring that the preparatory or auxiliary character of activities carried on at a fixed place of business must be viewed in the light of other activities that constitute complementary functions that are part of a cohesive business and which the same enterprise or closely related enterprises carry on in the same State.

21.124. It is often difficult to distinguish between activities which have a preparatory or auxiliary character and those which have not. The decisive criterion is whether or not the activity of the fixed place of business in itself forms an essential and significant part of the activity of the enterprise as a whole. Each individual case will have to be examined on its own merits. In any case, a fixed place of business whose general purpose is one which is identical to the general purpose of the whole enterprise, does not exercise a preparatory or auxiliary activity.

21.2 As a general rule, an activity that has a preparatory character is one that is carried on in contemplation of the carrying on of what constitutes the essential and significant part of the activity of the enterprise as a whole. Since a preparatory activity precedes another activity, it will often be carried on during a relatively short period, the duration of that period being determined by the nature of the core activities of the enterprise. This, however, will not always be the case as it is possible to carry on an activity at a given place for a substantial period of time in preparation for activities that take place somewhere else. Where, for example, a construction enterprise trains its employees at one place before these employees are sent to work at remote work sites located in other countries, the training that takes place at the first location constitutes a preparatory activity for that enterprise. An activity that has an auxiliary character, on the other hand, generally corresponds to an activity that is carried on to support, without being part of, the essential and significant part of the activity of the enterprise as a whole. It is unlikely that an activity that requires a significant proportion of the assets or employees of the enterprise could be considered as having an auxiliary character.

21.3 Subparagraphs a) to e) refer to activities that are carried on for the enterprise itself. A permanent establishment, however, would therefore exist if such activities were performed on behalf of other enterprises at the same fixed place of business; the fixed place of business exercising any of the functions listed in paragraph 4 were to exercise them not only on behalf of the enterprise to which it belongs but also on behalf of other enterprises. If, for instance, an advertising agency enterprise that maintained an office for the advertising of its own products or services were also to engage in
是一般都带有准备性质或辅助性质，这一点在1项虽不列于任何本款中设有列示的活动。另外，在1项规定下所列示的准备性质或辅助性质，该款规定项下的中得到明确的表述，该项规定实际上相当于对第1款的常设机构定义范围作了一定程度的限定，本款与第1款相结合共同为常设机构的定义提供了更明确的标准。本项的规定，即上款内容在相当程度上限制了第1款常设机构的一般定义，将一部分通过固定营业场所进行活动的经营活动形式固定营业场所之外在相当广泛的常设机构概念范围之外，即通过固定营业场所进行的经营活动仅限于准备性质或辅助性质时，这些固定营业场所不应被认为是常设机构。这些常设机构虽然对企业生产力有所贡献，但其提供的服务对实际利润实施作用甚微，难以将其利润问题归入这样的营业场所。（最后3句由原23段移至本段）此外，6项所列的a)项至e)项的各项活动的结合所设的固定营业场所，若根据本款最后部分的规定，该固定营业场所的全部活动属于准备性质或者辅助性质的，则该固定营业场所不构成常设机构。因此，第4款的规定是为了防止仅在缔约国一方从事常设性质或辅助性质或为常设性质的缔约国一方企业在缔约国另一方被征税。第4.1款对上述原则进行了补充，根据该款规定，判断通过固定营业场所进行的活动是否具有准备性质和辅助性质，必须考虑同一企业或其紧密关联企业在同一国家开展的组成整体业务的职能和互为的其他活动。

21.24 按照难以区分哪些活动是准备性质或辅助性质，而哪些活动不是，其决定性的标准是固定营业场所的活动本身是否构成企业整体活动的关键和重要的部分。每个案件应根据其具体情况加以分析。任何情况下，若固定营业场所的活动目的与整个企业的目的相同，那么该场所的活动就不视为准备性质或辅助性质的。

21.2 作为一般应为，准备性质活动是指在企业作为一个整体，开展的关键、重要活动前进行的活动。由于准备性活动在其他活动中发生，其开展时间往往相对较长，具体时间取决于企业核心活动的性质。然而，情况可能不限于此，有时可能长时期在固定场所开展准备工作活动，而核心活动在其他地点进行。例如一家建在企业某处对其员工进行培训，之后员工被派往在其他公司的远程工作地点进行工作，那么在培训中的培训活动对该公司而言是准备性活动。另一方面，具有辅助性质的活动，通常是为了支持（但不形成）企业整体活动关键和重要的部分。需要企业投入显著比例资产或人员的活动一般不被认为是辅助性活动。

21.3 a)项至e)项中的活动为企业自身开展的。然而因此，如果上述活动还包括代表其他企业进行的活动或同一固定营业场所开展的活动，该固定营业场所承担的第4款中列示的活动仅限于其独立的企业的发生的，同时还代表其他企业或自然人，那么该场所不构成常设机构。例如，如果一家广告代理企业所经营的办事处不仅代表企业自身产品和服务提供广告宣传服务，还为其他企业在同一地点进行广告宣传，那么该办事处将被视为构成该代理
advertising for on behalf of other enterprises at that location, its that office would be regarded as a permanent establishment of the enterprise by which it is maintained.

22. Subparagraph a relates only to the case in which an enterprise acquires the use of to a fixed place of business constituted by facilities used by an enterprise for storing, displaying or delivering its own goods or merchandise. Whether the activity carried on at such a place of business has a preparatory or auxiliary character will have to be determined in the light of factors that include the overall business activity of the enterprise. Where, for example, an enterprise of State 1 maintains in State 2 a very large warehouse in which a significant number of employees work for the main purpose of storing and delivering goods owned by the enterprise that the enterprise sells online to customers in State 1, paragraph 4 will not apply to that warehouse since the storage and delivery activities that are performed through that warehouse, which represents an important asset and requires a number of employees, constitute an essential part of the enterprise’s sale/distribution business and do not have, therefore, a preparatory or auxiliary character. Subparagraph b relates to the stock of merchandise itself and provides that the stock, as such, shall not be treated as a permanent establishment if it is maintained for the purpose of storage, display, or delivery. Subparagraph c covers the case in which a stock of goods or merchandise belonging to one enterprise is processed by a second enterprise, on behalf of, or for the account of, the first-mentioned enterprise. The reference to the collection of information in subparagraph d) is intended to include the case of the newspaper bureau, which has no purpose other than to act as one of many “tentacles” of the parent body; to exempt such a bureau is to do no more than to extend the concept of “mere purchase.”

22.1. Subparagraph a would cover, for instance, a bonded warehouse with special gas facilities that an exporter of fruit from one State maintains in another State for the sole purpose of storing fruit in a controlled environment during the customs clearance process in that other State. It would also cover a fixed place of business that an enterprise maintains solely for the delivery of spare parts to customers. Paragraph 4 would not apply, however, where a permanent establishment would also be constituted if an enterprise maintained a fixed place of business for the delivery of spare parts to customers for machinery supplied to those customers and, in addition, where, in addition, it for the maintenance of such machinery, as this would go beyond the pure delivery mentioned in subparagraph a) of paragraph 4 and would not constitute preparatory or auxiliary activities. Since these after-sale activities constitute organizations perform an essential and significant part of the services of an enterprise and its activities are not merely auxiliary ones [the preceding two sentences have been moved from paragraph 25 to this paragraph].

22.26. Issues may arise concerning the application of the definition of permanent establishment. Another example is that of facilities such as cables or pipelines that cross the territory of a country. Apart from the fact that income derived by the owner or operator of such facilities from their use by other enterprises is covered by Article 6 where these facilities constitute immovable property under paragraph 2 of Article 6, the question may arise as to whether subparagraph a) of paragraph 4 applies to them. Where these facilities are used to transport property belonging to other enterprises, subparagraph a), which is restricted to delivery of goods or merchandise belonging to the enterprise that uses the facility, will not be applicable as concerns the owner or operator of these facilities. Subparagraph e) also will not be applicable as concerns that enterprise since the cable or pipeline is not used solely for the enterprise and its use is not of preparatory or auxiliary character given the nature of the business of that enterprise. The situation is different, however, where an enterprise owns and operates a cable or pipeline that crosses the territory of a country solely for purposes of transporting its own property and such transport is merely incidental to the business of that enterprise, as in the case of an enterprise that is in the business of refining oil and that owns and
企业的常设机构。

22. (a) 项仅适用于企业使用目的为储存、陈列或交付本企业商品或商品的目的而使用的设施或固定营业场所的情况。在该营业场所进行的活动是否具有准备性质或辅助性质，取决于本企业的整体经营情况。例如，R国某企业在S国运营一个大型仓库，大量员工在该仓库工作。其主要目的是为了储存和交付该企业拥有的、标通过互联网向S国客户销售的商品。此种情况下，第4款将不适用于上述仓库。这是因为该仓库属于企业的重要资产，并且出于对仓库存储的仓库和服务的稳定活动需要大量员工投入。这些活动构成了企业销售/分销活动的组成部分，因此不认为这些活动具有准备性质或辅助性质。b) 项与企业仓库本身无需将企业专为储存、陈列或交付的目的而保存本企业库存视为常设机构。c) 项适用于专为另一企业代表本企业或为本企业设立的目的而保存本企业或商品的仓库。d) 项中关于收集情报的内容是为了明确专为商业收集情报的“触角”性新闻机构。e) 属于常设机构例外项目。对这类机构被排除常设机构实上是扩大了“纯粹采购”概念的外延。

22.1 举例而言，a) 项可用于下述情形：某国水果出口企业在另一国内使用具有一定气体设施的冷藏仓库，且使用该仓库的唯一目的是在运输过程中在适宜环境下保存水果。该项也适用于企业为向购买其设备的客户提供设备备件而使用固定营业场所的情形。然而，当企业既使用固定营业场所向其设备的客户提供备件和维修服务时，则不适用第4款规定。该企业会构成常设机构。这正是因为售后组织服务活动构成了企业对客户服务中关键且重要的部分，即该部分活动不能是纯粹辅助性活动。因而在上例情形中不仅仅在于第4款a) 项规定的纯粹的交付活动，不具有准备性或辅助性活动。

22.2 26.1 另一个例子是跨越一国领土的电缆或管道等设施，可能会涉及常设机构定义的适用问题。若这些设施构成第6条第2款下规定的不动产，它们的所有人或经营人使用这些设施的企业取得的所得属于第6条规范的范围。若非此种情形，则需考虑本条a) 项第4款是否适用。若这些设施被用于运输其他企业的财产，由于a) 项仅适用于使用设施的企业交付属于本企业的货物或商品的情形。该条对这些设施的所有人或经营人不适用。同时，由于该电缆或管道不仅仅由本企业使用，并考虑到企业的营业性质这种使用并不是预备性或辅助性的，a) 项同样无法适用。然而，以下情形应作不同处理：若某企业仅为运输其自有的财产的目的拥有并运营一条跨越一国领土的电缆或管道，且这种运营对于该企业的营业而言仅是附属性的，那么可以根据a) 项规定认为该企业不构成常设机构。举例而言，某企业经营石油精炼，同时拥有并运营跨越一国领土的管道，该管道仅用于将该企业拥有的石油运输到该企业在另一国的精炼厂。此种情况下，上述企业仅从电缆或管道运营商处获得了
operates a pipeline that crosses the territory of a country solely to transport its own oil to its refinery located in another country. In such case, subparagraph a) would be applicable. An additional question is whether the cable or pipeline could also constitute a permanent establishment for the customer of the operator of the cable or pipeline, i.e. the enterprise whose data, power or property is transmitted or transported from one place to another. In such a case, the enterprise is merely obtaining transmission or transportation services provided by the operator of the cable or pipeline and does not have the cable or pipeline at its disposal. As a consequence, the cable or pipeline cannot be considered to be a permanent establishment of that enterprise.

22.3 Subparagraph b) relates to the maintenance of a stock of goods or merchandise belonging to the enterprise. The stock is reclassified in storage and provides that the stock, as such, shall not be treated as a permanent establishment if it is maintained for the purpose of storage, display or delivery. This subparagraph is irrelevant in cases where a stock of goods or merchandise belonging to an enterprise is maintained by another person in facilities operated by that other person and the enterprise does not have the facilities at its disposal as the place where the stock is maintained cannot therefore be a permanent establishment of that enterprise. Where, for example, an independent logistics company operates a warehouse in State S and continuously stores in that warehouse goods or merchandise belonging to an enterprise of State R, the warehouse does not constitute a fixed place of business at the disposal of the enterprise of State R and subparagraph b) is therefore irrelevant. Where, however, that enterprise is allowed unlimited access to a separate part of the warehouse for the purpose of inspecting and maintaining the goods or merchandise stored therein, subparagraph b) is applicable and the question of whether a permanent establishment exists will depend on whether these activities constitute a preparatory or auxiliary activity.

22.4 Subparagraph c) covers the situation where a stock of goods or merchandise belonging to one enterprise is processed by a second enterprise, on behalf of, or for the account of, the first-mentioned enterprise. As explained in the preceding paragraph, the mere presence of goods or merchandise belonging to an enterprise does not mean that the fixed place of business where these goods or merchandise are stored is at the disposal of that enterprise. Where, for example, a stock of goods belonging to RCO, an enterprise of State R, is maintained by a toll-manufacturer located in State S for the purposes of processing by that toll-manufacturer, no fixed place of business is at the disposal of RCO and the place where the stock is maintained cannot therefore be a permanent establishment of RCO. If, however, RCO is allowed unlimited access to a separate part of the facilities of the toll-manufacturer for the purpose of inspecting and maintaining the goods stored therein, subparagraph c) will apply and it will be necessary to determine whether the maintenance of that stock of goods by RCO constitutes a preparatory or auxiliary activity. This will be the case if RCO is merely a distributor of products manufactured by other enterprises as in that case the mere maintenance of a stock of goods for the purposes of processing by another enterprise would not form an essential and significant part of RCO's overall activity. In such a case, unless paragraph 4.1 applies, paragraph 4 will deem a permanent establishment not to exist in relation to such a fixed place of business that is at the disposal of the enterprise of State R for the purposes of maintaining its own goods to be processed by the toll-manufacturer.

22.5 The first part of subparagraph d) relates to the case where premises are used solely for the purpose of purchasing goods or merchandise for the enterprise. Since this exception only applies if that activity has a preparatory or auxiliary character, it will typically not apply in the case of a fixed place of business used for the purchase of goods or merchandise where the overall activity of the enterprise consists in selling these goods and where purchasing is a core function in the business of the enterprise. The following examples illustrate the application of paragraph 4 in the case of fixed places of business where purchasing activities are performed:
传送或运输服务，而并设有自由支配电力建设。因此，电力建设不应被视为构成此类企业的常设机构。

22.3 b) 与保存商品本身，规定于专为储存、陈列和交付目的而保存的商品库存不构成常设机构保存本企业货物或商品的库存有关。当企业的货物或商品由另一人在其经营的设施保管，由此保存的商品库存不构成该企业的常设机构。因此在此情况下 b) 项并不相关。例如，某家独立的物流公司经营一个位于 S 国的仓库，而且持续在该仓库储存属于 R 国某企业的货物或商品。该合并不构成 R 国企业可以“自由支配”的固定营业场所，因此 b) 项不相关。然而，若该企业对仓库的独立部分有自由出人权，以检查和维护其中储存的货物或商品，可适用 b) 项规定。但该企业是否构成常设机构取决于这些活动是否属于准备性质或辅助性质。

22.4 c) 项针对一家企业的货物或商品由另一家企业代为加工的情形作出了规定。如本段所述，企业的货物或商品仅在储存地点并未构成该企业由此自由支配。例如，位于 S 国的某家加工企业，有关 S 国保存 R 国公司 R 等公司的货物库存，而 R 公司不能自由支配任何固定营业场所，因此，货物的储存地点不能构成 R 公司的常设机构。然而，若 R 公司对未加工前的设施的独立部分有自由出人权，以检查和维护其中储存的货物，则可适用 c) 项规定。但有必要确定 R 公司储存库存货物的活动是否属于准备性质或辅助性质。如上所述，当 R 公司仅仅是其他企业所生产货物的分销商时，R 公司仅为另一公司进行货物加工的目的而储存货物并不构成其整体业务的关键部分。在此情形下，除非适用第 4.1 款规定，否则根据第 4 款的规定，R 国企业所自由支配的、用于储存货物所依赖的加工或协议的固定营业场所不应用认定为构成常设机构。

22.5 d) 项的前半部分与仅为企业采购货物或商品而使用的场所有关。由于该规则仅在采购活动具有准备性质或辅助性质时才适用，因此若该企业主要经营活动为销售所采购商品或采购活动构成该企业整体经营的核心部分，则 d) 项一般不适用于该企业通过固定营业场所采购货物或商品的情形。以下案例说明了第 4 款如何应用于通过固定营业场所进行采购活动的情形:

- 案例 1: R 公司是 R 国的居民公司，它是 S 国生产的某类产品产品的大型采购商，同时从 R 国将该类农产品销售至位于不同国家的分销商。R 公司在 S 国运营一间采购办
Example 1: RCO is a company resident of State R that is a large buyer of a particular agricultural product produced in State S, which RCO sells from State R to distributors situated in different countries. RCO maintains a purchasing office in State S. The employees who work at that office are experienced buyers who have special knowledge of this type of product and who visit producers in State S, determine the type/quality of the products according to international standards (which is a difficult process requiring special skills and knowledge) and enter into different types of contracts (spot or forward) for the acquisition of the products by RCO. In this example, although the only activity performed through the office is the purchasing of products for RCO, which is an activity covered by subparagraph d), paragraph 4 does not apply and the office therefore constitutes a permanent establishment because that purchasing function forms an essential and significant part of RCO's overall activity.

Example 2: RCO, a company resident of State R which operates a number of large discount stores, maintains an office in State S during a two-year period for the purposes of researching the local market and lobbying the government for changes that would allow RCO to establish stores in State S. During that period, employees of RCO occasionally purchase supplies for their office. In this example, paragraph 4 applies because subparagraph f) applies to the activities performed through the office (since subparagraphs d) and e) would apply to the purchasing, researching and lobbying activities if each of these was the only activity performed at the office) and the overall activity of the office has a preparatory character.

22.6 The second part of subparagraph d) relates to a fixed place of business that is used solely to collect information for the enterprise. An enterprise will frequently need to collect information before deciding whether and how to carry on its core business activities in a State. If the enterprise does so without maintaining a fixed place of business in that State, subparagraph d) will obviously be irrelevant. If, however, a fixed place of business is maintained solely for that purpose, subparagraph d) will be relevant and it will be necessary to determine whether the collection of information goes beyond the preparatory or auxiliary threshold. Where, for example, an investment fund sets up an office in a State solely to collect information on possible investment opportunities in that State, the collecting of information through that office will be a preparatory activity. The same conclusion would be reached in the case of an insurance enterprise that sets up an office solely for the collection of information, such as statistics, on risks in a particular market and in the case of a newspaper bureau set up in a State solely to collect information on possible news stories without engaging in any advertising activities: in both cases, the collecting of information will be a preparatory activity.

23. Subparagraph e) applies to provides that a fixed place of business maintained solely for the purpose of carrying on, for the enterprise, any activity that is not expressly listed in subparagraphs a) to d); as long as that activity is not a preparatory or auxiliary character, that place of business is deemed not to be a permanent establishment. The wording of this subparagraph makes it unnecessary to produce an exhaustive list of the activities to which the paragraph may apply, the examples listed in subparagraphs a) to d) being merely common examples of activities that are covered by the paragraph because they often have a preparatory or auxiliary character. Furthermore, this subparagraph provides a generalised exception to the general definition in paragraph 1 ((the following part of the paragraph has been moved to paragraph 21)); and, when read with that paragraph, provides a more selective test, by which to determine what constitutes a permanent establishment. To a considerable degree it limits that definition and excludes from its rather wide scope a number of business activities which, although they are carried on through a fixed place of business, should not be treated as permanent establishments.
在该办事处工作的雇员都是经验丰富且对产品有深入了解的采购人员。他们早年非 S 国的生产商，并根据国际标准确定产品的类型和质量（此处仍有一定难度，需要特殊技能与知识），同时他们还负责为 R 公司收购这些产品签订不同类型的合同（现货或期货）。在此例中，虽然办事处唯一开展的业务活动是为 R 公司采购产品，属于 d) 项所涵盖的内容，但其活动内容实际上构成了 R 公司整体业务重要的一部分，并不适用第 4 款的规定，办事处因此构成了常设机构。

案例 2：R 公司是 R 国的居民公司，它经营着一些大型折扣商店，在两年时间内，R 公司在 S 国设立两个办事处。办事处的经营目的是调研当地市场以及说服政府允许 R 公司在 S 国开设商店。在此期间，R 公司雇员为经营而设立的办事处购买材料。在此期间，第 4 款可以适用，因为通过该办事处所开展的活动属于 d) 项适用的范围（因经营业务及采购活动）。在该阿里巴巴，办事处图书的活动实质上属于准备性质。

22.6 d) 项的后半部分规定了不仅为商业搜集信息而使用固定营业场所的情况。某企业决定是否以及如何在某国开展核心业务之前，非常需要先进行信息搜集工作。若该企业没有通过固定营业场所进行信息搜集，那么显然 d) 项并不适用。然而，若固定营业场所仅为搜集信息而履行，则可考虑适用 d) 项，但有必要判断信息搜集工作是否超过了准备性或辅助性的工作。例如，当一家投资基金在某国设立办事处的目的仅仅是为获取该国投资机会的相关信息，那么通过该办事处搜集信息是一项准备性活动。同样的结论也适用于保险公司为搜集与特定市场风险相关的信息（如统计数据）而设立的办事处，以及仅为搜集新闻素材在某国设立而不进行任何广告活动的新闻机构。在上述两种情形下，搜集信息都是准备性活动。

23. e) 项规定适用于专为本企业开展 d) 项中未能明列的活动而设立的固定营业场所，只要该活动是为具有准备性或辅助性目的而设立的。若该固定营业场所不构成常设机构。由于本项描述较为明确，无须详解列举例外情况，该项所适用的活动。e) 项至 d) 项仅列举了符合本款规定的情况。这些活动往往具有准备性或辅助性。此外，本项针对第 1 款的一般定义提出了具有普遍性的例外情况。（以下部分已被移至第 21 款）本条款与第 1 款相辅相成共同为常设机构的界定提供了更明确的标准。本项的规定在相当程度上限制了常设机构的一般定义，将一部分通过固定营业场所进行的经营活动排除在常设机构的界定范围之外。这些营业场所虽然对企业利润的实际贡献甚微，但其提供的服务对企业的实际利润作用甚微。
is recognised 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 profit to the fixed place of business in question. Examples are fixed places of business solely for the purpose of advertising, or for the supply of information or for scientific research or for the servicing of a patent or a know-how contract, if such activities have a preparatory or auxiliary character. (that last sentence has been moved to paragraph 23)

24. It is often difficult to distinguish between activities which have a preparatory or auxiliary character and those which have not. The decisive criterion is whether or not the activity of the fixed place of business in itself forms an essential and significant part of the activity of the enterprise as a whole. Each individual case will have to be examined on its own merits. In any case, a fixed place of business whose general purpose is one which is identical to the general purpose of the whole enterprise, does not exercise a preparatory or auxiliary activity (the preceding three sentences have been moved to paragraph 21.1) Examples of places of business covered by subparagraph e) are fixed places of business used solely for the purpose of advertising or for the supply of information or for scientific research or for the servicing of a patent or a know-how contract, if such activities have a preparatory or auxiliary character [this sentence currently appears at the end of paragraph 23].

Paragraph 4 would not apply, however, This would not be the case, where, for example, if a fixed place of business used for the supply of information would not only give information but would also furnish plans etc. specially developed for the purposes of the individual customer. Nor would it be the case if a research establishment were to concern itself with manufacture [these two sentences currently appear at the end of paragraph 25]. Similarly, where, for example, the servicing of patents and know-how is the purpose of an enterprise, a fixed place of business of such enterprise exercising such an activity cannot get the benefits of paragraph 4 subparagraph e). A fixed place of business which has the function of managing an enterprise or even only a part of an enterprise or of a group of the concern cannot be regarded as doing a preparatory or auxiliary activity, for such a managerial activity exceeds this level. If an enterprise with international ramifications establishes a so-called "management office" in a State in which it maintains subsidiaries, permanent establishments, agents or licensees, such office having supervisory and coordinating functions for all departments of the enterprise located within the region concerned, subparagraph e) will not apply to that "management office" because a permanent establishment will normally be deemed to exist, because the management office may be regarded as an office within the meaning of paragraph 2. Where a big international concern has delegated all management functions to its regional management offices so that the functions of the head office of the concern are restricted to general supervision (so-called politzentrale enterprises), the regional management offices even have to be regarded as a "place of management" within the meaning of subparagraph a) of paragraph 2. The function of managing an enterprise, even if it only concerns certain areas of the operations of the concern, constitutes an essential part of the business operations of the enterprise and therefore can in no way be regarded as an activity which has a preparatory or auxiliary character within the meaning of subparagraph e) of paragraph 4.

25. A permanent establishment could also be constituted, if an enterprise maintains a fixed place of business for the delivery of spare parts to customers for machinery supplied to those customers where, in addition, it maintains or repairs such machinery, as this goes beyond the pure delivery mentioned in subparagraph a) of paragraph 4. Since those after-sale organisations perform an essential and significant part of the services of an enterprise vis-à-vis its customers, their activities are not merely auxiliary ones. Subparagraph e) applies only if the activity of the fixed place of business is limited to a preparatory or auxiliary one. This would not be the case where, for example, the fixed place of business does not only give information but also furnishes plans etc. specially developed for the purposes of the individual customer. Nor would it be the case if a research establishment were to...
24. 往往难以区分哪些活动是准备性质或辅助性质，而哪些活动不是。其决定性的标准是固定营业场所以活动本身是否构成企业整体活动的关键和重要的部分。每个案件应根据其具体情况加以分析。任何情况下，若某固定营业场所的活动目的与整个企业的相同，那么该场所的活动就不应视为准备性质的。例如，就不应视为准备性质的。

25. 当企业利用固定营业场所向客户提供设备的交付服务时，该企业会构成常设机构。这是因为上述后服务活动构成了对客户服务中关键且重大的部分。上述情形不仅限于固定营业场所的交付活动，且不属于准备性质或辅助性质。
concern itself with manufacture.

26. Moreover, subparagraph e) makes it clear that the activities of the fixed place of business must be carried on for the enterprise. A fixed place of business which renders services not only to its enterprise but also directly to other enterprises, for example to other companies of a group to which the company owning the fixed place belongs, would not fall within the scope of subparagraph e).

26.1 Another example is that of facilities such as cables or pipelines that cross the territory of a country. Apart from the fact that income derived by the owner or operator of such facilities from their use by other enterprises is covered by Article 6 where they constitute immovable property under paragraph 2 of Article 6, the question may arise as to whether paragraph 4 applies to them. Where these facilities are used to transport property belonging to other enterprises, subparagraph a), which is restricted to delivery of goods or merchandise belonging to the enterprise that uses the facility, will not be applicable as concerns the owner or operator of these facilities. Subparagraph c) also will not be applicable as concerns that enterprise since the cable or pipeline is not used solely for the enterprise and its use is not of preparatory or auxiliary character given the nature of the business of that enterprise. The situation is different, however, where an enterprise owns and operates a cable or pipeline that crosses the territory of a country solely for purposes of transporting its own property and such transport is merely incidental to the business of that enterprise, as in the case of an enterprise that is in the business of refining oil and that owns and operates a pipeline that crosses the territory of a country solely to transport its own oil to its refinery located in another country. In such case, subparagraph e) would be applicable. An additional question is whether the cable or pipeline could also constitute a permanent establishment for the customer of the operator of the cable or pipeline, i.e. the enterprise whose data, power or property is transmitted or transported from one place to another in such a case, the enterprise is merely obtaining transmission or transportation services provided by the operator of the cable or pipeline and does not have the cable or pipeline at its disposal. As a consequence, the cable or pipeline cannot be considered to be a permanent establishment of that enterprise.

27. As already mentioned in paragraph 21 above, paragraph 4 is designed to provide for exceptions to the general definition of paragraph 1 in respect of fixed places of business which are engaged in activities having a preparatory or auxiliary character. Therefore, according to subparagraph f) of paragraph 4, the fact that one fixed place of business combines any of the activities mentioned in subparagraphs a) to e) of paragraph 4 does not mean of itself that a permanent establishment exists. As long as the combined activity of such a fixed place of business is merely preparatory or auxiliary, a permanent establishment should be deemed not to exist. Such combinations should not be viewed on rigid lines, but should be considered in the light of the particular circumstances. The criterion “preparatory or auxiliary character” is to be interpreted in the same way as is set out for the same criterion of subparagraph e) (see paragraphs 24 and 25 above). States which want to allow any combination of the items mentioned in subparagraphs a) to e), disregarding whether or not the criterion of the preparatory or auxiliary character of such a combination is met, are free to do so by deleting the words “provided to “character” in subparagraph f).

27.1 Subparagraph f) is of no importance in a case where an enterprise maintains several fixed places of business within the meaning of subparagraphs a) to e) provided that they are separated from each other locally and organisationally, as in such a case each place of business has to be viewed separately and in isolation for deciding whether a permanent establishment exists. Places of business are not “separated organisationally” where they each perform in a Contracting State complementary functions such as receiving and storing goods in one place, distributing those goods through another etc. An enterprise cannot fragment a cohesive operating business into several small operations in order to
26. 此外，e)项明了于固定营业场所的活动必须是为本企业服务的。某固定营业场所不仅为本企业提供服务，也直接为其他企业（如为拥有该固定营业场所的公司所属集团的其他公司）提供服务，则不属干e)项规定的范围。

26.1 另一个例子关于铺设一国领土的电缆或管道等设施。若设施构成第5条第2款下规定的不动产，则其所有人或经营人自使用这些设施的其他企业取得的所得属于第5条规定的范围。若非此种情形，则需考虑第4款是否适用。若这些设施被用于运输其他企业的财产。由于e)项仅适用于使用设施的他人交付使用本企业的货物或商品的情形。该项对该设施的使用人或经营人更适用。同时，由于该电缆或管道不专为本企业使用，并且考虑到企业的营业性质这种使用并不具有准备性或辅助性的，e)项同样无法适用。然而，以下情形应当不同处理：若某企业仅为运输其自身的财产的目的拥有并运营一条跨越一国领土的电缆或管道，且这种运输对于该企业的营业而言仅是附属性的，那么可以根据e)项规定认为该企业不构成常设机构。与之相关的一个问题是，电缆或管道是否会帮助该企业的客户（即那些通过电缆或管道传输其数据、能源或财产的企业）也构成常设机构。在此种情况下，上述企业仅从电缆或管道运营商处获得传送或运输服务，并没有自由支配电缆或管道。因此，电缆或管道不应被视为构成此类企业的常设机构。

27. 如上文第21段所述，第4款旨在针对从事准备性或辅助性活动的固定营业场所，提出第1款对常设机构一般定义的例外情况。因此，根据第4款a)项，某固定营业场所应结合在a)项a)项到e)项中提到的活动这一事实并不意味着该固定营业场所本身构成常设机构。只要该固定营业场所从事的活动的结合仅是准备性或辅助性的，就不会构成常设机构。这些活动组合进行判断时不应过于刻板，而需要结合各种具体情况进行考虑。本项“准备性或辅助性”标准的解释与e)项的相同（参见上文的第24和25段）。不论a)项到e)项中各项活动的结合是否具有准备性或辅助性，都可认定这些活动的结合而构成常设机构的国家，可自由决定删除a)项中“如果”至“性质”这一段文字。

27.1 若某企业没有干一个a)项到e)项规定下的固定营业场所，只要它们各自独自在地理上和组织上是相分离的，那么a)项的规定就无关紧要。因为在这种情况下，为判断常设机构是否存在，应该对每个固定营业场所分别地和独立地进行审查。如果这类固定营业场所在一个缔约国境内各自履行的功能是相互配合的，如在该国的一个场所接受和保存货物而在另一个场所分销货物，那么它们不是“在组织上相互独立的”，企业不能将整体商业运营拆分成不同的小单元，并主张每个单元仅参与准备性或辅助性活动。
argue that each is merely engaged in a preparatory or auxiliary activity.

28. The fixed places of business mentioned into which paragraph 4 applies do not constitute permanent establishments so long as the business activities performed through those fixed places of business are restricted to the activities referred to in that paragraph functions which are the prerequisite for assuming that the fixed place of business is not a permanent establishment. This will be the case even if the contracts necessary for establishing and carrying on these business activities are concluded by those in charge of the places of business themselves. The conclusion of such contracts by these employees will not constitute a permanent establishment of the enterprise. The employees of places of business within the meaning of paragraph 4 who are authorised to conclude such contracts should not be regarded as agents within the meaning of paragraph 5 as long as the conclusion of these contracts satisfies the conditions of paragraph 4 (see paragraph 33 below). A case in point would be a research institution. An example would be where the manager of which a place of business where preparatory or auxiliary research activities are conducted which is authorised to conclude the contracts necessary for establishing and maintaining that place of business the institution and who exercises this authority within the framework as part of the activities carried on at that location functions or the institution. A permanent establishment, however, exists if the fixed-place of business exercising any of the functions listed in paragraph 4 were to exercise them not only on behalf of the enterprise to which it belongs but also on behalf of other enterprises. If, for instance, an advertising agency maintained by an enterprise were also to engage in advertising for other enterprises, it would be regarded as a permanent establishment of the enterprise by which it is maintained.

29. If, under paragraph 4, a fixed place of business under paragraph 4 is deemed not to be a permanent establishment, this exception applies likewise to the disposal of movable property forming part of the business property of the place of business at the termination of the enterprise’s activity at that place in such establishment (see paragraph 11 above and paragraph 2 of Article 13). Since where, for example, the display of merchandise during a trade fair or convention is excepted under subparagraphs a) and b), the sale of that merchandise at the termination of the trade fair or convention is covered by subparagraph e) as such sale is merely an auxiliary activity this exception. The exception does not, of course, apply to sales of merchandise not actually displayed at the trade fair or convention.

30. Where paragraph 4 does not apply because a fixed place of business used by an enterprise for activities that are listed in that which rank as exceptions of paragraph 4 is also used and for other activities that go beyond what is preparatory or auxiliary, that place of business constitutes a single permanent establishment with respect to all activities may be taxed in the State where that permanent establishment is situated. This would be the case, for instance, where a store maintained for the delivery of goods also engaged in sales.

30.1 Some States consider that some of the activities referred to in paragraph 4 are intrinsically preparatory or auxiliary and, in order to provide greater certainty for both tax administrations and taxpayers, take the view that these activities should not be subject to the condition that they be of a preparatory or auxiliary character, any concern about the inappropriate use of these exceptions being addressed through the provisions of paragraph 4.1. States that share that view are free to amend paragraph 4 as follows (and may also agree to delete some of the activities listed in subparagraphs a) to d) below if they consider that these activities should be subject to the preparatory or auxiliary condition in subparagraph e)):

4. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:
28. 第4款所称适用的固定营业场所，只要在其中通过上述固定营业场所进行的商业活动限于第4款规定的活动而未构成或改变该机构的职能范围，就不能视为构成常设机构。即使该营业场所的负责人自己设立了有关独立和进行这些经营活动中所必需的合同，也不构成常设机构。只要所订立的合同满足第4款的条件，订立上述合同的雇员、债权人或有权签订此类合同的第4款所称的固定营业场所的雇员不属于第5款规定的常设机构所称的代理人（见下文第33段）。一个相关的例子是，某研究机构的某从事准备性或辅助性研究活动的固定营业场所的经济权利在该处开展的活动包括：建立与运作该营业场所研究机构所必需的合同以及经理在该机构的正常职能范围外行使这一权利，这属于在该场所进行活动的一部分。然而，若某个从事第4款所称职能的固定营业场所，不仅代表其企业从事上述职能，也同时代表其他企业，那么该场所构成常设机构。例如，若某企业运营的广告代理机构，也同时为其他企业进行广告宣传。该机构被视为运营该机构的企业常设机构。

29. 若某固定营业场所根据第4款的规定，如果第4款的规定不被视为常设机构。这一豁免的规定也适用于企业在该场所以经营活动中对该营业场所经营财产中的资产的处置行为（参见上文第11段和第13段第2款）。例如，因为a)项和b)项已经说明了商品交易会上或是展销会上陈列的展品不构成常设机构，所以在商品交易会或展销会结束后，企业出售这些陈列商品的活动仅属于辅助性活动，因而符合e)项的规定也适用该豁免。当然，这项豁免规定不适用于出售那些实际上没有在商品交易会或展销会上陈列的商品。

30. 若某固定营业场所从事第4款所称构成常设机构的活动（如第4款所称），其准备性或辅助性要超过其他活动。此情况不适用第4款的规定。该营业场所应被视为满足这些不同类活动构成该企业的单一常设机构。归属于该常设机构的上述两项活动的所得可能需要在该常设机构所在国纳税。例如，某用于交付本企业货物的仓库，同时也兼营商品销售，即属于这种情况。

30.1 一些国家认为第4段提到的某些活动本身就具有准备性或辅助性性质，而且，为了给税务机关和纳税人提供更广泛的确定性，这些国家认为上述活动不需要满足准备性或辅助性的条件，而关于不恰当适用豁免规定的问题应通过第4.1款解决。持上述观点的国家可以自行按照下列修改第4款的内容（如果某些国家认为a)项至d)项中的某些活动应满足e)项中准备性或辅助性的条件，也可以从a)项至d)项中选择性删除该些活动）：

4. 虽有上述规定，“常设机构”一语应认为不包括：
   a) 专为储存、陈列或者交付本企业货物或商品的目的而使用的设施；
   b) 专为储存、陈列或者交付的目的而保存本企业货物或商品的库存；
   c) 专为另一企业加工的目的而保存本企业货物或商品的库存；
2. Fragmentation of activities between closely related parties

14. Paragraph 27.1 of the Commentary on Article 5 currently deals with the application of Art. 5(4)/f in the case of what has been referred to as the “fragmentation of activities”:

27.1 Subparagraph f) is of no importance in a case where an enterprise maintains several fixed places of business within the meaning of subparagraphs a) to e) provided that they are separated from each other locally and organisationally, as in such a case each place of business has to be viewed separately and in isolation for deciding whether a permanent establishment exists. Places of business are not “separated organisationally” where they each perform in a Contracting State complementary functions such as receiving and storing goods in one place, distributing those goods through another etc. An enterprise cannot fragment a cohesive operating business into several small operations in order to argue that each is merely engaged in a preparatory or auxiliary activity.

15. Given the ease with which subsidiaries may be established, the logic of the last sentence (“[a]n enterprise cannot fragment a cohesive operating business into several small operations in order to argue that each is merely engaged in a preparatory or auxiliary activity”) should not be restricted to cases where the same enterprise maintains different places of business in a country but should be extended to cases where these places of business belong to closely related enterprises. Some BEPS concerns related to Art. 5(4) will therefore be addressed by the rule proposed below which will take 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. This new rule is the logical consequence of the decision to restrict the scope of Art. 5(4) to activities that have a “preparatory and auxiliary” character because, in the absence of that rule, it would be relatively easy to use closely related enterprises in order to segregate activities which, when taken together, go beyond that threshold.

NEW ANTI-FRAGMENTATION RULE

Add the following new paragraph 4.1 to Article 5:

4.1 Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and
2. 紧密关联方之间的活动拆分

14. 现行第 5 条注释第 27.1 段涉及第 5 条第 4 款如何适用于所谓的“活动拆分”情形：

27.1 若某企业设有若干个 a) 项至 e) 项所规定的固定营业场所，只要它们各自在地理上和组织上是相分离的，那么 d) 项的规定就无关紧要。因为在这种情况下，为判断常设机构是否存在，应该对每个固定营业场所分别地和独立地进行审查。如果这些固定营业场所在一个缔约国境内各自履行的功能是相互配合的，如在该国的一个场所接受和保存货物而在另一个场所分销货物等，那么它们不是“在组织上相互独立的”。企业不能将整体商业运营拆分成不同的小单元，不能主张各个单元仅参与准备性或辅助性的活动。

15. 鉴于设立子公司非常容易，上文最后一句（“企业不能将整体商业运营拆分成不同的小单元，不能主张各个单元仅参与准备性或辅助性的活动”）不应仅限于同一企业在中国设立多处营业场所的情形，还应该适用于多家紧密关联企业在同一设立多处营业场所的情形。由此，下文规定解决了部分第 5 条第 4 款涉及的稳妥侵蚀与利润转移的问题，其中既考虑了同一企业在不同场所进行的活动，也考虑了紧密关联企业在不同场所或相同场所进行的活动。这项新规定和将第 5 条第 4 款的适用范围限定在具有准备性质或辅助性质活动的决定是合理的。如果如果没有这项规定，就可以相对容易地利用紧密关联企业拆分将超过准备性或辅助性门槛的正常活动。

新反拆分规则

在第 5 条加入下列新规定的第 4.1 款

4.1 如果某企业使用或设有固定营业场所，而该企业或其紧密关联企业在该场所或位于同一缔约国的另一场所开展经营活动，并且：

a) 按照本条规定，该场所或另一场所构成该企业或紧密关联企业的常设机构；或

b) 该企业或其紧密关联企业在同一场所或两个场开展活动的结合，使得整体活动不属于准备性质或辅助性质。

如果该企业或其紧密关联企业在同一场所或两个场开展的经营活动，构成整体经营活动中的补充部分，则不适用第 4 款的规定。
a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or

b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

Proposed changes to the Commentary on Article 5 (changes to the existing text of the Commentary appear in bold italic for additions and strikethrough for deletions)

Replace existing paragraph 27.1 of the Commentary on Article 5 by the following:

27.1 Unless the anti-fragmentation provisions of paragraph 4.1 are applicable (see below), subparagraph (b) is of no importance in a case where an enterprise maintains several fixed places of business within the meaning of subparagraph (c) to (e) provided that they are separated from each other locally and organizationally, as in such a case each place of business has to be viewed separately and in isolation for deciding whether a permanent establishment exists. Places of business are not “separated organisationally” where they each perform in a Contracting State supplementary functions such as receiving and storing goods in one place, distributing those goods through another, etc. An enterprise cannot fragment a cohesive operating business into several small operations in order to argue that each is merely engaged in a preparatory or auxiliary activity.

Add the following new paragraphs to the Commentary on Article 5:

Paragraph 4.1

30.2 The purpose of paragraph 4.1 is to prevent an enterprise or a group of closely related enterprises from fragmenting a cohesive business operation into several small operations in order to argue that each is merely engaged in a preparatory or auxiliary activity. Under paragraph 4.1, the exceptions provided for by paragraph 4 do not apply to a place of business that would otherwise constitute a permanent establishment where the activities carried on at that place and other activities of the same enterprise or of closely related enterprises exercised at that place or at another place in the same State constitute complementary functions that are part of a cohesive business operation. For paragraph 4.1 to apply, however, at least one of the places where these activities are exercised must constitute a permanent establishment or, if that is not the case, the overall activity resulting from the combination of the relevant activities must go beyond what is merely preparatory or auxiliary.

30.3 The concept of “closely related enterprises” that is used in subparagraph (b) of paragraph 6 of the Article (see paragraphs 38.8 to 38.10 below).

30.4 The following examples illustrate the application of paragraph 4.1:

- Example A: RCO, a bank resident of State R, has a number of branches in State S which constitute permanent establishments. It also has a separate office in State S where a few employees verify information provided by clients that have made loan applications at these different branches. The results of the verifications done by the employees are forwarded to the headquarters of RCO in State R where other employees analyse the information included in the loan applications and provide reports to the branches where the decisions to grant the
拟对第5条注释进行的修改（对注释的增加内容用粗斜体表示，删除内容用删除线表示）

以如下内容替换第5条注释的第27.1段：

27.1 除非可适用第4.1款的反拆分条款（见下文），若某企业设有若干个a)至e)项规定下的固定营业场所，只要它们各自在地理上和组织上是相分离的一一那么，e)项的规定就无关紧要。因为在这种情况下，为判断是否附合机构是否存在，应该对每个固定营业场所分别地和独立地进行审查。如果这些固定营业场所在一个缔约国境内各自履行的功能是相互配合的，如在该国的一个场所接受和保存货物而在另一个场所分发货物等，那么它们不是“在组织上相互独立的”，企业不能将整体商业运营拆分成不同的小单元，并主张每个单元仅参与准备性或辅助性的活动。

为第5条注释增加以下新段落

第4.1款

4.1款的目的是防止企业或由紧密关联企业组成的集团将整体业务运营拆分成若干较小的运营单元，以宣称每个运营单元都仅开展准备性或辅助性活动。根据4.1款规定，若一家企业在某个可能构成常设机构的营业场所进行活动，且在该营业场所进行的活动与其他企业或多个紧密关联企业位于该同一场所或位于该国的另一场所进行的其他活动组成整体业务运营的互惠职能，则该场所不适用于第4款的豁免规定。然而，只有进行上述活动的场所至少一处构成常设机构，或者虽然每处场所单独都不构成常设机构，但相关活动结合的全部活动超过仅是准备性或辅助性的范畴时，第4.1款才会适用。

30.2 4.1款中“紧密关联企业”的概念在本条第6款第二项进行了定义（参见下文第38.8至38.10段）

30.4 下列案例说明了如何应用第4.1款规定：

- 案例A：R公司是S国的一家居民银行，其在S国拥有若干构成常设机构的分支机构。R公司同时在S国拥有一间单独的办事处。一些雇员在该办事处核查上述分支机构提交贷款申请的客户所提供的信息。这些雇员的核查结果将被递交给R银行在S国的总部，由其他员工对贷款申请中的信息进行分析，并向S国的分支机构提供报告，以供其决定是否批准贷款。此案例中，第4款中的豁免条件并不能适用于该办事处，因为其他场所（即在R国的其他分支机构）构成了R公司在S国的常设机构，而R公司在该办事处开展的活动与相关分支机构组成整体业务运营（即向S
loans are made. In that case, the exceptions of paragraph 4 will not apply to the office because another place (i.e. any of the other branches where the loan applications are made) constitutes a permanent establishment of RCO in State S and the business activities carried on by RCO at the office and at the relevant branch constitute complementary functions that are part of a cohesive business operation (i.e. providing loans to clients in State S).

Example B: RCO, a company resident of State R, manufactures and sells appliances. SCO, a resident of State S that is a wholly-owned subsidiary of RCO, owns a store where it sells appliances that it acquires from RCO. RCO also owns a small warehouse in State S where it stores a few large items that are identical to some of those displayed in the store owned by SCO. When a customer buys such a large item from SCO, SCO employees go to the warehouse where they take possession of the item before delivering it to the customer; the ownership of the item is only acquired by SCO from RCO when the item leaves the warehouse. In this case, paragraph 4.1 prevents the application of the exceptions of paragraph 4 to the warehouse and it will not be necessary, therefore, to determine whether paragraph 4, and in particular subparagraph 4 a), applies to the warehouse. The conditions for the application of paragraph 4.1 are met because:

- SCO and RCO are closely related enterprises;
- SCO's store constitutes a permanent establishment of SCO [the definition of permanent establishment is not limited to situations where a resident of one Contracting State uses or maintains a fixed place of business in the other State; it applies equally where an enterprise of one State uses or maintains a fixed place of business in that same State]; and
- The business activities carried on by RCO at its warehouse and by SCO at its store constitute complementary functions that are part of a cohesive business operation (i.e. storing goods in one place for the purpose of delivering these goods as part of the obligations resulting from the sale of these goods through another place in the same State).

C. Other strategies for the artificial avoidance of PE status

1. Splitting-up of contracts

16. The splitting-up of contracts in order to abuse the exception in paragraph 3 of Article 5 is discussed in paragraph 18 of the Commentary on Art. 5:

18. ... The twelve month threshold has given rise to abuses; it has sometimes been found that enterprises (mainly contractors or subcontractors working on the continental shelf or engaged in activities connected with the exploration and exploitation of the continental shelf) divided their contracts up into several parts, each covering a period less than twelve months and attributed to a different company which was, however, owned by the same group. Apart from the fact that such abuses may, depending on the circumstances, fall under the application of legislative or judicial anti-avoidance rules, countries concerned with this issue can adopt solutions in the framework of bilateral negotiations.

17. The Principal Purposes Test (PPT) rule that will be added to the OECD Model Tax Convention as a result of the adoption of the Report on Action 6 (Preventing the granting of treaty benefits in inappropriate
第三章. 人为规避构成常设机构的其他安排

1. 合同分割

16. 第 5 条注释第 18 段讨论了通过合同分割滥用第 5 条第 3 款豁免规定的情形：

18. ... 12 个月的门槛已经造成了一些滥用协议的现象。有时可以注意到，某些企业 （主要是在大陆设立作业或从事大陆设经营的承包商或分包商）将其合同分段或持续时间少于 12 个月的几部分，并分配给同一集团的不同公司分别履行。对于这些滥用协议的行为，除根据情况适用法律或司法反避税规定外，担心这个问题的国家还可以通过双边谈判寻求解决方式。

17. 经合组织协议模板将根据税基侵蚀与利润转移第 6 项行动计划（防止税收协议优惠的不当授予）报告增加主要目的测试条款。该条款将解决通过合同分割滥用协议所带来的税基侵蚀与利润

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4. 参见第 6 项行动计划报告第 28 段中关于主要目的测试条款的注释第 14 段。
circumstances)\(^{4}\) will address the BEPS concerns related to the abusive splitting-up of contracts. In order to make this clear, the following example will be added to the Commentary on the PPT rule. For States that are unable to address the issue through domestic anti-abuse rules, a more automatic rule will also be included in the Commentary as a provision that should be used in treaties that would not include the PPT or as an alternative provision to be used by countries specifically concerned with the splitting-up of contracts issue.

**CHANGES DEALING WITH THE SPLITTING-UP OF CONTRACTS**

1. **Add the following example to the Commentary on the PPT rule proposed in the Report on Action 6:**

   Example J: RCO is a company resident of State R. It has successfully submitted a bid for the construction of a power plant for SCO, an independent company resident of State S. That construction project is expected to last 22 months. During the negotiation of the contract, the project is divided into two different contracts, each lasting 11 months. The first contract is concluded with RCO and the second contract is concluded with SUBCO, a recently incorporated wholly-owned subsidiary of RCO resident of State R. At the request of SCO, which wanted to ensure that RCO would be contractually liable for the performance of the two contracts, the contractual arrangements are such that RCO is jointly and severally liable with SUBCO for the performance of SUBCO’s contractual obligations under the SUBCO-SCO contract.

   In this example, in the absence of other facts and circumstances showing otherwise, it would be reasonable to conclude that one of the principal purposes for the conclusion of the separate contract under which SUBCO agreed to perform part of the construction project was for RCO and SUBCO to each obtain the benefit of the rule in paragraph 3 of Article 5 of the State R-State S tax convention. Granting the benefit of that rule in these circumstances would be contrary to the object and purpose of that paragraph as the time limitation of that paragraph would otherwise be meaningless.

2. **Replace paragraph 18 of the Commentary on paragraph 3 of Article 5 by the following (consequential changes will be required to paragraphs 42.45-42.48 of the Commentary):**

   18. The twelve month test applies to each individual site or project. In determining how long the site or project has existed, no account should be taken of the time previously spent by the contractor concerned on other sites or projects which are totally unconnected with it. A building site should be regarded as a single unit, even if it is based on several contracts, provided that it forms a coherent whole commercially and geographically. Subject to this proviso, a building site forms a single unit even if the orders have been placed by several persons (e.g. for a row of houses). [rest of the paragraph is moved to paragraph 18.1]

   **18.1** The twelve month threshold has given rise to abuses; it has sometimes been found that enterprises (mainly contractors or subcontractors working on the continental shelf or engaged in activities connected with the exploration and exploitation of the continental shelf) divided their contracts up into several parts, each covering a period of less than twelve months and attributed to a different company which was, however, owned by the same group. Apart from the fact that such abuses may, depending on the circumstances, fall under the application of legislative or judicial anti-abuse rules, countries concerned with this issue can adopt solutions in the framework of bilateral negotiations. These abuses could also be addressed through the application of the anti-abuse rule of paragraph 7 of Article [X], as shown by example J in paragraph [14] of the Commentary on Article [X]. Some States may nevertheless wish to deal expressly with such abuses. Moreover, States that do not

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4 See paragraph 14 of the Commentary on the PPT rule included in paragraph 26 of the Report on Action 6.
为应对合同拆分而进行的修改

1. 在第6项行动计划报告中建议的主要目的测试注释中添加以下内容：

案例1：R公司是S国的居民公司。R公司成功地对S公司的某个发电站建设项目进行了投标。S公司是S国的居民公司，且与R公司相互独立。该建设项目预计将持续22个月。在合同谈判过程中，该项目被拆分为两个合同，每个合同持续11个月。第一份合同由R公司签订，第二份合同由一家由R公司近期在S国设立的子公司签订。S公司希望从法律上确保R公司对两份合同的履行情况负责。因此，要求在两份合同安排中明确，R公司的子公司履行其与S公司之间的合同义务时，R公司负有连带责任。

在此案例中，若无导致不同结论的其他事实与情况，有理由认为分开签署合同，使R公司的子公司参与部分工程项目的全部目的之一是为了让R公司与其子公司分别享受S国和S国税收协定第5条第3款的协定优惠。在上述情况下，授予协定优惠将违背该款的目的和意图，因为该款规定的时间期限将变得没有任何意义。

2. 将原第5条第3款注释的第18段替换为如下内容（注释第42.45段至第42.48段将做相应修改）

18. 12个月期限的判断标准适用于各个单独的工地或项目。在判断某一工地或项目的持续时间时，不应包括承包商之间从事与本项目完全无关的其他工地或项目所花费的时间。例如，建筑工地在商业和地理上构成一个不可分割的整体，即使它由几个合同组成，也应视为同一个整体单位。从这一点来看，即使合同是由多人所提交（如为多人为一排房屋下单），建筑工地仍可视为一个整体。[本段原全部被移至18.1段]

18.1 12个月期限的门槛已经造成了一些滥用协议的现象。有时可以看到某些企业（主要是在大陆架上作业或从事大陆架勘探和开发活动的承包商或分包商）将其合同分成不同期限少于12个月的几部分，并分配给属于同一集团下的不同公司分别人行。对于这些滥用协议的行为，除根据情况可以适用立法或司法反滥用规则外，担心这些问题的国家还可以通过双边谈判寻求解决方案。还可以如第X条注释第[14]段中所示，通过第X条第7款作为反滥用条款来解决该问题。尽管如此，一些国家可能希望能够有针对性地解决类似协议滥用问题。此外，协议未加入第X条第7款规定的国家应举办加入一条规定，以解决合同拆分问题。举例而言，该规定可以起草如下：
include paragraph 7 of Article [X] in their treaties should include an additional provision to address contract splitting. Such a provision could, for example, be drafted along the following lines:

For the sole purpose of determining whether the twelve month period referred to in paragraph 3 has been exceeded,

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 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 30 days, by one or more enterprises closely related to the first-mentioned enterprise,

these different periods of time shall be added to the period of time during which the first-mentioned enterprise has carried on activities at that building site or construction or installation project.

The concept of “closely related enterprises” that is used in the above provision is defined in subparagraph b) of paragraph 6 of the Article (see paragraphs 38.8 to 38.10 below).

18.2. For the purposes of the alternative provision found in paragraph 18.1, the determination of whether activities are connected will depend on the facts and circumstances of each case. Factors that may especially be relevant for that purpose include:

- whether the contracts covering the different activities 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 activities would have been covered by a single contract absent tax planning considerations;
- whether the nature of the work involved under the different contracts is the same or similar;
- whether the same employees are performing the activities under the different contracts.

2. Strategies for selling insurance in a State without having a PE therein

As part of the work on Action 7, BEPS concerns related to situations where a large network of exclusive agents is used to sell insurance for a foreign insurer were also examined. It was ultimately concluded, however, that it would be inappropriate to try to address these concerns through a PE rule that would treat insurance differently from other types of businesses and that BEPS concerns that may arise in cases where a large network of exclusive agents is used to sell insurance for a foreign insurer should be addressed through the more general changes to Art. 5(5) and 5(6) in section A of this report.

D. Profit attribution to PEs and interaction with action points on transfer pricing

18. The work on Action 7 that was done with respect to attribution of profit issues focussed on whether the existing rules of Art. 7 of the OECD Model would be appropriate for determining the profits that would be allocated to PEs resulting from the changes included in this report. The conclusion of that work is that these changes do not require substantive modifications to the existing rules and guidance concerning the attribution
2. 在一国销售保险规避构成常设机构的安排

第 7 条行动计划还研究了外国保险公司通过大型独家代理商网络销售保险相关的税基侵蚀和利润转移问题。然而，最后得出的结论是，通过针对保险活动规定与其它类型营业额活动不同的常设机构判定规则来解决这些问题是不合适的；外国保险公司通过大型独家代理商网络销售保险相关的税基侵蚀和利润转移问题，应该通过本报告第一章对第 5 条第 5 款和第 6 款的整修修改来解决。

第四章. 常设机构利润归属及其与转让定价相关行动计划的相互影响

18. 第 7 条行动计划关于利润归属问题的工作主要关注的是，对于因本报告的修改而判定的常设机构，现有综合协议模板第 7 条的规则对于确定其利润归属是否合适。该工作的结论是无需因本报告的修改而对现有第 7 条关于常设机构利润归属的规定与指导原则进行重大调整，但应就如何将第 7 条的规定应用于因本报告的修改而判定的常设机构（尤其是非金融业的常设机构）
of profits to a permanent establishment under Article 7 but that there is a need for additional guidance on how the rules of Article 7 would apply to PEs resulting from the changes in this report, in particular for PEs outside the financial sector. There is also a need to take account of the results of the work on other parts of the BEPS Action Plan dealing with transfer pricing, in particular the work related to intangibles, risk and capital.

19. Realistically, however, work on attribution of profit issues related to Action 7 could not be undertaken before the work on Action 7 and Actions 8-10 had been completed. For that reason, and based on the many comments that have stressed the need for additional guidance on the issue of attribution of profits to PEs, follow-up work on attribution of profits issues related to Action 7 will be carried on after September 2015 with a view to providing the necessary guidance before the end of 2016, which is the deadline for the negotiation of the multilateral instrument that will implement the results of the work on treaty issues mandated by the BEPS Action Plan.
提供更多指引。同时，还需要考虑税基侵蚀与利润转移行动计划其他针对转让定价的工作的影响，尤其是关于无形资产、风险与资本方面的工作。

19. 然而，在第7项以及第8项至第10项行动计划的工作完成之前，实际上无法开展第7项行动计划相关的利润归属问题研究。有鉴于此，尤其许多评论也强调了对常设机构利润归属问题提供额外指引的必要性，经合组织将于2015年9月以后开展第7项行动计划相关的利润归属问题后续工作，目标在2016年年底多边工具磋商的截止日前提供必要的指引。税基侵蚀与利润转移行动计划中与税收协议相关的工作成果将通过多边工具进行实施。