OECD 「Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention（OECD モデル租税条約第 5 条（恒久的施設）の解釈及び適用)」に対するコメント

平成 23 年 10 月 12 日、経済協力開発機構（OECD）は、OECD モデル租税条約第 5 条にある恒久的施設（Permanent Establishment=PE）の定義に関するディスカッションドラフトを公表し、2014 年を目標とする OECD モデル租税条約のコメンタリー改定に向けて、意見募集を開始した。

本ドラフトでは、PE 構成有無の判定指針となる”at the disposal”の解釈、恒久性の要件等、租税条約の適用や解釈を行う上での様々な重要な論点に係る議論の結果を踏まえた提案がなされている。

経理委員会では、これに対して、各国の税務当局及び納税者間で PE の認定等における解釈の余地が極力生じぬよう、より確実性を重視した内容とすることを強く求める意見を取り纏め、2 月 9 日、OECD 宛提出した。

2012 年 2 月 9 日

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OECD「Interpretation and Application of Article 5(Permanent Establishment) of the OECD Model Tax Convention」に関する意見

以下は、経済協力開発機構（OECD）において意見募集が行なわれた「Interpretation and Application of Article 5(Permanent Establishment)of the OECD Model Tax Convention」に関する社団法人日本貿易会経理委員会のコメントである。社団法人日本貿易会は、日本の貿易商社及び貿易団体を中心とする貿易業界団体であり、経理委員会は、各種税制に対する意見発信を主な活動内容の一つとしている。（末尾に当会経理委員会の参加会社を記載。）

Ⅰ.総論

PE の解釈及び適用に関しては、各国で税務当局及び納税者間にて論争となることが多いことから、本コメンタリーにおいては、両者間で PE の認定等における解釈の余地が極力生じぬよう、より確実性（certainty）を重視した内容になることを強く要望する。

Ⅱ.各論（各論点に対するコメント）

論点 2.　Meaning of “at the disposal of”

- ✓ 改定案パラグラフ 4.2 の「ある場所が企業の自由になると考えられ、その結果、当該場所が企業の事業が全体的或いは部分的に実行される場所を構成するか否かは、当該場所における企業の存在の程度並びに当該場所にて企業が遂行する活動の程度に拠るものと言える（Whether a location may be considered to be at the disposal of an enterprise in such a way that it may constitute a “place of business through which the business of [that] enterprise is wholly or partly carried on” will depend on the extent of the presence of an enterprise at that location and the activities that it performs there.）」について、ある場所が企業の「自由になる（at the disposal of）」場所に該当するか否かの判断要素として、当該場所における①「企業の存在の程度（the extent of the presence of an enterprise）」及び②「当該企業が遂行する活動（the activities that it performs）」の 2 つが挙げられたことは評価できるが、この①と②の判定においては納税者と税務当局間で解釈が異なるケースも想定されるため、結局は個々の事例における事実認定に頼らざるを得ないとしても、できる限り解釈の余地が生じぬような詳述を要望する。また、「全体的或いは部分的に実行される（wholly or partly carried on）」となると、「部分的（partly）」の解釈が問題となり得るので、できれば「全体的（wholly）」のみに限定してほしい。更に、存在の程度（extend of the presence）を判断する上で、活動の期間は重要な要素の一つであり、当該期間についての客観的な判断基準を設けることは、納税者と税務当局間での無用な論争の回避という観点から非常に重要と言える為、最低期間基準の設定を要望する。

- ✓ 改定案パラグラフ 4.2 の「当該企業のある場所での存在が断続的又は偶発的であり、その場所が当該企業の事業の場所とは考えられないとすれば該当ケースにはなることはない（This will not be the case, however, where the enterprise’s presence at a location is so intermittent or incidental that the location cannot be considered a place of business of the enterprise.）」について、存在（presence）、断続的（intermittent）及び偶発的（incidental）の意味や範囲・程度を明確にしてほしい。

- ✓ 改定案パラグラフ 4.2 の「ある企業がある場所に所在する権利を有していない、そして、実際に当該場所自体を使用していない場合においては、当該場所は明確に企業の自由になるというものではない（Where an enterprise does not have a right to be present at a location and, in fact, does not use that location itself, that location is clearly not at the disposal of the enterprise）」について、たとえある企業がある場所に所在する権利を有していた（an enterprise has a right to be present at a location）としても、実際に当該場所自体を使用していない場合（in fact, it does not use that location itself）は、当該場所で事業が実際に行われていない為、PE を構成しているということにはならないと理解しているが、この点を明確にしてもらいたい。

- ✓ なお、PE 課税に関する予見可能性を更に高める為、”at the disposal of”の判断は非常に重要となることから、”at the disposal of”の概念が明瞭化するよう、上述の様な判断基準の提示と共に、BIAC が 2005 年 2 月の WP1 との会合で表明していた通り”at the disposal of”に該当するケース／しないケースについて non-exclusive のリストが示されることは有用と考えられる。

論点 6. Time requirement for the existence of a permanent establishment

- ✓ PE を構成する期間について一定の合理的な基準を設けることは、納税者と当局間での無用な論争の回避という観点から非常に重要であると考えるので、最低期間基準の設定を要望する。改定案パラグラフ 6.2 における二つの事例では、もっぱら当該国において行われる事業（the location where the business of that enterprise is wholly carried on）であるか否かよって結論を区別しており、その事業の期間を考慮していないように見える。しかし、事業の継続期間が極めて短期（very short period）であれば、決して恒久性を有するものではなく、企業の事業がもっぱら当該国において行われるか否かという要素によってのみ、PE を構成するか否かの判断がなされるべきではないと考える。また、期間による”恒久性”の判断は、建設工事現場の PE 構成（12ヶ月ルール）や代替的アプローチとしてのサービス PE 構成（183 日ルール）でも取り入られており、これらと整合性のとれた基準が設定されるべきとも考える。

論点 7. Presence of Foreign enterprise's personnel in the host country

- ✓ 通常の出向のケースにおいては、出向者は当該出向先である外国企業のために業務を遂行しており、原則は PE となり得るものでは無いと言える。一方、改定案パラグラフ 10.では、出向者への言及、第 15 条（給与所得）のコメンタリーとの関連性が示されたものの、出向者が PE となり得るか否かについての判断基準は明記されていない。特に、以下の様なケースにおいては PE とは判断しない旨を明確化してほしい。
  - 親会社から出向するケースにおいては、形式的な雇用契約の有無に拘わらず、経済的な雇用者が実質的な雇用者と言えるため、経済的な雇用者が出向先である場合は、当該出向者を PE とは判断しない。
  - 経済的（事実的）な雇用者を判定するにあたり、出向元親会社が出向者給与差額を負担している場合でも、当該負担だけを以って出向者が出向元親会社の PE とは判断しない。
  - グローバルな経営管理を行っている多国籍企業の場合、国を跨いだ業績評価システムやレポーティングラインを有することのみを以って、出向元親会社からの出向者を PE とは判断しない。

- ✓ 改定案パラグラフ 10 の「多国籍グループにおいては、ある企業の職員が一時的に当該グループの別の企業へと出向し、当該別の企業の事業に明らかに帰属する事業活動を行うということは比較的多くある（Within a multinational group, it is relatively frequent for employees of one company to be temporarily seconded to another company of the group and to perform business activities that clearly belong to the business of that other company）」について、「一時的（temporarily）」の定義を明確にしてほしい。

論点 8. Main contractor who subcontracts all aspects of a contract

- ✓ 契約形態にかかわらず、実際に現場で指揮、監督等を行っているかどうかがポイントとなると考えられる。現実には、Discussion Draft でも言及されている通り、元請会社がある建設現場に複数の使用人を有していないのはかなり稀なケース（it would be fairly unlikely that a main contractor would not have some employees on a construction site）であり、実際に当該従業員が現場で指揮、監督等を行っていれば、PE を構成するのが通常と考える。しかし、元請会社の従業員が一切現場にいないという稀な状況があったとすれば、単に契約履行の責任を負っているとい

うだけで PE を構成するというのではなく、その会社の実在性（physical presence of the enterprise）の有無が最も重要な判定要素と考える。

- ✓ 改定案では、あるプロジェクトにおける「元請企業」と「下請企業」の両方が、ある締約国において PE を構成し得ることになるので、元受企業と下請企業で同一所得に対する二重課税が生じることが無いよう、第 7 条のコメンタリー等における PE 帰属所得の取扱いとも合わせ、明確化されるべきである。

論点 9. Application of paragraph 3 to joint venture and partnership activities

- ✓ ある国における同一のプロジェクトを二つの企業から構成される unincorporated joint venture として行うが、それぞれの企業が別個の作業を各自（severally）で行い、プロジェクトの履行責任は両者が連帯して負うという場合がある。このケースにて、一方の企業が当該国内での作業を行わない（即ち、当該国外での作業にのみ従事する）という場合、当該企業としては当該国内にて実在性（physical presence）を一切有していないことから、PE を構成しないと考えるが、論点 8 における考え方に基づくと、単に契約履行の責任を負っているということにより PE を構成するとも解釈され得るので、この点についての明確化を要望する。

論点 10. Meaning of “place of management”

- ✓ グローバルな経営管理を行っている多国籍企業が、国を跨いだ業績評価システムやレポーティングラインを有することのみを以って「事業の管理の場所（place of management）」を有すると判断すべきではないことを明確化してほしい。

論点 11. Additional work on a construction site

- ✓ 「ある現場にて建設工事が完了した後に企業に対して補修を求めることができるという保証に基づきなされた作業は、通常、当初の建設期間に含まれないであろう（work that is undertaken on a site after the construction work has been completed pursuant to a guarantee that requires an enterprise to make repairs would normally not be included in the original construction period）」という考え方には同意する。一方、現実には、当該保証期間中における補修作業の大部分が無償で行われるとしても、客先からのリクエストを付随的（incidentally）に受けて、一部有償での追加作業を行うというケースが発生することもあり得る。この場合においても、保証契約に基づく無償での作業が大部分を占めているとすれば当初建設期間に含める必要はないと考えられるが、明確にしてほしい。

論点 17. Negotiation of import contracts as an activity of a preparatory or auxiliary activity

- ✓ 改定案パラグラフ 24.2 を設けることには異論がある。特に「積極的に参加（take an active part）」及び「関与することにより（by participating in）」の定義付けがないことで、納税者と課税当局の間で解釈の相違が生じかねず、PE の認定が拡大する懸念がある。また、論点 20.における改定案パラグラフ 33.1 の「しかし、ある者がある国においてある企業とある顧客との間の交渉に同席し、又は、参加したという単なる事実は、それ自体では、当該者が当該国において当該企業の名において契約を締結する権限を行使したと結論付けるには、十分ではないだろう（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 in that State an authority to conclude contracts in the name of the enterprise.)」との関係も不明確である。

論点 19.　Meaning of "to conclude contracts in the name of the enterprise"

- ✓ 「経済的に拘束される（being economically bound)」の概念を挙げている一方で、何をもって「経済的に拘束（economically bound)」であると言えるのか等についての考え方が提示されていない。「経済的に拘束される」の概念は、論点 22.の"Assumption of entrepreneurial risk as a factor indicating independence"における「ある代理人が独立代理人としての地位を有しているか否か（whether or not a person was an agent of an independent status）の判断にも関連する重要な要素であり、更なる明確化が必要と考える。

- ✓ 論点 21.において、作業部会が認識している通り、第５条第６項（独立代理人）の英語版で用いられる"general commission agent"とフランス語版の"commissionaire"は対応しないとされているので、common law 系と大陸系国の間で締結される租税条約において両国間で解釈のずれが生じないよう、改定案パラグラフ 32.1 の「ある企業に代わって活動する者（a person acting on behalf of the enterprise)」の定義付け及び解釈が必要である。

- ✓ 一方の締約国居住者である親会社と他方の締約国居住者である子会社との間で業務委託契約（Service Agreement）を締結する場合、当該契約で子会社が提供する役務の内容に「親会社と顧客との契約に係る情報提供や連絡取次ぎ業務」等の「契約」に関連する役務が含まれていることのみを以って PE とは判定しない旨を明確化してほしい。

論点 22.　Assumption of entrepreneurial risk as a factor indicating independence

- ✓ 2002 年に作業部会が提案したパラグラフ 38.7 において、「企業家としてのリスクの負担が独立代理人の明確な特徴であり、そのリスク負担の判断に当たっては報酬の特徴や当該代理人の事業の規模等が有用な示唆になり得る」とされたが、リスクの判断に当たっては依然解釈の余地が大きく、また必ずしもリスク負担の有無だけで独立性を判定できるものでもないと考える。ついては、独立代理人と従属代理人の判定に当たり、更なる基準の明確化を要望する。

以　上

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Accounting & Tax Committee
Japan Foreign Trade Council, Inc.

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Comments on OECD "Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention"

The following are the comments of the Accounting & Tax Committee of the Japan Foreign Trade Council, Inc. in response to the invitation to public comments by OECD regarding "Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention." The Japan Foreign Trade Council is a trade-industry association with trading companies and trading organizations as its core members, while one of the main activities of its Accounting & Tax Committee is to develop the trade environment by submitting specific policy proposals and requests to government authorities concerning tax matters. (Member companies of the Accounting & Tax Committee of JFTC are listed at the end of this document.)

I. General Comments

Differences in interpretation and application of the concept of permanent establishment (PE) have frequently been the cause of disputes between tax authorities and taxpayers in various countries. For this reason, we strongly request that greater emphasis be placed in this Commentary on certainty in order to eliminate, to the greatest extent possible, any room for such differences between the two sides.

II. Comments on Specific Issues

Issue 2: Meaning of "at the disposal of"

- ✓ The proposed paragraph 4.2 states: "Whether a location may be considered to be at the disposal of an enterprise in such a way that it may constitute a 'place of business through which the business of [that] enterprise is wholly or partly carried on' will depend on the extent of the presence of an enterprise at that location and the activities that it performs there." We strongly support the inclusion of the following two criteria for determining whether a location is "at the disposal of" an enterprise: (1) the extent of the presence of an enterprise, and (2) the activities that it performs there. However, differences in interpretation may arise between tax authorities and taxpayers on the interpretation of these criteria. While ultimately it would be determined based on the facts and circumstances on a case-by-case basis, we request that detailed explanations be provided in order to eliminate, to the greatest extent possible, room for interpretation. We are also concerned that "wholly or partly carried on" may give rise to problems of interpretation concerning the meaning of "partly." Therefore, we request that this provision be limited to "wholly." In addition, we believe that the duration of activities should be an important factor in determining the "extent of the presence of an enterprise" and hence it is highly important to establish an objective criterion on duration to avoid unnecessary disputes between taxpayers and tax authorities. Therefore, we request the establishment of a minimum time criterion.

- ✓ The proposed paragraph 4.2 states: "This will not be the case, however, where the enterprise's presence at a location is so intermittent or incidental that the location cannot be considered a place of business of the enterprise." We request that the meaning, scope, and/or degree of "presence," "intermittent" and "incidental" be clarified.

- ✓ The proposed paragraph 4.2 states: "Where an enterprise does not have a right to be present at a location and does not, in fact, use that location itself, that location is clearly not at the disposal of the enterprise." In this respect, assuming a situation where an enterprise has a right to be present at a location but it never actually be using that location itself, we understand that such a case does not constitute a PE because the enterprise is not actually

engaged in business activities at that location. We request that this point be clearly stated.

- ✓ Because the criteria for determination of "at the disposal of" are highly important in further ensuring the predictability of PE taxation, we request that this concept be further clarified. In addition to the above-mentioned criteria, we believe it would be useful to present a non-exclusive list of criteria as to what constitutes "at the disposal of," as previously suggested by the Business and Industry Advisory Committee in a note for its meeting with Working Party 1 Delegates in February 2005.

Issue 6: Time requirement for the existence of a permanent establishment

- ✓ From the perspective of avoiding unnecessary disputes between taxpayers and tax authorities, we believe it is highly important to establish a certain rational criteria on time requirements for a location to be considered a PE. Therefore, we request the establishment of a minimum time criterion. While the proposed paragraph 6.2 contains two illustrative examples, in both cases the conclusion is based merely on whether or not it is "the location where the business of that enterprise is wholly carried on." As such, it appears that no consideration has been given to the duration of activities. However, we believe there should not be "permanency" if a place of business exists for a very short period and whether a place of business constitutes a PE should not be determined merely because the business activities are carried on exclusively in that location. Criteria for "permanency" based on duration already exist in the cases of construction sites (12-month rule) and alternative option to services (183-day rule). We believe that time requirement rules compatible with the above should be established.

Issue 7: Presence of foreign enterprise's personnel in the host country

- ✓ In normal cases of secondment, seconded personnel would perform the business activities of the foreign enterprise to which they have been seconded. In principle, it can be said that this does not constitute a PE. On the other hand, while the proposed paragraph 10 refers to seconded personnel and the relationship to the Commentary on Article 15 (Income from employment), it

does not contain explicit criteria for determining whether seconded personnel can constitute a PE. In particular, we request that clear provisions be added to preclude constitution of a PE in the following cases.

- In case of secondment from parent company, regardless of whether or not a formal employment contract has been concluded, it can be said that the economic employer is the actual employer. Therefore, when the receiving enterprise is the economic employer, seconded personnel should not be deemed to constitute a PE.

- In determining the economic (actual) employer, even if the dispatching parent company makes up for the difference in pay, this should not by itself be grounds for determining that seconded personnel constitute a PE of the dispatching parent company.

- Cross-border performance assessment systems and reporting lines of multinational groups as a part of the global management and administration should not by themselves be grounds for determining that seconded personnel constitute a PE of the dispatching parent company.

✓ The proposed paragraph 10 states: "Within a multinational group, it is relatively frequent for employees of one company to be temporarily seconded to another company of the group and to perform business activities that clearly belong to the business of that other company." We request the term "temporarily" be more clearly defined.

Issue 8: Main contractor who subcontracts all aspects of a contract

✓ Regardless of the type of contract, we believe the essential factor for this issue is whether or not the main contractor is actually engaged in onsite supervision and instruction. As referred to in this Discussion Draft, "it would be fairly unlikely that a main contractor would not have some employees on a construction site." We understand that if such employees are engaged in onsite supervision and instruction, this would normally constitute a PE. However, assuming there is the fairly unlikely case where a main contractor has no employees on a construction site, we believe no PE should be constituted merely because the main contractor has responsibilities for the

project. Rather, we believe the most important factor should be whether physical presence of the enterprise exists or not.

- ✓ Under the provisions of the proposed changes, both a main contactor and its subcontractor of a project could be subject to taxation in the same State. In this respect, we think clarification of this section, together with clarification of the treatment of income attributable to PE in the Commentary on Article 7, should be made so that the same income is not taxed in the hands of both the main contractor and the subcontractor (i.e., double taxation).

Issue 9: Application of paragraph 3 to joint venture and partnership activities

- ✓ There may be a case where an unincorporated joint venture is formed by two companies to execute a construction project in a given country and then the companies are separately and severally engaged in their own works but jointly responsible for the execution of the project. In such cases, even if one of the companies is not engaged in the works in the country in question (in other words, the company is exclusively engaged in its works in countries other than the country in question), it might be possible to interpret that a PE of that company exists merely on the grounds that it has contractual responsibilities based on the concept of Issue 8. We believe no PE should be constituted because the company has no physical presence in the country in question. We request that this point be clearly stated.

Issue 10: Meaning of "place of management"

- ✓ We request that it be clearly stated that cross-border performance assessment systems and reporting lines of multinational groups as a part of the global management and administration should not by themselves be grounds for determining the existence of "place of management."

Issue 11: Additional work on a construction site

- ✓ We agree with the conclusion that "work that is undertaken on a site after the construction work has been completed pursuant to a guarantee that requires

an enterprise to make repairs would normally not be included in the original construction period." However, the reality is that, even if the majority of such repair works pursuant to a guarantee is performed without charge, some additional works could be incidentally undertaken with additional charge upon request of the client. In such cases, as long as the majority of the additional works is undertaken without charge pursuant to a guarantee, we understand that it is not necessary to include such works in the original construction period. We request that this point be clarified.

Issue 17: Negotiation of import contracts as an activity of a preparatory or auxiliary activity

- ✓ We do not agree with replacing a part of paragraph 24 by the proposed paragraph 24.2. In particular, it concerns us that "take an active part" and "by participating in" have not been defined. Failure to define these phrases can give rise to differences in interpretation between taxpayers and the tax authorities, which may lead to a broader interpretation and application of the PE definition. We should also point out that the relation between this paragraph and the following sentence of the proposed paragraph 33.1 under Issue 20 is unclear. "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 in that State an authority to conclude contracts in the name of the enterprise."

Issue 19: Meaning of "to conclude contracts in the name of the enterprise"

- ✓ While reference is made to the concept of being "economically bound," no explanation is provided on what constitutes being "economically bound." The concept of being "economically bound" is also an important factor in determining "whether or not a person was an agent of an independent status" under Issue 22: "Assumption of entrepreneurial risk as a factor indicating independence." We therefore believe that further clarification of this phrase is needed.

- ✓ Regarding Issue 21, as has been pointed out by the Working Group, the term "general commission agent" used in the English version of paragraph 6

of Article 5 does not correspond to the term *commissionnaire* used in the French version. In order to avoid differences in interpretation in tax treaties concluded between common law and continental law countries, it will be necessary to provide definitions and interpretations of "a person acting on behalf of the enterprise," which appears in the proposed paragraph 32.1.

- ✓ When a service agreement has been concluded between a parent company domiciled in a Contracting State and a subsidiary domiciled in the other Contracting State, the fact that under the agreement the subsidiary provides services related to other contracts—such as supply of information, communication, and liaison activities related to a contract between the parent company and customers—should not by itself constitute a PE. We request that this point be clearly stated.

Issue 22: Assumption of entrepreneurial risk as a factor indicating independence

- ✓ Paragraph 38.7 proposed by the Working Party in 2002 stated: "the assumption of entrepreneurial risk is a distinguishing feature of the independent agent. The character of the remuneration which an agent receives may provide a useful indication of whether (or to what extent) the agent bears the commercial risk of his activities." However, significant room still remains for interpretation in the recognition of risk. Moreover, we do not believe that independency can necessarily be determined solely on the basis of the assumption of risk. Therefore, we request further clarification of criteria for the determination of independent agents and dependent agents.

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