

BRIEF REMARKS ON THE PUBLIC DISCUSSION DRAFT
CONCERNING THE INTERPRETATION AND APPLICATION OF ARTICLE 5
(PERMANENT ESTABLISHMENT)
OF THE OECD MODEL TAX CONVENTION
(Issued on 12 October 2011)

Firstly, REPSOL would like to welcome the opportunity provided by the OECD to let interested parties contribute on the discussion draft of the revised Commentary related to the concept of permanent establishment (PE), and wishes to take the opportunity to provide the following comments to the proposed discussion draft.

1.- The permanent establishment concept and the Upstream sector

We can assume that the term “permanent establishment” takes three basic forms: (i) a facility, (ii) a construction site and (iii) an agency relationship. In general terms, facility refers to a fixed place of business through which the business of an enterprise is carried on; construction site includes a building site or construction or installation project or drilling rig used for the exploration of natural resources; and agency relationship is a dependent agent with authority to conclude contracts in the name of the principal.

One of the specialities of Oil & Gas sector is that sometimes these three types of establishment are involved in a contract and that an enterprise enters into different contracts in the same country.

That is why we think that it is important to clarify the meaning of the wording “*at the disposal of*” (paragraph 4.2 of the Commentary) by adding some sentences and phrases to the Recommendation of the Working Group as follow:

*“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, **as well as the formal legal right to use this particular site.** Where an enterprise has an exclusive legal right to use a particular location which is used only for*

*carrying on that enterprise's own business activities, that location is clearly at the disposal of the enterprise. **Whilst an enterprise has exclusive legal rights to use different locations in the same contract state, it will have as many permanent establishments as exclusive legal rights possesses.** This will also be the case where an enterprise performs business activities on a continuous and regular basis during an extend period of time at a location that belongs to another enterprise (...)"*

2. Main contractor who subcontracts all aspects of a contract (paragraphs 10 and 19 of the Commentary)

We consider important to point out that in order to consider a permanent establishment when a business is carried out through subcontractors, all conditions of Article 5 must be met. So we propose these changes to be made to the Commentary by adding the following wording to the Working Group recommendation:

*10.1. An enterprise may also carry on its business through subcontractors, acting alone or together with employees of the enterprise. In that case, a permanent establishment will only exist for the enterprise if the other conditions of Article 5 are met, **including the period of time required for a location to be considered a permanent establishment.***

So we think it should be necessary to link paragraph 10 and 19 with paragraph 6 of the Commentary. But the meaning of the Commentary must be clearer and we also think that the OECD should seriously consider using a minimum period of time for which an activity has to be performed in a continuous manner before a PE is created. As the Working Group recommends, six months can be a reasonable minimum period of time as a general rule.

3. Presence of foreign enterprise's personnel in the host country (paragraphs 10 of Commentary)

REPSOL is, among others things, engaged in the exploration and production area (E&P) which involves the exploration and production of oil and natural gas. Such activity normally requires the hire of contractors and subcontractors to carry out on-site services which may constitute a PE depending on the criteria adopted by the source country.

From our point of view, is not only important to answer the question raised in the draft about the circumstances in which the presence of employees of a foreign enterprise constitutes a PE but also whether the employees hired by the foreign enterprise to work in a host country can be considered a PE. We think that the answer to this question must be negative when these employees are working less than the minimum period of time for the foreign enterprise and the other conditions of Article 5 are not met, as the Working Group recommends.

REPSOL

Madrid (Spain)

Alvaro de Juan

Susana Bokobo