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CYBERTAX - THE IMPACT OF THE INTERNET ON INTERNATIONAL TAXATION AND VICE VERSA

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Early this year, I gave my first presentation describing potential international tax issues which were raised by the rapid expansion of commercial and individual access to the Internet. At the time, the Commissioner of Internal Revenue Service and other senior officials had announced that they regarded the Internet as a priority area for study. In May, I appeared on a panel at an American Bar Association meeting in Washington in which the participants, including Bob Mattson from IBM and Bruce Cohen from Treasury, truthfully stated that they were there to raise rather than answer questions. At the time, I thought that it would not be too long before some answers would be forthcoming. Certainly when Tom Garvin asked me to give this talk I was sure I would have some definitive idea of where the best thinking of government and the private sector was headed.

Some progress has been made, but uncertainty and confusion remains. As noted below, the Treasury expects to publish a study on these issues quite shortly -- perhaps before this Thanksgiving. For the most part, however, international tax practitioners in government and in the private sector seem more content to deal in broad generalities than to try to analyze the problem systematically. I cannot promise to do much better but this outline will try to lift some of the cosmic fog which seems to settle on the tax community when the Internet is the topic.

1. An International Taxation Snapshot.

We should start with a quick review of the conceptual framework in which we are operating.

1.1 Residence and Source-Based Taxation. The international tax system in the United States, and in this respect the United States is similar to many foreign countries, is constructed on the basis of the concepts of residence and source. As discussed below, the Internet and other technological developments will tend to undermine the administrability of a tax system based on these concepts.

1.2 Taxation of U.S. Persons. The United States taxes U.S. persons, that is, individual citizens and residents and corporations organized in the United States, at graduated rates on worldwide income from whatever source derived, net of deductions allowed by law. A credit (the foreign tax credit) is allowed against U.S. tax if the U.S. person is taxed by a foreign country on income derived from a foreign source. This credit is extended, in the case of dividends received by U.S. corporations making direct investments (10% or more) in foreign corporations, to the tax paid by the foreign corporation on the U.S. corporations' share of income. The credit is limited to the amount of U.S. tax attributable to foreign source income and is calculated separately for eight specific and one general categories of income.

1.3 Taxation of Foreign Persons. The United States taxes foreign persons, meaning nonresident aliens (not Mr. Spock -- alien is an obnoxious word meaning noncitizen) and corporations incorporated outside the United States, on (1) income effectively connected with a trade or business within the United States if the income has a U.S. source or, in three cases, if the income is attributable to a U.S. office or fixed place of business and (2) certain types of income (mostly investment income such as interest, dividends, rents and royalties but not capital gains) from U.S. sources even though not effectively connected with a U.S. trade or business. Capital gains are not taxed unless they are effectively connected to a trade or business or are real-estate related, in which they are treated as if they were effectively connected. Trade or business income is taxed at the same graduated rates applicable to U.S. persons U.S. source investment income is taxed at a flat rate of 30%, with no deductions.

2. Economic Activity on the Net.

Any system of taxation is related in some fashion to collecting for government a share of income or cash flows derived from commerce and other economic activity. Classical systems of direct taxation seek to measure income, on a gross or net basis; indirect taxation usually measure the value of flows of goods and services, either absolutely or in terms of value added. Although taxation effectively affects or can even be said to be imposed upon less tangible items, such as the gratification of a consumer's actual or imagined needs and desires, no administrable tax system can base itself on such concepts. The system must find methods of evaluating income or consumption in terms of currency or at least some relatively broad-based medium of exchange.

This is a long-winded way of saying that in order to analyze the impact of taxes on the Internet and the Internet on taxes, we have to examine what kind of economic activity occurs in whole or in part on the Internet or can be foreseen to arise in the near future. My own view is that these activities can be categorized as follows:

2.1 Advertising medium. The Internet is a vehicle for advertising all manner of products and services.

2.2 Delivery of goods and services. The Internet provides a means of delivering many types of finished goods and services in which the intellectual content (as opposed to the physical embodiment) is paramount. For example, a book and a carrot are both goods but a carrot cannot (yet) be delivered electronically; similarly, on-line you can obtain legal advice, but not a massage. Gambling may also be included in this category of economic activity.

2.3 Communications device. The Internet provides a means for delivery of many types of information which is directly or indirectly incorporated into other goods and services. In this respect, the Internet is primarily a method of communications superior in some respects to earlier means of communication.

3. Macro Effects of the Net on the Tax System.

3.1 Disintermediation. One characteristic of activity (academic as well as commercial) on the Internet is a process which can be called disintermediation. Disintermediation refers to the elimination or significant reduction in significance of intermediaries, such as distributors, sales representatives, brokers and, dare one say it, lawyers and other professionals, in the delivery of products, services and information from the ultimate producer to the ultimate consumer. In other words, the Internet tends to diminish or eliminate channels of distribution for both services and physical goods.

Disintermediation may be easy to understand in the case of supplies of software and other services. You can buy directly software from a software company and airline tickets from airlines, without having to go to Egghead or your travel agent. But disintermediation may, and probably will, also have a major impact on financial institutions as it permits commercial transactions to occur with significantly less involvement by such institutions. In an extreme scenario, banks and financial institutions would disappear, with economic wealth existing in the form of verifiable credits recorded in a cyberspace existing in no readily identifiable location.

In theory, the elimination of intermediaries should not affect the fundamental results of a commercial transaction -- the taxation of the sale of software on the Internet should not really differ much from the sale of the same software by the software developer to the same consumer via a wholesale and a retailer. However, tax authorities around the world have found intermediaries and transactions handled by intermediaries to be administratively convenient points at which to collect direct and, especially, indirect taxes and duties. The Internet will tend to diminish the numbers of large transactions which can be taxed so much more easily than numerous smaller transactions.

3.2 Fragmentation of Economic Activity. A related effect of the Internet is fragmentation of economic activity so that it can become much more difficult to determine where the activity was carried on and by whom. I refer here not just to the way numerous transactions can be carried on in relative anonymity, although that is itself capable of producing significant administrative issues, but to the diminished significance of location in connection with transactions and the need for parties to transactions to know each other's identities.

4. Taxation of Economic Activities on the Internet.

4.1 Source-Based Taxation Issues. An important effect of the Internet and of rapidly development in electronic communications will be to de-emphasize the significance of the place economic activity is carried on. Here are two examples:

(a) Services Income. The source of income from the performance of services is, under current U.S. norms, the place of performance. IRC §§ 861(a)(3) and 862(a)(3). But what exactly is the place of performance when, in an era of Pentium Pro (or Power PC) laptops

and T-1 lines, the performer may be sitting by the pool on a Caribbean island and there is no way for the service-recipient to know?

(b) Permanent Establishment. As noted earlier, one of the two types of source-based taxation imposed by the United States arises if the foreign taxpayer is engaged in a U.S. trade or business; the threshold for being so engaged is quite low. Under our treaties with other countries, and most tax treaties worldwide, the threshold is raised to require that the foreign taxpayer have a "permanent establishment". A copy of the permanent establishment articles of three model treaties (U.S., OECD and the UN Model for treaties with developing countries) is attached.

The models were developed at a time when most work was performed by people or by machines whose human operators and supervisors were physically proximate. Imagine, however, an automated teller machine. Is an ATM a permanent establishment? Perhaps not, if all it does is to dispense cash and give information. What if it does more - sells you insurance, airline tickets, stocks and bonds; accepts a loan application; processes a credit card application; allows you to video conference with bank service personnel at a remote location? Does it make any difference if the ATM belongs to the foreign bank or is simply available through one of the interbank networks?

One question currently exercising the IRS in this area is whether a server constitutes a permanent establishment. At the ABA panel we concluded under current law that the use of a server located in the United States to transact business could constitute being engaged in a trade or business. However, we concluded that it probably would not be a permanent establishment, except in the case of a person selling the use of the server itself (as opposed to making use of the server to sell other products and services).

4.2 The Treasury Department's Approach. The approach of the U.S. Treasury Department, which I expect to be set out in a report to be published shortly, is likely to be based on three key premises:

- First, economic activity should so far as possible be taxed in a similar manner whether conducted through the Internet or by historically more conventional methods.

- Second, it follows that economic activity on the Internet should so far as possible be taxed based on existing concepts and that new classifications relating to character and source of income should be avoided.

- Third, increased emphasis will be placed on allocating taxing jurisdiction for income from electronic commerce to the residence of the taxpayer rather than the source of the income. This results from the relatively greater difficulty of tracking the place where income-producing activity occurs as opposed to where the owner of the income resides or belongs. Taxes

are, after all, ultimately imposed on people and people do not circulate with the same rapidity and untraceability as electronic data.

It seems likely that the report will not propose radical new taxes or tax collection methods, such as the "toll booths on the information superhighway" concerning which Joe Guttentag, International Tax Counsel at the Treasury Department has reportedly speculated as a possible solution for Internet-related tax assessment needs.

The Treasury's approach is appealing to aging tax professionals who are hoping that the current tax system outlasts their years to retirement. It also probably makes sense given the current state of Internet technology. The Internet does not yet involve any economic activity that does not occur and could not in theory have occurred in some other manner. Logically, therefore, it should be possible to characterize, measure and source any income earned in connection with Internet activities in the same manner as any other activity. For example, the transfer of software for an agreed upon consideration is an everyday transaction. The Internet provides a means for the consumer to locate and the seller to advertise and deliver the software but the nature of the transaction is not fundamentally changed.

4.3 What the Treasury-Based Approach Might Entail. Adopting the Treasury's approach, our first task is to determine the character of the income. Character in turn determines which source rule will apply. For U.S. taxpayers, source matters primarily in computing the foreign tax credit limitation but it also matters if the income would be treated under another country's tax laws as having a source in that country and that country would impose tax at a high rate (or at any rate at all if the U.S. taxpayer is seeking deferral by earning the income through a foreign subsidiary corporation). For foreign taxpayers, source matters because only U.S. source income and certain limited types of foreign source income are subject to U.S. taxation.

A recent article about the taxation in Cyberspace dwells at length on the problems of distinguishing between the rendering of services, the sale of software and the licensing of copyright. Cigler, Burritt and Stinett, "Cyberspace: The Final Frontier for International Tax Concepts", 7 J. Intl. Tax. 340 (August 1996). These problems long pre-dated the widespread use of the Internet and are not really changed by the Internet. Nevertheless, the Internet brings these problems into sharper focus and in particular the rather arbitrary way taxing jurisdiction is allocated based on how income is classified. In the remainder of this Section, I look at how various classes of income which may arise in connection with the Internet may be characterized and sources.

4.4 Advertising Income. Under current law, advertising income is generally characterized as income from the performance of services. Income from services generally has as its source the place services are performed. The media through which advertising is displayed is generally irrelevant so far as an advertising agency is concerned; it is, rather, the place where the individuals who create the advertising perform their creative work which is determinative.

So far as the media are concerned, there is little authority. A newspaper's source of advertising income is presumably the place or places where the newspaper is published. Similarly, a broadcaster's income from advertising has its source in the place from which the programming originated rather than the places where the broadcast is targeted or in fact reaches. In *Piedras Negras Broadcasting Co. v. Commissioner*, 127 F.2d 260 (8th Cir. 1942), affg. 43 B.T.A. 297 (1941), a Mexican corporation broadcast radio advertising from south of the border into Texas. The Board of Tax Appeals concluded that the activities of the corporation did not constitute engaging in a trade or business and this judgment was upheld on appeal to the Fifth Circuit Court of Appeals. Both courts held that the source of the income was in Mexico, where the capital and labor used to generate the transmission were deployed. As the Court of Appeals put it, "If income is produced by the transmission of electromagnetic waves that cover a radius of several thousand miles, free of control or regulation by the sender from the moment of generation, the source of that income is the act of transmission." Accordingly, because the advertising income was not from a U.S. source, it was not taxable.

Generally, advertising on the Internet consists of the publisher of a page including advertising material on the page. The material may consist of text and graphics and may also include real-time or downloadable audio or video materials. The advertising may be contained on the advertiser's own page and on the advertiser's own server, in which case there is no advertising income. However, the advertiser may place the advertising on another server or it may pay a third party to include the advertising on the third party's page. This does not appear different from advertising in a newspaper or broadcasting an advertisement using a third party's transmission facilities. So long as the advertiser does not own the newspaper or the broadcaster, the newspaper or broadcaster should be taxed according to the place where it does business not where it broadcasts to. *Piedras Negras* continues to be good law and should apply to Internet advertising as it does to other broadcast income.

4.5 Sales of Goods and Services Through The Internet.

(a) Goods and Services Ordered on the Internet. The sale of physical goods through the Internet which were then physically delivered would be treated no differently, under the Treasury approach, than any other mail order supply. In such a case, the Internet is a means of communication by which customers can be reached. The maintenance of sales information on a U.S. server would not constitute a permanent establishment under traditional definitions. It is doubtful if the maintenance of such information would constitute doing business in the United States but, even if it did, the source of income from the sale would be outside the United States. The source of income from the sale of inventory is determined under the title passage rule, under which income from the sale of inventory is source outside the United States if title to the goods passes the United States. Under IRC § 865(e)(2), income derived from sales by nonresidents attributable to a U.S. office or other fixed place of business will have a U.S. source. However, the term "office or other fixed place of business" is defined very similarly to the way the term permanent establishment is defined in our tax treaties and, as noted above, a website using today's technology probably will not be treated as a permanent establishment and so should not be an

office or other fixed place of business either. See Treas. Reg. § 1.864-7, which applies by virtue of IRC § 865(e)(3). (For completeness, we should mention that there is a further exception from the sale of inventory property if the property is sold for use, disposition or consumption outside the United States if a foreign office or other place of business of the taxpayer materially participated in the sale.)

(b) **Delivery of Software.** Software can be delivered over the Internet as it could and was in earlier days through CompuServe and other on-line services. The Internet does not create new issues here but it highlights the rather artificial distinction that has plagued tax authorities concerning whether a sale of software is a sale or a license for tax purposes.

When software is sold in stores, typically shrink-wrapped with a license agreement designed to protect the seller's copyright, tax authorities generally treat the transaction as a sale of goods in the same way that the sale of a record or videotape would be treated as a sale of a good and not a license for tax purposes. This is true even though the transaction for property law purposes is generally analyzed as the grant of a license to use the record or tape for nonpublic performances with no right to duplicate all or any part except for noncommercial purposes in accordance with fair use and other provisions of our copyright laws. To a large extent, software delivered over the Internet is sold on a similar basis and subject to the same legal protections. The only difference is that the software is not embodied in a physical object such as a floppy disk or a CD-ROM and may not have a printed manual (although a downloadable manual may be available or built into the software). Although it seems odd to treat such a transaction as a sale of goods, in reality so long as we would treat a sale of the same software in stores or by mail order as a sale for tax purposes, we should also treat an Internet sale the same way.

On the other hand, income from software which is customized by the software supplier for the customer is generally treated and sources as a royalty if (1) the transaction is not an exclusive license or (2) the amount of the income is contingent upon productivity, use or disposition of the software. See, *e.g.*, IRC §§ 865(d) and 871(a)(1)(D). Again, delivery over the Internet should not change this treatment.

The real problem (and opportunity for tax planning) is that income from copyrights is taxed differently according to whether it is sold or licensed for tax purposes. Moreover, if the software is a work for hire, the income of the software designer is services income. As discussed below in somewhat greater detail, the source rules essentially cause royalty income to have a source according to the place the software is used whereas sales income is, with certain exceptions, sourced according to the residence of the seller. Services income is sourced according to the place services are performed. Yet it is not always easy to distinguish sales from licenses or the rendering of services, especially given the fact that copyrights and other intangibles can be sliced up so many different ways and with different tax results. For example, an exclusive license of a particular territory can be treated as a sale whereas the exclusive license of a particular field of use of a patent cannot, unless the patent has no use or value outside the particular field of use. See, *e.g.*, *Merck & Co. v. Smith*, 261 F.2d 162 (3rd Cir. 1958). A grant of a license or a "sale"

for less than the full remaining term of the particular rights will be treated as a license for tax purposes. *Commissioner v. Sunnen*, 333 U.S. 591 (1948). Income from rights to different media of exhibition of a motion picture or other audiovisual programming can be sold separately for tax purposes, although there is plenty of room to get to a different result depending on the exact legal rights conveyed. See discussion in Moore, The Entertainment Industry (Warren, Gorham & Lamont 1995) ¶ 2.2; Rev. Rul. 84-78, 1984-1 C.B. 173; Rev. Rul. 60-226, 1960-1 C.B. 26; Rev. Rul. 54-409, 1954-2 C.B. 174.

Under our source of income rules, income from sale of intangible property for a price not computed like a royalty and exclusive licenses is treated as having its source where the seller is resident. IRC § 865(a). (Note that a U.S. resident for these purposes includes a nonresident alien who has a tax home in the United States - see IRC § 865(g) - and "tax home" means the taxpayer's regular or if he has more than one his principal place of business. The drafters of this provision seem to have been blissfully unaware of the multiple layers of words meaning the opposite of what they say.) Also, the same rule that classifies as having a U.S. source any income from sales of personal property attributable to the taxpayer's U.S. office or fixed place of business applies to sales of intangible property such as computer software. Again, this rule should not impose a significant risk on a reasonably well-advised foreign software supplier.

By contrast, income from the license of an intangible is sourced according to the location of the property. IRC §§ 861(a)(4) and 862(a)(4). Intangible property is "located" in the place where it enjoys the legal protection which is conferred upon the licensor. Therefore, a license to use a copyright in the United States has a U.S. source because U.S. copyright laws protect the property rights of the licensor with respect to exploitation of the copyright in the United States.

4.6 Communications Income. Service providers who charge for access to or the conveyance of data on the Internet generally are engaged in business in the countries where they offer such services and their income from customers located in those countries is sourced there. A special rule applies to "international communications income", defined as income derived from the transmission of communications or data from the United States to any foreign country or *vice versa*. IRC § 863(e) allocates 50% of such income to foreign source and 50% to U.S. source in the case of U.S. persons and 100% to foreign source income in the case of foreign persons. Strangely, however, if the international communications income of a foreign person is attributable to a U.S. office or other fixed place of business, all (not just 50%) of the income has a U.S. source. We may wonder if this rule would prevail against a treaty nondiscrimination provision.

5. The Impact on Tax Administration.

The difficulties for tax authorities will arise in two ways. First, disintermediation will diminish the number of transactions handled by enterprises which are large enough that it is reasonable to require them to comply with sophisticated recordkeeping requirements. Similarly, tax authorities rely on parties reporting their transactions with each other (and especially on payers reporting payments to payees). But such reporting is much harder to require and enforce when the payor

is a consumer or a small business than an intermediary and even more so if the payor has no idea of the identity of the payee or where the payee is located.

The Internet did not create these kinds of problems but clearly it will exacerbate them. For example, imagine (it isn't hard to do) that a software developer, consisting of an undocumented temporary alliance of programmers located in Cupertino, Israel, Belorus and Belgium, produces a relatively narrow vertical application for use in the manufacture of vehicle anti-theft devices in response to an RFP posted on a bulletin board by an electronic parts manufacturer that sells all its output to automobile manufacturers all over the world. The software is duly produced and placed on four different servers in four different countries from which it can be downloaded by any of the manufacturers' affiliates or subcontractors. Leaving aside difficulties of characterization of any resulting payment (is it a royalty or a fee for services?), how does the manufacturer know who it is dealing with and whether to withhold tax and at what rate?

Having to deal with the Internet comes at a bad time for the IRS. It is clear that the IRS will need greatly enhanced technology resources to administer taxation of economic activity conducted electronically. Yet its resources are poor and its modernization efforts are in disarray, with literally billions of dollars having been wasted.

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The question is whether economic activity on the Internet will require any adjustment to the system of taxation we currently employ, particularly in the international arena. At this stage, I can only say that the question must be asked. This FAQ has not yet received a clear answer. The Treasury's likely approach on substantive analysis appears sound. It is not so clear how it will handle the administrative problems intensified by the Internet.

COMPARISON TABLE OF PERMANENT ESTABLISHMENT ARTICLE OF U.S. MODEL (1981), OECD MODEL AND UN MODEL INCOME TAX TREATIES

U.S. Model	OECD Model	UN Model
1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.	1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.	1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term "permanent establishment" includes especially a) a place of management; b) a branch; c) an office; d) a factory; e) a workshop; and f) a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources.	2. The term "permanent establishment" includes especially: a) a place of management; b) a branch; c) an office; d) a factory; e) a workshop, and f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.	2. The term "permanent establishment" includes especially: (a) A place of management; (b) A branch; (c) An office; (d) A factory; (e) A workshop; (f) A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
3. A building site or construction or installation project, or an installation or drilling rig or ship used for the exploration or exploitation of natural resources, constitutes a permanent establishment only if it lasts more than twelve months.	3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.	3. The term "permanent establishment" likewise encompasses: (a) A building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than six months; (b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the country for a period or periods aggregating more than six months within any 12- month period.

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 the activities mentioned in subparagraphs a) to e).	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 sub-paragraphs 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	4. Notwithstanding the preceding provisions of this article, the term "permanent establishment" shall be deemed not to include: (a) The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise; (b) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display,; (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.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting on behalf of an enterprise and has and habitually exercises in a Contracting State an authority to conclude contracts in the name of the 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.	5. Notwithstanding the provisions of paragraphs 1 and 2, where a person--other than an agent of an independent status to whom paragraph 6 applies--is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the 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.	5. Notwithstanding the provisions of paragraphs 1 and 2, where a person---other than an agent of an independent status to whom paragraph 7 applies---is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person: (a) Has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or (b) Has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise
No provision on insurance companies.	No provision on insurance companies.	6. Notwithstanding the preceding provisions of this article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.

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.	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.	7. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.
7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.	7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.	8. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise) shall not of itself constitute either company a permanent establishment of the other.

As the foregoing makes clear, the U.S. and OECD Models are virtually identical; the U.N. Model is responsive to developing country concerns, such as the notion that a construction project of shorter duration should be treated as a permanent establishment.