

The BEPS future for the Permanent Establishment in Brazil

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ABSTRACT: The present article aims to analyze how the concept of the ‘permanent establishment’ was affected by the digital economy and how Brazilian reality deals with it. Initially, the institute is conceptualized considering the International Tax Law, with the challenges related to its requirements being presented when inserted in the scope of the digital economy. Subsequently, we present how the permanent establishment (PE) is addressed within the Brazilian legal system, either through decisions or legislation in this regard. Finally, Actions 01 and 07 of the BEPS (Base Erosion and Profit Shifting) Project are described in relation to the future of the permanent establishment, prospecting how such proposals will be received within the Brazilian legal system. This is eminently a bibliographic and documentary research, whose methodology comprises the reading of reports and studies prepared by the Organization for Economic Cooperation and Development (OECD), as well as the analysis of national and international doctrine in the scope of International Tax Law.

KEYWORDS: International Tax Law – Digital Economy – Permanent Establishment – BEPS Project – Brazil Legal System

I. Introduction

The digital economy brought the intangibility of business to a global tax order that is completely structured under the criteria of concrete and tangible presence to define tax jurisdiction and, consequently, determine which State will be the taxing entity of the commercial transaction.

Over the years, States and International Organizations have created guidelines based on studies, reports and, mainly, models of international treaties, with the aim of solving or minimizing such problems, respecting the fiscal sovereignty of each jurisdiction.

In this vein, the pioneering spirit of the Organization for Economic Cooperation and Development (OECD)¹ in debating and seeking solutions to such fiscal problems stands out. Since before the emergence of the Internet, the OECD was responsible for drafting the ‘Model Tax Convention on Income and on Capital’², an important guide used by States as a method to combat international double taxation.

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¹ ‘The Organization for Economic Co-operation and Development (OECD) is an international organization that works to build better policies for better lives. Our goal is to shape policies that foster prosperity, equality, opportunity, and well-being for all. We draw on 60 years of experience and insights to better prepare the world of tomorrow. Together with governments, policy makers and citizens, we work on establishing evidence-based international standards and finding solutions to a range of social, economic, and environmental challenges. From improving economic performance and creating jobs to fostering strong education and fighting international tax evasion, we provide a unique forum and knowledge hub for data and analysis, exchange of experiences, best-practice sharing, and advice on public policies and international standard-setting’. OCDE, “Together, we create better policies for better lives”, <https://www.oecd.org/about/> (visited 21 September 2022).

² OCDE (2017). “Model Tax Convention on Income and on Capital. Condensed Version (as it read on 21 November 2017)”, <https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm> (visited 9 June 2022).

Among the articles in this model, the wording of Article 5 stands out, which conceptualizes the 'permanent establishment', a relevant criterion whose function is to resolve conflicts of tax jurisdiction. As a subject of International Law, Brazil widely adopts the concept when it signs its international treaties, following the ideas of expanding the institute according to the positions of the OECD, which tries to modernize its guidelines to follow the current scenario in international tax policy.

Recently, in order to carry out upgrades in the international tax system, the OECD in partnership with the G20³ launched the BEPS Project (Base Erosion and Profit Shifting), which shook global tax structures with its promises of significant changes. Composed of 15 coordinated actions between the States, BEPS Actions 1 and 7 bring relevant proposals for modifying and revising the concept of Permanent Establishment, considering the intangibility of the digital economy.

II. The Permanent Establishment and the Digital Era

The Internet, which currently connects more than 3 billion users, was responsible for driving the digital revolution. In the words of Daniel Freire and Almeida, *'the Internet revolution has changed, and continues to change, the ways in which we organize the world, how we give it meaning, how we interact, and how we look at for ourselves and for others.'*⁴

In 2014, the OECD stated in a report that the digital economy raised fundamental questions about how companies add value and earn profits, linking the concepts of source and residence for purposes of calculating income tax in intangible transactions that make it difficult to determine which jurisdiction is responsible for the effective creation of value.⁵

This conflict of competence between origin and residence translates into the tax collection dispute between developed countries and less developed countries, which is also wide open in the elaboration of treaty models against international double taxation.⁶ This is the case of the OECD and UN⁷ Model Conventions, launched with the aim of better coordinating actions in the face of such global fiscal problems.

Despite such conventions having a common objective and being used as reference for the subjects of International Law in their deals, they reflect the dispute between source and

³ 'The G20 is a strategic multilateral platform connecting the world's major developed and emerging economies. The G20 holds a strategic role in securing future global economic growth and prosperity. Together, the G20 members represent more than 80 percent of world GDP, 75 percent of international trade and 60 percent of the world population' (G20, "About the G20", <https://g20.org/about-the-g20/#about> (visited 23 September 2022)).

⁴ Daniel Freire e Almeida, *A Tributação do Comércio Eletrônico nos Estados Unidos da América e na União Europeia*, 1st ed. (São Paulo: Almedina, 2015) 276.

⁵ Matheus Bertholo Piconez, *Os princípios da tributação no Estado da fonte e no Estado da residência e os impactos da economia digital no Brasil e no mundo*. In: Renato Vilela Faria; Ricardo Maitto Silveira; Alexandre Luiz Moraes do Rêgo Monteiro (coord.), *Tributação da Economia Digital: desafios no Brasil, experiência internacional e novas perspectivas*, (São Paulo: Saraiva Jur, 2018) 123.

⁶ Rodrigo Maitto Silveira. *Tributação Internacional em Tempos de Economia Digitalizada: Entre a Decisão de Como Alocar o Direito de Tributar (Fonte x Residência) e a Realidade Brasileira*. In: Luís Eduardo Schoueri; Luís Flávio Neto; Rodrigo Maitto da Silveira (coord.), *Anais – VIII Congresso Brasileiro de Direito Tributário Internacional: Novos Paradigmas da Tributação Internacional e a Covid-19*, (São Paulo: IBDT, 2020) 403.

⁷ 'The United Nations is an international organization founded in 1945. Currently made up of 193 Member States, the UN and its work are guided by the purposes and principles contained in its founding Charter. The UN has evolved over the years to keep pace with a rapidly changing world'. UN, "About Us", <https://www.un.org/en/about-us> (visited 14 February 2023).

residence, each favoring countries that import or export income depending on the taxation criterion adopted.

Historically, since the first works produced on double taxation, there has been a predominance of adoption of the theory of taxation by the State of residence, which prevails in the OECD Model Convention. This option is protected by political justification, since ‘priority taxation on residence meets the interest of countries that traditionally export capital’⁸, which represent the vast composition of the OECD. And to balance these relationships, the concept of permanent establishment (PE) seen in Article 5 of the OECD Model Convention was created, with the purpose of ‘*preserving* the right to tax in the source country, but not in the country where the consumer market is located’⁹.

Thus, the OECD Model Convention allows that, as a rule, the State of residence is responsible for the taxpayer's taxation. However, the source State will be allowed to carry out the tax collection if there is a permanent establishment in its territory, thus characterizing its tax exercise power. This attribution of competence is based on the Theory of Economic Allegiance, ‘according to which it is necessary to identify a relationship of belonging or integration of the wealth produced with the economy of a country’¹⁰.

However, with the advent of the digital economy, this clash between taxation by the State of residence (defended by developed countries) and taxation by the State of source (defended by developing countries) gained a new outline.

This is because the permanent establishment requirements were defined before the advent of the digital economy, quite related to the need to a physical location. However, the intangibility of e-commerce has relativized the requirement of a tangible link since there is often no concrete place to establish the PE of the taxpayer. Checking the full text of the OECD Model Convention, paragraphs 1 to 4.1 of article 5 provide:

ARTICLE 5 PERMANENT ESTABLISHMENT

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. 3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months. 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; f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), 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. 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

⁸ Carlos Otávio Ferreira Almeida, *Concorrência Internacional e Tributação de Renda no Brasil*, (PhD Thesis on Faculdade de Direito da Universidade de São Paulo - USP, 2012) 20-21.

⁹ See Rodrigo Maito Silveira above, at 405.

¹⁰ Wagner Patriota Lima Silva, “*A Economia Digital e a Aplicabilidade dos Elementos de Conexão de Renda na Tributação Direta Internacional*”, *Boletim de Economia e Política Internacional* (BEPI) 28 (2020) at 108.

place or at another place in the same Contracting State and 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 (OCDE, 2017, p.31-32).

From the concept above, it can be concluded that there are three central requirements that characterize a 'permanent establishment': (i) physical presence, the place through which the activity is carried out (physical presence test or place of business test); (ii) a direct connection between the organization existing abroad and the activity carried out by the company in the country of residence; and (iii) the regular economic connection, that is, its maintenance with a certain degree of permanence¹¹.

In this way, it is clear that the current concept of permanent establishment may not fit into situations of e-commerce's in which there are no physical locations related to the virtual store 'of the foreign company in the territory of the country where its consumer market is located'¹². There is a problem with the link between the source/residence connection elements that authorize income taxation¹³.

To regulate such situations, the OECD presented projects regarding the expansion of the concept of permanent establishment to justify the taxation of income by the source country and respond to the changing nature of customer relations in the digital economy¹⁴. Of particular note are Action Plans 1 and 7 of the BEPS Project, whose aim is to create a concept of 'meaningful digital presence', also known as 'taxable digital presence', preventing permanent establishment status from being artificially avoided¹⁵.

Meanwhile, in Brazil, it is interesting to note how the country behaves domestically in adopting the concept of permanent establishment. The institute, which already has plausible reasons for being widely modified, is little discussed in Brazilian legislation, appearing timidly in specific situations.

¹¹ Daniel de Paiva Gomes; Eduardo de Paiva Gomes; Gisele Barra Bossa, *Tributação Direta dos Rendimentos Provenientes da Computação na Nuvem: Estabelecimento Permanente*. In: PISCITELLI, Tathiane; BOSSA, Gisele Barra (coord.), *Tributação da Nuvem: conceitos tecnológicos, desafios internos e internacionais*, 2nd ed. (São Paulo: Thomson Reuters – Revista dos Tribunais, 2020) Kindle 2005-29 and Ana Barros; José Carlos Lopes, *O Conceito de Estabelecimento Estável e a Dupla Tributação Internacional*, XIV Encuentro AECA (2010) 07.

¹² Michell Przepiorka, et al, *Tributação Direta dos Rendimentos Provenientes da Computação Na Nuvem: Alguns Pressupostos*. In: PISCITELLI, Tathiane; BOSSA, Gisele Barra (coord.), *Tributação da Nuvem: conceitos tecnológicos, desafios internos e internacionais*, 2nd ed. (São Paulo: Thomson Reuters – Revista dos Tribunais, 2020) Kindle 1792-1802.

¹³ Antonio José Ferreira Levenhagen, "Economia Digital, Reforma do Sistema Tributário Internacional e Impactos sobre os Países em Desenvolvimento" (LL.M. Thesis on Universidade Católica de Minas Gerais, Belo Horizonte, 2020), 64-65.

¹⁴ OCDE, *Addressing the Tax Challenges of the Digital Economy – Action 1: 2014 Deliverable*, <http://dx.doi.org/10.1787/9789264218789-en> (visited 28 June 2022) at 146.

¹⁵ GOMES, Daniel de Paiva; GOMES, Eduardo de Paiva; CANEN, Dóris. Medidas Unilaterais Adotadas Internacionalmente e Outras Propostas de Endereçamento do Problema no Âmbito da Tributação Direta da Renda. In: PISCITELLI, Tathiane; BOSSA, Gisele Barra (coord.), *Tributação da Nuvem: conceitos tecnológicos, desafios internos e internacionais*, 2nd ed. (São Paulo: Thomson Reuters – Revista dos Tribunais, 2020) Kindle 4247-61.

III. The Brazilian PE

It is important to mention how Brazil, as a subject of International Law, has behaved in the face of international cooperation in tax matters, especially after the advent of the digital economy. In terms of its own regulations on the exchange of information, there is no specific legislation in the Brazilian regulatory framework on the viability of actions regarding international fiscal solidarity¹⁶.

However, the Federal Constitution itself ensures cooperation between States for the progress of humanity among the fundamental principles and guarantees contained in the wording of its article 5¹⁷. This provision, together with article 98 of the National Tax Code, which states that *'international treaties and conventions revoke or modify domestic tax legislation and will be observed by whatever comes after them'*¹⁸ end up guiding the attitudes of the Brazilian State in its international relations, highlighting the possibility of exchanging tax information with other jurisdictions.

Considered a *'key partner'*¹⁹ of the OECD since 2007, the country made a formal request to join the group in 2017. However, it was only in 2022 that the OECD itself opened discussions on Brazil's entry into the organization. In this sense, the country has followed numerous values and priorities imposed by the organization to formally join the group.

In fact, Brazil is on the list of countries that are part of the Inclusive Framework²⁰ for the implementation of the BEPS Project, a team composed of members of the OECD and/or G20²¹. In a specific consultation, it is possible to extract that Brazil signed and agreed, in October 2021, with the two-pillar²² plan to face the fiscal challenges arising from the digitization of the economy, actively participating in actions 5, 6, 13 and 14 of the BEPS Project, which make up the *'minimum standard'* of the plan.

However, if at the international level the concept of permanent establishment is widely adopted in the treaties signed by Brazil, on the other hand, very little is said or discussed about the institute in the domestic legal system of the country, due to the application of other rules

¹⁶ Nádia Rubia Biscaia; Rosaldo Trevisan, *A Assistência Internacional Mútua em Matéria Tributária e o Brasil: Aportes Teóricos*. 39 Revista Direito Tributário Atual (2018) 350.

¹⁷ BRASIL, *Constituição da República Federativa do Brasil de 1988* (Brasília, DF: Senado Federal, 1988), https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm (visited 26 October 2022).

¹⁸ BRASIL, *Código Tributário Nacional (Lei nº 5.172/1966)*, http://www.planalto.gov.br/ccivil_03/leis/15172compilado.htm (visited 10 June 2022).

¹⁹ *'As a Key Partner, Brazil has had access to Partnerships in OECD Bodies, adherence to OECD instruments, integration into OECD statistical reporting and information systems, sector-specific peer reviews, and has been invited to all OECD meetings at Ministerial level since 1999. Brazil has contributed to the work of OECD Committees and has participated on an equal footing with OECD Members in a number of significant bodies and projects.'* OECD, "The OECD and Latin America & the Caribbean", <https://www.oecd.org/latin-america/countries/brazil/> (visited 14 February 2023).

²⁰ *'In the same year, the OECD established the OECD/G20 Inclusive Framework on BEPS, bringing together interested and committed countries and jurisdictions on an equal footing in the Tax Affairs Committee and all its subsidiary bodies. Signed in June 2016 in Kyoto, Japan, the Inclusive Framework has more than one hundred and thirty-five members, who monitor and peer-review the implementation of minimum BEPS standards'* (OECD, 2020a, p.03 and OECD, 2021a, p.04).

²¹ OECD, *Base Erosion and Profit Shifting Project*, <https://www.oecd.org/tax/BEPS/> (visited 28 May 2022).

²² OCDE, *Countries making substantial progress towards implementation of the two-pillar international tax reform*, <https://www.oecd.org/tax/beps/countries-making-substantial-progress-towards-implementation-of-the-two-pillar-international-tax-reform.htm> (visited 9 October 2022).

that make taxation possible at the source even if the PE is not characterized (such as, for example, that established in Normative Instruction RFB n° 1662/2016, which amended RFB n° 1.455/2014)²³.

In practice, the institute ends up being left in the lurch, this because analytical taxation, notoriously, the withholding tax, is much more practical than identifying a permanent establishment, executing the attribution of profits and expenses and, finally, carrying out the assessment, without enforceability guarantees, since it is not known whether that particular enterprises will have enough assets in the country to allow the enforcement of the tax debt²⁴.

Thus, except for the international treaties signed by the country, Brazilian legislation does not conclusively define the concept of permanent establishment (QUEIROGA, 2019, p.11). However, it is possible to notice its existence in rare devices and judgments.

For example, the Law n. 12,350 of 2010, enacted in preparation for the 2013 Confederations Cup and the 2014 World Cup, brought the following wording in Article 7 § 4:

Art. 7, § 4 For the purposes of this Law, the temporary business base in the Country, installed by the legal entities referred to in § 2, with the specific purpose of serving the organization and realization of the Events, does not constitute a permanent establishment for the purposes of application of the legislation Brazilian and is not subject to the provisions of items II and III of art. 147 of Decree no. 3000, of March 26, 1999, as well as in art. 126 of Law no. 5.172, of October 25, 1966²⁵.

This legal device marked the first time that the term Permanent Establishment was used in Brazilian legislation. Subsequently, the institute was also addressed in Normative Instruction RFB No. 1681 of 2016²⁶. The purpose of the regulation is to establish the CbC regulatory rules, in order to comply with the requirements of Action 13 of the BEPS Project²⁷. Although the definition of PE in the Regulations does not bring any doctrinal innovation, it served as a milestone in the alignment of internal regulations with international standards²⁸.

In this regard, it is important to mention that the Administrative Board of Tax Appeals ('CARF') recognized the existence of a PE, when the Administrative Proceeding n. 10980.729160/2012-43, Judgment no. 2202-003.114 ('Faurecia Case')²⁹, a case that analyzed the incidence of Withholding Income Tax on remittances made abroad as remuneration for the provision of technical services performed in Brazil. The decision stated in its summary that:

BRAZIL-FRANCE TREATY TO AVOID DOUBLE TAXATION. EXISTENCE OF PERMANENT ESTABLISHMENT. TAXATION AT SOURCE. Characteristics of a permanent establishment are the

²³ Michell Przepioraka, *Brazilian Permanent Establishment (Estabelecimento Permanente A Brasileira)*, 02 Revista Direito Tributário Internacional Atual (2017), 143.

²⁴ Ibid, at 160.

²⁵ Câmara dos Deputados, *Lei 12.350 de 20 de dezembro de 2010*, <https://www2.camara.leg.br/legin/fed/lei/2010/lei-12350-20-dezembro-2010-609723-publicacaooriginal-131031-pl.html> (visited 15 February 2023).

²⁶ Carolina Queiroga Nogueira, "*O Estabelecimento Permanente e a Economia Digital*" (Final Paper on Thesis Universidade Federal de Pernambuco – UFPE, 2019), 14.

²⁷ 'Under BEPS Action 13, all large multinational enterprises (MNEs) are required to prepare a country-by-country (CbC) report with aggregate data on the global allocation of income, profit, taxes paid and economic activity among tax jurisdictions in which it operates. This CbC report is shared with tax administrations in these jurisdictions, for use in high level transfer pricing and BEPS risk assessments.' OCDE, *Action 13 Country-by-Country Reporting*, <https://www.oecd.org/tax/beps/beps-actions/action13/> (visited 11 August 2022).

²⁸ See Carolina Queiroga Nogueira above, at 15.

²⁹ Ibid, at 143.

existence of a material facility, of a permanent nature, which is available to the company, which must carry out its activity in or through this facility. In the existence of a permanent establishment, profits can be taxed at source³⁰.

By describing Article 5 of the Model Conventions of the OECD and the UN, the judgment made an analysis of the internal legal situation applying the international dictates to the case³¹.

In this way, it is clear that the BEPS has influenced the national jurisprudence, with an expectation that the Brazilian Federal Revenue ('RFB') will begin to use the concept of PE more frequently³².

In summary, there are rare mentions of the concept of PE within Brazilian legislation. The issue has not yet been addressed from the perspective of the digital economy. However, considering that the Brazilian government, so far, has expressed interest in joining the OECD, actively participating in the BEPS Project Action Plans, we can expect that an adjustment will be required in the conduct of applying some institutes of international tax law in the legal system inside the country³³.

IV. The BEPS Future for the PE

Composed of fifteen structured actions³⁴, the BEPS Project seeks to harmonize the tax system at an international level, justifying its ideas based on the dynamics of the current economy itself, seeking ensure *'that profits are taxed where economic activities generating the profits are performed and where value is created'*³⁵.

Focused on addressing the tax challenges arising from the digital economy, Action 1 of the BEPS Project recognizes the emergence of new business models arising from e-commerce that make it difficult to apply existing nexus rules to distribute tax rights on generated income by cross-border activities, which affects the effectiveness of profit allocation between developed and developing countries. In addition, the scope of the action plan admits that new technologies have facilitated tax evasion by transferring profits from multinational enterprises (MNEs) to low or no tax jurisdictions³⁶.

Among the situations suggested in Action Plan 1, *'the possibility of a company having a significant digital presence in the economy of another country without suffering taxation, due to the lack of bond (connection) by international rules'*³⁷. Thus, with the configuration of the *'significant digital presence'*, it will be possible to assess the existence of a permanent establishment in fully dematerialized digital activities, provided that the substantial interaction of the company with the economy of the market country is indicated³⁸.

³⁰ João Francisco Bianco, Análise de Caso de Tributação de Estabelecimento Permanente, 85 Revista Fórum de Direito Tributário – RFDT, Belo Horizonte, (2017) at 63.

³¹ Ibid, at 65.

³² See Michell Przepiorka (2017) above at 143.

³³ See Michell Przepiorka (2017) above at 143.

³⁴ OCDE, *BEPS Actions*, <https://www.oecd.org/tax/beps/beps-actions/> (visited 8 August 2022).

³⁵ See OCDE (2014) above at 03.

³⁶ OCDE, *Action 1 Tax Challenges Arising from Digitalisation*, <https://www.oecd.org/tax/beps/beps-actions/action1/> (visited 8 August 2022).

³⁷ See Wagner Patriota Lima Silva (2018) above at 101.

³⁸ See OCDE (2014) above at 144.

To measure this significant digital presence, a test related to the 'permanent establishment' would be adopted, with the objective of verifying the necessary connection³⁹, either through the collection of data from users and consumers, or through the imposition of a withholding tax on these digital transactions. For these reasons, the solution to create a 'significant digital presence' will also require prior studies to attest its viability, which led the OECD to classify it as one of the *'options that require additional development by the Task Force'*⁴⁰.

On the other hand, running parallel to Action 1, to prevent the status of permanent establishment from being artificially avoided, Action Plan 7⁴¹ of the BEPS Project intends, in short, to *'update the definition of PE to prevent abuses, that is, prevent the PE status from being artificially avoided in terms of tax base erosion and profit transfer'*⁴².

In addition to the concern with changing the wording of the Model Convention, Action 7 of the BEPS Project pays attention to the extension of the currently existing hypotheses for excluding the configuration of a *'permanent establishment'*⁴³.

Therefore, the proposed Action also raises an interpretative revisitation of the concept of *'permanent establishment'*, trying to modify the exhaustiveness of the list of fixed locations that can be considered in this way, and not directly its definition. Such action focused on *'limiting the scope of exceptions, which, in practical terms, means expanding the general rule'*⁴⁴.

Making the 'permanent establishment' rule more comprehensive leads to a greater degree of subjectivity in the application of the rule by the tax authorities, facilitating its characterization. This proposal, therefore, fulfills the aspiration of the BEPS Project to avoid the loss of the tax base, helping the States in the mission of not losing the chance to tax the growing virtual monetary flows, avoiding tax evasion *'through the artificial use of a permanent establishment'*⁴⁵.

The intentions to modify the definition of *'permanent establishment'* and the creation of a *'significant digital presence'* represent just some of the Action Plans that make up the BEPS Project. And both the proposal to revise the concept of *'permanent establishment'* and the creation of a *'significant digital presence'* reveal the need to modify the Model Conventions currently in force, as it will be necessary to do more than make comments to implement such concepts.

The concern of the subjects of International Law in applying existing rules in global taxation, such as the concept of *'permanent establishment'*, to transactions carried out in the context of the digital economy is flagrant. The dematerialization of electronic commerce induces States and International Organizations to study the need to review concepts already established

³⁹ See Rodrigo Maito Silveira above, at 403-04.

⁴⁰ See OCDE (2014) above at 153.

⁴¹ *'The work carried under BEPS Action 7 provides changes to the definition of permanent establishment in the OECD Model Tax Convention to address strategies used to avoid having a taxable presence in a jurisdiction under tax treaties'* OCDE, "Action 7 Permanent establishment status", <https://www.oecd.org/tax/beps/beps-actions/action7/> (visited 11 August 2022).

⁴² Luís Eduardo Schoueri, *O Projeto BEPS: Ainda uma Estratégia Militar*. In: Gomes, Marcus Lívio; Schoueri, Luís Eduardo (coord.), *A Tributação Internacional na Era Pós-BEPS: Soluções Globais e Peculiaridades de Países em Desenvolvimento* (Rio de Janeiro: Lumen Juris, 2016) 43.

⁴³ Felipe Kertesz Renault, *Competência Tributária Internacional e Economia Digital*, (Rio de Janeiro: Lumen Juris Direito, 2020) 84.

⁴⁴ See Daniel de Paiva Gomes; Eduardo de Paiva Gomes; Gisele Barra Bossa (2020) above at Kindle 2192-2208.

⁴⁵ See Felipe Kertesz Renault (2020) above, at 84.

worldwide so that tax incidence patterns can reach this new technological reality of the virtual universe.

V. Conclusions

It is undeniable that the digital economy has exposed existing weaknesses in the international tax system, in particular on the division of tax competence between source States and residence States, highlighting an intrinsic political discussion added to tax collection between developed and developing countries.

Even though tax incidence rules favor states of residence, withholding taxation remains the best alternative for Brazil as a country that imports capital and is a major consumer of utilities provided by online providers.

By using criteria that allow taxation at source even if there is no PE in its territory, we realize that the change in the definition of the institute will not cause major consequences for the Brazilian legal system, since the country's tax policy allows the taxation of remittances abroad and the profit obtained by Brazilian companies in other jurisdictions.

It is noticeable that, although Brazil largely adopts in its treaty negotiation policy the OECD concept rule of PE, on the other hand, the country does not apply the institute domestically.

In any case, as a developing country negotiating a chair within the OECD, it is speculated that Brazil will promote more importance to PE within Brazilian tax law, even more so at a time when international organizations are turning to its restructuring. However, our internal tax system is known to be complex, and the introduction of a new concept can lead to internal confusion about its practical application.

There is, therefore, a long path of modification and restructuring of the Brazilian tax system to be traversed, a discussion that is not new before the Brazilian Tax Administration. However, with its (future and probable) entry into the OECD and the positive effects that international cooperation in tax matters can have on the internal order, it is possible to state that Brazil will face new scenarios in the relationship between States as a subject of International Law and as a nation before the link between the tax authorities and their taxpayers.

From the analysis of the Action Plans exposed above, it is legitimate to say that the demands and measures brought by the BEPS Project require internationally coordinated responses. The adoption of innovative measures for the digital economy already has strong support from countries and jurisdictions around the globe. Therefore, as these are recent provisions that will in fact still be implemented, it remains to wait for the necessary time to analyze the impacts and consequences that such planning will have on the future of global taxation in this digital age.