

**USE OF AND VARIANCE FROM THE UNITED NATIONS MODEL TAX
TREATY CLAUSES FOR TAX TREATIES CONCLUDED BY A GROUP OF
SOUTHERN AFRICAN DEVELOPMENT COMMUNITY COUNTRIES**

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ABSTRACT

Africa has been experiencing significant growth over the last few years, with many seeing Africa as the next investment destination. This increased growth in international trade and investment could broaden and deepen the tax base for African countries which could be a source of additional tax revenue.

In particular, the SADC comprises a group of African countries which has as one of their common goals the promotion of sustainable and equitable economic growth. One possible way of achieving this goal could be through the use of effective tax treaties, allowing for greater retention of taxing rights over income flows from FDI, which could go a long way in deepening and broadening the tax base for the SADC countries. This could assist the SADC countries in promoting the growth and development of their economies.

A greater retention of taxing rights over income by the SADC countries could be achieved through the use of the UN Model. This Model has primarily been designed to assist developing countries in retaining greater taxing rights over income in order to assist with their development and growth.

Therefore, this dissertation has primarily focused on the use of and variation from the UN Model treaty clauses by a group of SADC countries in order to determine the extent of the application of the provisions of the UN Model in the SADC countries' tax treaties.

This analysis has specifically considered the distributive rules of the UN Model dealing with the most common forms of income that are likely to arise from FDI, namely: business profits, income from immovable property, dividends, interest, royalties, capital gains, income from employment and pensions. The focus has been on whether the SADC countries have been able to retain greater taxing rights over these forms of income by making use of the provisions of the UN Model. However, at the same time, the analysis also considered the provisions of the OECD Model, as it recognised that the OECD Model is one of the most widely used Models for negotiating tax treaties amongst both developed and developing countries. By considering the provisions of the OECD Model in this dissertation, it has allowed for a useful and meaningful analysis of any variations from the UN Model.

The results of the analysis of 62 tax treaties concluded by a group of SADC countries suggest that the provisions of the UN Model are not widely adopted in the tax treaties concluded by the SADC countries, with the SADC countries appearing to favour the more restrictive rules of the OECD Model. Furthermore, the analysis has revealed that there are a number of variations to the provisions of not only the UN Model, but also the OECD Model, which tend to be inconsistent amongst the tax treaties concluded by the SADC countries.

Due to these inconsistencies and tendencies to deviate from the provisions of the UN Model and at times the OECD Model, it is recommended that further analysis be carried out in order to better understand these deviations and whether these deviations create uncertainty and a lack of transparent tax treaty policies amongst the SADC countries which could impact on the inflow of FDI.

It is further recommended that the SADC countries work together towards a common goal of achieving consistency and conformity amongst their tax treaties which could go a long way to promoting effective tax systems, reliable and transparent tax treaty policies. This should ultimately create confidence for foreign investors in the tax systems and governance structures of the SADC countries which may promote FDI.

ABBREVIATIONS AND GLOSSARY

DTA	Double Tax Agreement
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
IBFD	International Bureau of Fiscal Documentation
IPS	Independent Personal Services
MFN	Most-Favoured-Nation
MTA	Model Tax Agreement
OECD	Organisation of Economic Cooperation and Development
OECD MTC	OECD Model Tax Commentary
OECD Model (1963)	OECD Model Tax Convention on Income and Capital (1963)
OECD Model (1977)	OECD Model Tax Convention on Income and Capital (1977)
OECD Model (1992)	OECD Model Tax Convention on Income and Capital (1995)
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OECD Model (2008)	OECD Model Tax Convention on Income and Capital (2008)
OECD Model (2010)	OECD Model Tax Convention on Income and Capital (2010)
OEEC	Organisation for European Economic Co-Operation
PE	Permanent Establishment
SA	South Africa
SADC	Southern African Development Community
SADC MTA (2011)	SADC Model Tax Agreement (2011)
SAS	Scandinavian Airlines System
Tax treaties	Bilateral tax agreements or conventions or double tax agreements
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UN MTC	UN Model Tax Commentary
UN Model (1980)	UN Model Taxation Convention between Developed and

	Developing Countries (1980)
UN Model (2001)	UN Model Taxation Convention between Developed and Developing Countries (2001)
UN Model (2011)	UN Model Taxation Convention between Developed and Developing Countries (2011)

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1. INTRODUCTION

1.1. International tax

In the advent of the globalisation of international markets back in the 1980's, there has been a significant increase in cross-border trade and investment which carries the inherent risk of international juridical double taxation¹. Generally, international juridical double taxation arises when there are conflicts between the domestic laws of two countries which may stem from the following conflicts²:

(1) A source-source conflict

This conflict arises where two countries tax the same income or capital as both countries assert under their domestic laws that the income or capital has been derived from a source³ within their borders.

(2) A residence-residence conflict

This conflict arises where two countries tax the same income or capital as both countries assert under their domestic laws that the taxpayer is a resident⁴ of their country (i.e. dual residency).

(3) A source-resident conflict

This is probably the most common form of double taxation that arises from international transactions. This conflict arises where two countries tax the same income or capital as, under the domestic laws of the respective countries, the taxpayer is considered to be a resident of one country while the other country asserts that the income or capital has been derived from a source within its borders.

¹ "International juridical double taxation can be generally defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods" (OECD MTC, 2010:7 – para. 1).

² Holmes, 2007:22-24

³ The '**source principle**' is based on the concept that where income or capital is generated in a country, it will have been derived from a source within that country and should therefore be subject to tax in that country.

⁴ The '**residence principle**' is based on the concept that a resident of a country will be subject to tax on their worldwide income, irrespective of the source of the income.

In the absence of any relief provided by either country from taxation under their respective domestic laws, a taxpayer may be subject to being taxed twice on the same income or capital. This can severely impede cross-border trade and investment which could have a direct impact on FDI⁵.

In order to overcome international juridical double taxation, countries often enter into tax treaties which are primarily aimed at allocating taxing rights between two countries in order to eliminate or relieve international juridical double taxation. When negotiating tax treaties, countries often make use of the OECD and/or UN Models as the basis for drafting their tax treaties⁶.

These two models contain very similar rules for allocating taxing rights between two countries, but the main difference is that the UN Model is considered more desirable for negotiations between developing countries (capital importing countries) and developed countries while the OECD Model is considered more desirable for negotiations between developed countries (capital exporting countries). The reason for this is that the UN Model tends to allow for more taxing rights to be allocated to the source country with the principle behind the UN Model being that tax treaties should contribute towards the furtherance of the development of developing countries whereas the OECD Model tends to allocate more taxing rights to the country of residence.

This difference in these two models may be of particular importance to African countries that are experiencing increased growth from international trade and investment as the UN Model may prove a source of additional tax revenue for these African countries.

Therefore the purpose of this dissertation is to consider the impact of the UN Model on a selected group of African countries with the primary focus on whether these

⁵ It is noted in the OECD MTC (2010:7 – para. 1) that international juridical double taxation can have harmful effects on the exchange of goods and services and movements of capital, technology and persons which can impact on the development of economic relations between countries.

⁶ These two models are probably the most common Model Tax Conventions used by countries when negotiating tax treaties. Other Models include the US Model DTA, SADC DTA, Nordic Convention and CAPRICOM Agreement.

countries have made use of or deviated from the provisions of the UN Model in their tax treaties.

1.2. A brief overview of the history of the UN and OECD Models

The first model bilateral convention was drawn up in 1928 by the League of Nations which was subsequently followed by the Model Conventions of Mexico (1943) and London (1946). However, international double taxation was becoming an important issue post war due to increasing economic interdependence and co-operation of member countries of the OEEC. As a result, the OECD⁷ recognised the need for uniform principles, definitions, rules, methods and common interpretation and began in 1956 to establish a draft convention that would resolve the issue of double taxation and be appropriate for all member countries⁸. This resulted in the first OECD Model being published in 1963 which has subsequently been revised on 9 occasions⁹.

However, as the globalisation of economies increased, it was recognised that traditional tax conventions did not lend themselves to the conclusion of tax treaties between developed and developing countries. Traditional tax conventions were considered to favour capital-exporting countries mainly because the country of source often had to give up taxing rights over income and capital. This weakness in traditional tax conventions was identified by the Economic and Social Council of the UN which in 1968 set up an Ad Hoc Group of Experts (“Group of Experts”) tasked with exploring ways and means of facilitating the conclusion of tax treaties between developed and developing countries¹⁰.

The Group of Experts completed the formulation of guidelines for the negotiation of bilateral tax treaties between developed and developing countries from 1968 to 1977. From this the Group of Experts recognised the need for a model bilateral tax convention that could be used by developing and developed countries during bilateral tax treaty negotiations. They began drafting such a model tax bilateral convention in 1979 by using the OECD Model as their main reference point on the basis that the

⁷ The OECD is the successor of the OEEC.

⁸ OECD MTC, 2010:7-8 – para's 4, 5 & 6

⁹ The OECD Model was revised in 1977, 1992, 1996, 1998, 2000, 2003, 2005, 2008 and 2010.

¹⁰ UN MTC, 2001:vii – viii

OECD Model was being used not only by member countries but also developing countries. The draft model bilateral convention was adopted by the Group of Experts at the end of 1979 and was first published in 1980¹¹.

The basic principle behind the UN Model is that it represents a compromise between the source principle and residence principle by providing for greater allocation of taxing rights to the source country (i.e. developing countries)¹². Since 1980, the UN Model has been revised on two¹³ occasions mainly as a result of the increase in globalization of trade, investment and international tax policies¹⁴.

1.3. Definition of research problem, method and scope of study

It is widely recognised that Africa is considered to be the next investment destination with many investors seeing considerable potential for growth in Africa. The African economy has for the past few years been growing at a remarkable rate of 5% per year which is almost twice the global rate of 2.7%¹⁵.

In order to take advantage of this increased growth in international trade and investment, African countries need to improve the quality of their tax systems so as to broaden and deepen their tax bases¹⁶. The design and implementation of effective tax policies should promote good governance and ensure reliable and transparent tax policies¹⁷. All of this should attract additional FDI which could generate additional tax revenues for these African countries. Tax revenues play a vital role for developing countries as it raises revenue that may be used to finance services demanded by citizens, projects and the development of infrastructure which should help developing countries to overcome poverty¹⁸.

One way of broadening the tax base is through the use of effective tax treaties designed to encourage international trade and investment, but at the same time allow

¹¹ UN MTC, 2001:x

¹² UN MTC, 2001:xiii

¹³ The UN Model has been revised in 2001 and 2011.

¹⁴ UN MTC, 2001:xii

¹⁵ Gurria, A., 2012

¹⁶ "African Economic Outlook", 2012:19

¹⁷ "African Economic Outlook", 2012:19

¹⁸ "Developing the International Dialogue on Taxation", 2002

for sharing of taxing rights over income and capital flowing from international transactions.

This dissertation will focus on the tax treaty policies of a group of SADC¹⁹ countries to determine whether these countries have made use of or deviated from the UN Model tax treaty clauses in their tax treaties. The intention being too establish whether these countries are able to retain greater taxing rights over income and capital which may arise from FDI and ultimately be a source of increased revenue which could go a long way to achieving the goal of promoting development and growth for the SADC countries.

The reason that the UN Model has been selected for comparison to the tax treaties of the SADC countries is that the UN Model has been specifically designed to assist developing countries in tax treaty negotiations by allowing for greater taxing rights to be retained by developing countries over income and capital arising from transactions within their borders.

The SADC has been chosen for the purpose of this dissertation for the following reasons²⁰:

- The economic composition of the SADC countries varies widely from mining, agriculture, forestry and services which provide diversity and differentiation amongst the SADC countries allowing for a useful and meaningful analysis.
- All of the SADC countries are faced with economic challenges from unemployment, poverty and political challenges. The tax treaty policies of these countries can play an important role in alleviating these challenges.
- The SADC countries are expected to grow at above average growth rates in the next few years. The tax treaty policies of these countries could play an important role in attracting FDI and possibly increasing tax revenues.
- Tax revenues as a percentage of GDP vary widely across the SADC region with the lowest being 0.5% and the highest being 36% and therefore their tax treaties could be a source of increased tax revenues.

¹⁹ The SADC comprises of a group of African countries that has as their goal the promotion of sustainable and equitable economic growth and socio-economic development through efficient productive systems, deeper co-operation and integration, good governance and durable peace and security ("SADC Facts & Figures", n.d.).

²⁰ "SADC Facts & Figures", n.d.

Therefore, the following SADC member countries (hereinafter referred to as “the SADC countries”) shall be included in the analysis²¹:

- Botswana
- Congo
- Lesotho
- Malawi
- Mozambique
- Namibia
- Swaziland
- Tanzania
- Zambia
- Zimbabwe

In determining whether the SADC countries have made use of or deviated from the UN Model Treaty clauses, the following qualitative approach will be adopted²²:

- (1) Identifying all official tax treaties²³ concluded by the SADC countries;
- (2) Distinguishing between tax treaties concluded prior to 1980, between 1980 and 2001, between 2001 and 2011, and after 2011²⁴;
- (3) Identifying and selecting only those tax treaties concluded post 1980²⁵;
- (4) Distinguishing between tax treaties concluded with developed and non-developed countries²⁶;
- (5) Analysing specific provisions of the UN Model (2011) and identifying any amendments or revisions to these provisions since the UN Model was first introduced in 1980²⁷;

²¹ Angola has been excluded from the analysis on the basis that Angola has not concluded any tax treaties.

²² The analysis will also briefly consider the provisions of the newly issued SADC MTA to determine whether the SADC countries tax treaties may require amendment or revision so as conform to this new Model.

²³ All tax treaties will be considered for the purpose of this analysis, irrespective of whether they are in force or not.

²⁴ This distinction is important for the purposes of this analysis as the UN Model has been revised and amended on two occasions since it was first introduced in 1980, namely in 2001 and 2010.

²⁵ As this dissertation is concerned with the provisions of the UN Model, any tax treaties concluded prior to 1980 are of no relevance as the UN Model was first published in 1980 and therefore will not have been considered in the tax treaties concluded by SADC countries prior to 1980.

²⁶ This distinction is important as the UN Model has primarily been designed to assist developing countries in negotiating tax treaties with developed countries.

²⁷ It is important to identify any revisions or amendments to the provisions of the UN Model as some tax treaties would have been concluded on a previous version of the UN Model which may not have reflected any revisions or amendments.

- (6) Analysing specific provisions of the OECD Model (2010)²⁸ and identifying any amendments or revisions to these provisions between 1977 and 2010²⁹;
- (7) Comparing the provisions of the UN Model (2011) with those of the OECD Model (2010) to identify any differences between the two models³⁰; and
- (8) Analysing³¹ and comparing the provisions of the SADC countries tax treaties with those of the UN Model to determine whether the SADC countries have made use of or deviated from the provisions of the UN Model³².

This dissertation will primarily focus on the ‘distributive rules’ contained in the UN Model that deal with income and capital taxes. These ‘distributive rules’ can be broadly split into two categories, namely: active income and passive income³³. Active income refers to income derived from certain activities (e.g. business, employment etc.) while passive income refers mainly to income derived from capital investments (e.g. shares, loans etc.). The ‘distributive rules’ of the UN Model that will be considered for the purposes of this dissertation are:

- Article 6 – Income from immovable property
- Article 7 – Business profits
- Article 10 – Dividends
- Article 11 – Interest
- Article 12 – Royalties
- Article 13 – Capital gains
- Article 15 – Employment income
- Article 18 – Pensions and social security payments

²⁸ The OECD Model has been used as an alternative Model for comparison as it is well known that the OECD Model is widely used not only by members of the OECD, but also by non-OECD members. It will therefore provide for a useful and meaningful analysis of any deviations from the provisions of the UN Model.

²⁹ Any updates to the OECD Model prior to 1977 have not been considered in the analysis as only tax treaties concluded post 1980 will be considered. Any changes prior to 1977 are therefore not considered relevant for the purpose of this analysis.

³⁰ Identifying differences between these two models should allow for a useful and meaningful analysis of any deviations from the UN Model as well as any deviations from the OECD Model.

³¹ In carrying out the analysis, extensive use will be made of the OECD MTC (2010) since the UN Model, in many respects, reproduces the provisions of the OECD Model with some differences and makes extensive use of the commentaries of the OECD Model.

³² In carrying out this analysis, tax treaties concluded between 1980 and 2001 have been compared to the provisions of the UN Model (1980), tax treaties concluded between 2001 and 2011 have been compared to the provisions of the UN Model (2001) and tax treaties concluded after 2011 have been compared to the provisions of the UN Model (2011).

³³ Holmes, 2007:87-90

These particular ‘distributive rules’ have been selected for the purpose of this dissertation as they are probably considered the most common forms of income and capital that arise from international trade and investments.

In comparing the provisions of the SADC tax treaties with those of the UN Model, the following specific questions have been identified and will be addressed to some extent by this dissertation:

- Whether any deviations from the provisions of the UN Model are due to the SADC countries adopting the provisions of the OECD Model.
- Whether the SADC countries tax treaties are transparent and consistent to encourage FDI.
- Whether any of the SADC countries tax treaties may require amendment or revision in order to take into account changes in international tax policies and practices.
- Whether the SADC countries tax treaties are in line with the provisions of the newly issued SADC MTA.

This research has been carried out using the IBFD *Tax Treaty Database*.

1.4. Limitations

This dissertation will not consider the specific domestic tax legislation of the respective SADC countries as the analysis is mainly concerned with whether these countries have made use of or deviated from the provisions of the UN Model which is an international Model Tax Convention and therefore an international interpretative approach will be adopted³⁴.

The SADC countries have concluded a total of 103 tax treaties of which 41 have not been included in the analysis for the following reasons³⁵:

- 30 tax treaties were concluded prior to 1980;
- for 5 tax treaties an English text is not yet available;

³⁴ It is explained by Baker (2012:E-2) that it is accepted that double tax conventions are to be interpreted in accordance with the rules of public international law applicable to the interpretation of tax treaties, and not by application of the rules applicable to domestic legislation.

³⁵ See **Annexure A and C** for a detailed analysis.

- for 2 tax treaties the text is currently not available; and
- 4 tax treaties which have been concluded with SADC countries that are already included in the analysis.

Therefore, a total of 62 tax treaties will be analysed in this dissertation.

For the purpose of this dissertation, it is important to distinguish between tax treaties concluded prior to 1980, between 1980 and 2001, between 2001 and 2011, and after 2011³⁶. In order to make such a distinction inevitably carries some subjectivity as the process of negotiating a tax treaty can often be a time consuming and lengthy process which may take many years to finalise. Therefore, in order to simplify such a distinction, the conclusion date³⁷ of the tax treaties has been used to classify each of the tax treaties within the appropriate period³⁸. On this basis, there are 36 tax treaties which have been concluded between 1980 and 2001, 24 between 2001 and 2011, and 2 after 2011³⁹.

Of the 62 tax treaties included in the analysis, 52 are currently in force while 10⁴⁰ are not yet in force⁴¹. Furthermore, 12 (19%) have been concluded with countries in Asia, 21 (34%) with countries in Africa, 24 (39%⁴²) with countries in Europe and 5⁴³ (8%) with countries in North America⁴⁴.

For the purposes of this dissertation, it is also considered useful to make a distinction between developed and developing countries. However, to make such a distinction

³⁶ This distinction is very important as it will determine which version of the UN or OECD Model the SADC countries may have adopted or deviated from when negotiating their tax treaties.

³⁷ The conclusion date is generally the date on which the tax treaty is formally approved by the respective Governments of the relevant countries entering into the tax treaty.

³⁸ For example, on the basis of the conclusion date of a tax treaty, it has been assumed that where a tax treaty has been concluded in 2002, it will be classified as having been concluded in the period between 2001 and 2011 and will be compared with the provisions of the UN Model (2001). However, there is a limitation to using the conclusion date as the process of negotiating the tax treaty may have commenced some years before 2001 and therefore it may have been negotiated on the basis of the provisions of the UN Model (1980).

³⁹ See **Annexure A and D** for a detailed analysis.

⁴⁰ There is currently a tax treaty in force between Malawi-Norway which was concluded in 1961. However, there is a more recent tax treaty between Malawi-Norway which was concluded in 2009, but not yet in force. Accordingly, the tax treaty concluded prior to 1980 has been excluded from the analysis while the tax treaty concluded in 2009 has been included in the analysis.

⁴¹ See **Annexure A and C** for a detailed analysis.

⁴² This finding may be expected given that a number of the SADC countries were part of former colonies.

⁴³ All of these tax treaties have been concluded with Canada.

⁴⁴ See **Annexure A** for a detailed analysis.

inevitably carries with it some degree of subjectivity and accordingly, to simplify such a distinction, the countries included in this research have been classified as a developed country if they are a member of the OECD (hereinafter referred to as “developed countries”) while those countries that are not members of the OECD have been classified as developing countries (hereinafter referred to as “developing countries”)⁴⁵. On this basis, there are 23 (37%) tax treaties which have been concluded with developed countries and 39 (63%) with developing countries⁴⁶.

Finally, it is important to emphasize that, even though this dissertation examines in detail the various provisions of 62 tax treaties concluded by the SADC countries in comparison to the UN Model provisions, only the most relevant and interesting findings have been discussed in the body of this report⁴⁷.

1.5. Chapter outline

Chapter 2 considers activities carried on by an enterprise in another country and the taxation of the business profits attributable to these activities carried on by the enterprise in that other country. In particular, this chapter will consider the provisions of Article 7 of the UN Model dealing with business profits and the application of this Article in the tax treaties concluded by the SADC countries.

Another common form of income arising from activities carried on in a State are those arising from the provision of services, in particular income from employment. This is dealt with in Chapter 3 which considers the provisions of Article 15 and 18 of the UN Model dealing with income derived from current and past employment exercised in another country and the application of these Articles in the tax treaties concluded by the SADC countries.

Chapter 4 considers passive income and capital arising from investments in a country that do not relate directly to activities carried on in that country. This chapter will

⁴⁵ This approach is identical to that adopted by Wijnen, Goede & Alessi (2012:27) in distinguishing between developed and developing countries.

⁴⁶ See **Annexure B** for a detailed analysis.

⁴⁷ For a detailed analysis of all variations or deviations identified for each of the 62 tax treaties concluded by the SADC countries, see **Annexures F to M** of the accompanying booklet.

consider the provisions of Articles 6, 10, 11, 12 and 13 of the UN Model which are concerned with income from immovable property, dividends, interest, royalties and capital gains and the application of these Articles in the tax treaties concluded by the SADC countries

Chapter 5 concludes with a summary of the main findings and whether, on overall basis, the SADC countries have adopted or deviated from the provisions of the UN Model. This chapter will also consider any recommendations or areas that may require further research.

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2. BUSINESS PROFITS ARTICLE

2.1. Introduction

One of the most important and significant categories of income in any tax treaty is business profits⁴⁸. This category of income may be considered one of the largest portions of income derived from international activity⁴⁹ and is also probably one of the most widely discussed⁵⁰.

The general principle is that business profits should only be taxed in the source State to the extent that such profits are attributable to a PE⁵¹ situated in the source State. However, the UN Model extends this general principle by advocating a “restricted” force of attraction rule that may attribute business profits to a PE which are not directly related to the activities of the PE. This may be considered to be one of the most significant differences between the UN and OECD Models.

In this chapter, the provisions of Article 7 of the UN and OECD Models which deal with taxation and determination of business profits are analysed. The chapter later evaluates whether the SADC countries have made use of or deviated from the UN Model provisions of Article 7, in particular, whether the SADC countries have been able to adopt the limited force of attraction rule advocated by the UN Model.

2.2. Article 7 of the UN Model

Article 7 of the UN Model (2011) reads as follows⁵²:

“1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through

⁴⁸ Holmes, 2007:88

⁴⁹ It is explained by Vogel (1997:399 – para. 4) that “under all national tax systems as well as under tax treaty law, ‘business profits’ is the most important category of income. By far the largest portion of income derived from international economic activities falls under that category.”

⁵⁰ Holmes, 2007:88

⁵¹ The term “permanent establishment” generally means “a fixed place of business through which the business of an enterprise is wholly or partly carried on” (UN Model, 2011:9 – para. 1) The concept of a PE is most probably one of the most talked about tax treaty issues (Daurer & Krever, 2012:7, cited by van Raad), but what is of importance is the determination and attribution of profits to a PE situated in a source State as this will determine the amount of tax that the source State may claim.

⁵² UN Model, 2011:12-14

a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to

(a) that permanent establishment;

(b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or

(c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In **the determination of the profits of a permanent establishment**, there shall be allowed as deductions expenses which are incurred for the purposes **of the business** of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere. **However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or**

for management, or, except in the case of a banking enterprise by way of interest on moneys lent to the head office of the enterprise or any of its other offices.

4. *In so far as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this article.*

5. *For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.*

6. *Where profits include items of income which are dealt with separately in other articles of this Convention, then the provisions of those articles shall not be affected by the provisions of this article.”(Emphasis added)*⁵³

There have been no amendments to Article 7 of the UN Model since it was first introduced in 1980.

For the purpose of this analysis, each provision of Article 7 of the UN Model shall hereinafter be referred to as:

- Article 7(1) – Profits of a PE⁵⁴ and limited force of attraction⁵⁵
- Article 7(2) – Direct method⁵⁶
- Article 7(3) – Allowable expenditure⁵⁷ and prohibited expenditure⁵⁸
- Article 7(4) – Indirect method
- Article 7(5) – Consistency of approach

⁵³ An emphasis has been added to highlight the differences between the UN Model and OECD Models.

⁵⁴ This shall refer to paragraph 7(1)(a) of the UN Model.

⁵⁵ This shall refer to paragraphs 7(1)(b) and (c) of the UN Model.

⁵⁶ The decisive criterion for the direct method is the arm's length test (Vogel, 1997:425 – 57).

⁵⁷ This shall refer to the 1st sentence of paragraph 7(3) of the UN Model.

⁵⁸ This shall refer to the 2nd sentence of paragraph 7(3) of the UN Model

- Article 7(6) – Specific articles override

2.3. Article 7 of the OECD Model

The provisions of Article 7 of the OECD Model were completely revised in 2010 and are substantially different to those of the OECD Model (2008). While the changes to the OECD Model (2010) are important, the provisions of Article 7 of the UN Model more closely resemble those of the OECD Model (2008). Furthermore, the majority (97%)⁵⁹ of the treaties analysed in this dissertation have been concluded prior 2010⁶⁰. Therefore, for the purpose of this analysis, it would be more meaningful and useful to compare the provisions of Article 7 of the UN Model to those of Article 7 of the OECD Model (2008).

Accordingly, Article 7 of the OECD Model (2008)⁶¹ reads as follows⁶²:

“1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

⁵⁹ Refer to **Annexure A (Table 2)** for a detailed analysis.

⁶⁰ In addition, none of the tax treaties concluded post 2010 have adopted the revised provisions of the OECD Model (2010). Two of the tax treaties concluded post 2010 have entered in the OECD MTC (2010:441 – para.s 1.1 and 1.3) a reservation to use the previous version of Article 7 of the OECD Model (2008). See the tax treaties concluded between Botswana-China and Tanzania-India.

⁶¹ OECD Model, 2008:26-27

⁶² The provisions of Article 7 of the SADC MTA (2011) essentially follow those of the OECD Model (2008) except provision 7(3) includes the ‘**prohibited expenditure**’ provision contained in the UN Model (2011).

3. ***In determining*** the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.

4. Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

5. ***No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.***

6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.” **(Emphasis added)**⁶³

Since 1977 and prior to 2010, there have been no amendments to Article 7 of the OECD Model.

For the purpose of this analysis, provision 7(5) of the OECD Model shall hereinafter be referred to as “purchasing office”.

⁶³ An emphasis has been added to highlight the differences between the UN Model and OECD Models.

2.4. Comparison of Article 7 of the UN and OECD Models

Paragraph 7(1) of the UN Model essentially reproduces paragraph 7(1) of the OECD Model by providing that business profits shall be taxable only in the State of residence of the enterprise unless such business profits are attributable to a PE that the enterprise has in the source State. However, the UN Model extends the provision to allow the source State to tax business profits of an enterprise from the sale of goods or merchandise or business activities of a same or similar kind as those carried on by the enterprise through its PE situated in the source State⁶⁴.

Paragraph 7(2) of the UN Model reproduces paragraph 7(2) of the OECD Model by providing that business profits attributable to a PE shall be arm's length profits.

Paragraph 3 of the UN Model essentially reproduces paragraph 2 of the OECD Model by providing for the deduction of expenses incurred for the purpose of the PE. However, there are three drafting differences between the two Models, which are summarised as follows:

- the UN Model begins the paragraph with the words "*In the determination of*"⁶⁵ whereas the OECD Model uses the words "*In determining*".
- the UN Model refers to "*for the purposes **of the business** of the permanent establishment*" whereas the OECD Model only refers to "*for the purposes of the permanent establishment*"⁶⁶.
- the UN Model extends paragraph 7(3) to provide clarification as to which expenses shall not be allowed as a deduction by the PE⁶⁷.

⁶⁴ This extension of paragraph 1 of the UN Model is known as the '**limited force of attraction rule**' which was adopted by the UN Model as some developing countries had expressed support for such a rule, however, they would limit the application of this rule. Furthermore developing countries felt that such a rule would lessen the administrative burden of determining whether particular activities are part of a PE or whether the income from such activities are attributable to such activities. There are however mixed views as to whether such a limited force of attraction rule should be adopted with some developed countries having expressed that the force of attraction rule was found to be unsatisfactory and abandoned in recent treaties because of the undesirability of taxing income unrelated to a PE and the uncertainty that such an approach may create for taxpayers (UN MTC, 2011:142 – para. 6).

⁶⁵ This wording was previously used in the OECD Model (1963), but was amended in 1977 to include the current wording used in the OECD Model (2008)

⁶⁶ It explained by Vogel (1997:450 – para. 105) that Article 7 is generally concerned with the taxation of business profits of an enterprise and the inclusion of these words by the UN Model merely makes the rule more specific, but does not in substance change this rule.

⁶⁷ This additional provision was adopted by the UN Model as developing countries felt that it would useful to include all necessary definitions and clarifications in order to assist them in computing the business profits

Paragraph 7(4) of the UN Model reproduces paragraph 7(4) of the OECD Model by providing for an alternative basis of attributing profits to a PE when the direct method cannot be applied.

The UN Model does not contain a provision similar to that of paragraph 7(5) of the OECD Model which provides that no business profits shall be attributed to a PE that merely purchases goods or merchandise for the enterprise of which it is a PE⁶⁸.

Paragraph 7(5) of the UN Model reproduces paragraph 7(6) of the OECD Model by providing that the method of attributing business profits to a PE should be applied consistently from year to year.

Paragraph 7(6) of the UN Model reproduces paragraph 7(7) of the OECD Model by providing that provisions of Article 7 shall not apply to income which is dealt with separately under other articles of the Convention.

2.5. Comparison of the SADC countries tax treaties to Article 7 of the UN Model

2.5.1. Profits of a PE and limited force of attraction

The results of an analysis of 62 tax treaties suggest that a significant number (89%) of the SADC countries do not adopt the **‘limited force of attraction’** rule⁶⁹. This may suggest that the SADC countries are reluctant to adopt such a rule as it may create uncertainty, which is undesirable for potential investors⁷⁰ and could hamper normal commercial activities⁷¹ which could have a direct

attributable to a PE and that taxpayers were fully aware of their fiscal obligations (UN MTC, 2011:151 – para. 16)

⁶⁸ When drafting the UN Model (1980), the Group of Experts could not reach consensus on whether such a paragraph should be included in Article 7 of the UN Model and therefore felt it would best if it was settled in bilateral negotiations. However, there were mixed views between developing countries as to whether this provision should be omitted or not, with some developing countries believing that it should be included with some amendment while others felt it should be omitted completely. While there were mixed views between developing countries, developed countries generally felt that such a provision should be included (UN MTC, 2011:141 – para. 5).

⁶⁹ This finding would be consistent with the provision of the SADC MTA which does not contain a limited force of attraction rule.

⁷⁰ It is noted in the UN MTC (2011:142 – para. 6) that developed countries have found the **‘limited force of attraction’** rule to be unsatisfactory and stressed that such a rule may create uncertainty for taxpayers.

⁷¹ It is explained by Baker (2012:7-31) that the **‘limited force of attraction’** principle would “*interfere with existing business organisations and inflict onerous demands for information from foreign enterprises*”.

impact on FDI. Furthermore, these findings are consistent with international tax treaty practice which has rejected this rule⁷².

There are only 2⁷³ tax treaties which have adopted a **‘limited force of attraction’** rule identical to that of the UN Model. However, 1 of these tax treaties limits the application of this rule by providing that the rule shall not apply where the enterprise can demonstrate that the activities of the enterprise are not attributable to the PE that the enterprise may have in the source State⁷⁴.

1⁷⁵ tax treaty contains a provision similar to the **‘limited force of attraction’** provision of the UN Model, except that the provision refers to “any” other business activities carried on by the enterprise. Furthermore, the application thereof, appears to include past business activities carried on by the enterprise, as the provision refers to “*if the enterprise carries on **or has carried on** business*”.

There are 2⁷⁶ tax treaties which have provided that only the profits of other business activities that an enterprise carries on in the source State of the same or similar kind as those carried on by a PE of the enterprise may be attributed to the PE. However, both of these tax treaties have limited the application of the provision by providing that it shall not apply if the activities are unrelated to those of the PE.

⁷² It is explained in the OECD MTC (2010: 157 – para. 10) that while there have historically been different views on whether the general **“force of attraction rule”** should be included in tax treaties, it has been accepted in international treaty practice that only profits attributable to a PE should be taxed. The reason for this is it allows for simpler and more efficient tax administration and compliance, and is more closely related to how business is carried on internationally. To attempt to attribute the business activities or sale of goods or merchandise of an enterprise to a PE that it may carry on in a contracting State, could seriously hamper international business and would be contrary to the aims of the Convention.

It is also noted by Baker (2012:7-4) that the **‘limited force of attraction’** principle has now been rejected in international treaty practice. Modern day business is highly complex, as a number of companies may engage in a wide diversity of activities across many different countries. By not adopting the **‘limited force of attraction’** principle allows for simpler and more efficient tax administration and compliance and is more adapted to the way that modern business is carried on.

⁷³ See the tax treaties concluded between Zimbabwe-Norway and Zimbabwe-Sweden.

⁷⁴ See the tax treaty concluded between Zimbabwe-Sweden.

⁷⁵ See the tax treaty concluded between Zimbabwe-Canada.

⁷⁶ See the tax treaties concluded between Botswana-Barbados and Tanzania-Canada.

1⁷⁷ tax treaty has combined the ‘**limited force of attraction**’ provision into a single paragraph.

1⁷⁸ tax treaty provides that profits derived by an enterprise from the sale of goods or merchandise or services rendered of the same or similar kind as those carried on by a PE which the enterprise has in the source State may be attributed to that PE. However, the tax treaty has limited the application of this provision by providing that it shall not apply if the enterprise can prove that the sales or services are not attributable to the PE.

Of the tax treaties which contain a provision similar to the ‘**limited force of attraction**’ provision, 6 have been concluded with developed countries of which 3 have been concluded by Zimbabwe. It would therefore appear that Zimbabwe has more bargaining power than the other SADC countries when it comes to the inclusion of this rule in its tax treaties.

All 62 tax treaties include a ‘**profits of a PE**’ provision similar to the UN or OECD Models.

1⁷⁹ tax treaty expands the ‘**profits of a PE**’ provision to specifically include ‘*payments of any kind received as a consideration for the use of, or right to use, industrial, commercial or scientific equipment*’ as falling within the provisions of Article 7.

There are 3⁸⁰ tax treaties where the provision appears to include past activities that an enterprise has carried on in the source State through a PE situated in the source State.

⁷⁷ See the tax treaty concluded between Zambia-Canada.

⁷⁸ See the tax treaty concluded between Zambia-India.

⁷⁹ See the tax treaty concluded between Zimbabwe-Kuwait. The only purpose of this reference to ‘*the use of or right to use, industrial, commercial or scientific equipment*’ would be clarification as the OECD MTC (2010:223 – para. 9) makes it clear that such income shall be considered “business profits” for the purposes of Article 7.

⁸⁰ See the tax treaties concluded between Namibia-Canada, Zimbabwe-Canada and Zimbabwe-Kuwait.

2.5.2. Direct method

Of the 62 tax treaties analysed, 56 (90%) contain a **‘direct method’** provision similar to the UN Model.

There are 6 tax treaties which contain a variation of the **‘direct method’** provision. The most notable variations can be summarised as follows:

- 3⁸¹ tax treaties expand the provision to refer to dealing wholly independently “*with all other persons*”⁸².
- 3⁸³ tax treaties provide that the paragraph shall not be subject to the **‘allowable expenditure’** and **‘prohibited expenditure’** provisions⁸⁴.
- 1⁸⁵ tax treaty provides that where the profits of the PE cannot be determined or ascertained in exceptional circumstances, a reasonable estimate of the profits of the PE can be made.

2.5.3. Allowable expenditure and prohibited expenditure

Of the 62 tax treaties analysed, 26 (42%)⁸⁶ contain a **‘prohibited expenditure’** provision similar to the UN Model. Of these tax treaties, only 7⁸⁷ have been concluded with developed countries.

Of the tax treaties which contain a provision similar to the **‘limited force of attraction’** rule, 3⁸⁸ did not contain a **‘prohibited expenditure’** provision.

⁸¹ See the tax treaties concluded between Namibia-Canada, Tanzania-Canada and Zimbabwe-Canada.

⁸² This reference to *‘all other persons’* would appear to be merely a clarification which in substance does not change the general principle of Article 7(2) which is based on the arm’s length profits.

⁸³ See the tax treaties concluded between Zambia-Canada, Zambia-India and Zimbabwe-UK.

⁸⁴ This variation should not in substance have any impact on the interpretation of Article 7(2) as the **‘allowable expenditure’** and **‘prohibited expenditure’** provisions merely supplement and clarify the general principle laid down in Article 7(2) concerning arm’s length profits (Vogel, 1997:442 – para. 91 & OECD MTC, 2010:162 – para 27).

⁸⁵ See the tax treaty concluded between Zambia-India.

⁸⁶ This finding would not be consistent with the SADC MTA (2011) which also proposes a **‘prohibited expenditure’** provision identical to the UN Model.

⁸⁷ See the tax treaties concluded between Botswana-Sweden, Botswana-UK, Congo-Belgium, Namibia-Canada, Namibia-Sweden, Zimbabwe-Norway and Zimbabwe-Sweden.

⁸⁸ See the tax treaties concluded between Tanzania-Canada, Zambia-Canada and Zambia-India

There are 4 tax treaties which contain a variation of the ‘**prohibited expenditure**’ provision. The most notable variations are summarised as follows:

- 2⁸⁹ tax treaties have omitted the wording “*fees or other similar payments in return for the use of patents or other rights*”.
- 2⁹⁰ tax treaties specifically include other similar payments in return for the use of ‘*know-how*’, ‘*or other charges*’.

These findings would suggest that the SADC countries generally do not adopt the ‘**prohibited expenditure**’ provision even though the inclusion thereof stems from proposals⁹¹ by developing countries noting that this provision required more clarification⁹².

Of the 62 tax treaties analysed, all contained an ‘**allowable expenditure**’ provision similar to that of the UN or OECD Model. The most notable variations are summarised as follows:

- 2⁹³ tax treaties specifically refer to executive and general administrative expenses incurred for the purposes of the enterprise **as a whole**⁹⁴.
- 1⁹⁵ tax treaty provides that expenditure incurred elsewhere may only be deducted under certain conditions.
- 8⁹⁶ tax treaties provide that the deduction of expenditure shall be subject to the domestic laws of the State in which the PE is situated⁹⁷.

⁸⁹ See the tax treaties concluded between Botswana-France and Namibia-Mauritius. However, in the Namibia-Mauritius tax treaty, only the term “*other similar payments in return for the use of patents*” has been omitted from the second sentence of the ‘**prohibited expenditure**’ provision.

⁹⁰ See the tax treaties concluded between Mozambique-India and Tanzania-India.

⁹¹ UN MTC, 2011:151 – para. 16

⁹² It is explained by Vogel (1997:451 – para. 105) that the inclusion of the ‘**prohibited expenditure**’ provision may, on individual questions, result in a different result than that of the OECD Model. Therefore, perhaps the SADC countries felt that this provision is merely a clarification of the ‘arm’s length’ principle and that the OECD MTC provides sufficient clarity as to the application of this provision. As, the SADC countries may have felt that it was not necessary to include such a clarification in their tax treaties.

⁹³ See the tax treaties concluded between Lesotho-UK and Zimbabwe-UK.

⁹⁴ This would appear to be no more than a clarification as the arm’s length principle would still apply to ensure that only arm’s length profits are attributed to the PE.

⁹⁵ See the tax treaty concluded between Congo-Zimbabwe.

⁹⁶ Of these tax treaties, 4 had been concluded with India. It is noted that India has entered a position on the OECD MTC (2010:444 – para. 7) to include a provision to this effect in its tax treaties.

⁹⁷ It is noted in the OECD MTC (2010:163 – para. 30) that paragraph 3 merely determines which expenses are to be attributed to a PE and whether such expenses are deductible is a matter to be determined by domestic law. Therefore, the reference to the domestic laws of the State in which the PE is situated would be no more than a

- 1⁹⁸ tax treaty provides that the paragraph shall apply regardless of any limitation provided by the internal laws of the State in which the PE is situated.

2.5.4. Indirect method

Of the 62 tax treaties analysed, 40 (65%) contain an ‘**indirect method**’ provision similar to the UN Model.

There are 4 tax treaties which contain a variation of the ‘**indirect method**’ provision. The most notable variations are summarised as follows:

- 1⁹⁹ tax treaty provides that in the absence of adequate accounts or other proof making it impossible to determine the profits of the PE, the profits attributable to the PE may be determined in accordance with the domestic laws of the State in which the PE is situated by taking into account the normal profits of similar enterprises carrying on similar activities under similar conditions in that State.
- 1¹⁰⁰ tax treaty provides that the paragraph may only apply in exceptional circumstances when application of the ‘**direct method**’¹⁰¹ is impossible.
- 2¹⁰² tax treaties provide that if information available to the State in which the PE is situated is inadequate, nothing shall preclude it from determining the profits attributable to the PE in terms of its domestic laws in accordance with the principles of Article 7.

clarification of the principle laid down in the OECD MTC. It is further noted in the UN MTC (2011:153 – para 18) that some States may wish to clarify that only those expenses which are deductible under their domestic laws shall be permitted as deductions.

It is also explained by Vogel (1997, 459 – para 111) that the reference to domestic laws of the State in which the PE is situated is merely a clarificatory one, since the business profits of the PE would have been determined based on the domestic laws of the State where the PE is situated even if not expressly stipulated.

⁹⁸ See the tax treaty concluded between Mozambique-UAE. This would appear to depart from the general principle laid down in the OECD MTC (2010:163 – para. 30) that the business profits of the PE shall be determined in accordance with the domestic laws of the State in which the PE is situated.

⁹⁹ See the tax treaty concluded between Congo-Belgium.

¹⁰⁰ See the tax treaty concluded between Namibia-Germany.

¹⁰¹ It is explained by Vogel (1997: 444 – para 96) that the indirect method can place an unduly heavy burden on enterprises operating at a multi-State level and it can be difficult, if not impossible, to determine an adequate basis of apportioning the overall profits amongst the various part of the enterprise.

¹⁰² See the tax treaties concluded between Namibia-Malaysia and Zimbabwe-Malaysia. One may need to consider that it may be the bargaining power of the other State that has resulted in such an outcome rather than any particular policy of the African State.

There are 18¹⁰³ tax treaties which did not include an ‘**apportionment of total profits**’ provision¹⁰⁴. Of these tax treaties, 10 have been concluded with developed countries.

2.5.5. Consistency of approach

Of the 62 tax treaties analysed, 61 (98%) contain a ‘**consistency of approach**’ provision similar to the UN Model.

1¹⁰⁵ tax treaty does not contain a ‘**consistency approach**’ provision.

2.5.6. Specific articles override

Of the 62 tax treaties analysed, 58 (94%) contain a ‘**specific articles override**’ provision similar to the UN.

There are 3¹⁰⁶ tax treaties which expand the provision to exclude capital gains dealt with separately under specific Articles of the tax treaty.

1¹⁰⁷ tax treaty does not contain the ‘**specific articles override**’ provision, but defines the term “business profits”¹⁰⁸.

¹⁰³ Of these tax treaties, 10 had been concluded by Botswana and 3 by Namibia.

¹⁰⁴ It is noted in the OECD MTC (2010:168 – para. 52) that contracting States may delete paragraph 4 where neither State uses such a method. The exclusion of this provision does not necessarily preclude an alternative basis of attributing profits to a PE provided it is within the ‘arm’s length rule’ (Vogel, 1997:460 – para 115). However, the exclusion of this provision can create problems when an alternative basis is not compatible with the arm’s length rule (See *North West Life Assurance Company of Canada v Commissioner of Inland Revenue* and Baker, 2012:7-37).

¹⁰⁵ See the tax treaty concluded between Lesotho-UK. It is noted in the OECD MTC (2010:170 – para. 58) that the purpose of this paragraph is to ensure continuous and consistent tax treatment. However, the exclusion of this provision does not necessarily allow a contracting State to adopt another method of allocating business profits to a PE situated in that State as any arbitrary change in the method of allocation could violate the prohibition, under international law, of abuse of rights (Vogel, 1997:469 - para. 2).

¹⁰⁶ See the tax treaties concluded between Botswana-UK, Lesotho-UK and Zimbabwe-Kuwait.

¹⁰⁷ For an example of this provision, see the tax treaty concluded between Zambia-India.

¹⁰⁸ It is noted in the OECD MTC (2010:170 – para 63) that contracting States may agree during bilateral treaty negotiations on a definition of business profits with the view of clarifying the term business profits.

2.5.7. Purchasing office

Of the 62 tax treaties analysed, 59 (95%)¹⁰⁹ contain a **‘purchasing office’** provision identical to the OECD Model. These findings could suggest that the SADC countries are reluctant to exclude this provision as it could create uncertainty for potential investors and possibly discourage FDI.

1¹¹⁰ tax treaty provides that no profits shall be attributed to a PE in respect of the mere purchase of goods or merchandise by the PE for purpose of export to the enterprise of which it is a PE.

There are 2¹¹¹ tax treaties which did not contain the **‘purchasing office’** provision. However, both include the **‘limited force of attraction’** rule.

2.5.8. Additional provisions not included in the UN or OECD Models

1¹¹² tax treaty provides that:

- No profits shall be attributed to a building site, construction, assembly or installation project except those profits which are as a result of the activities themselves;
- Income derived from design, planning, engineering, research or from technical services shall not be attributed to a PE; and
- Any payments made in consideration of any services of a managerial, technical or consulting nature shall be regarded as business profits.

There are 2¹¹³ tax treaties which provide that if information available to the State in which the PE is situated is inadequate, nothing shall preclude that State from determining the profits attributable to the PE by applying its domestic laws in accordance with the principles of Article 7.

¹⁰⁹ This finding would be consistent with the SADC MTA (2011) which also proposes a ‘purchasing office’ provision identical to the UN Model.

¹¹⁰ See the tax treaty concluded between Zambia-India.

¹¹¹ See the tax treaties concluded between Zimbabwe-Norway and Zimbabwe-Sweden.

¹¹² See the tax treaty concluded between Namibia-France.

¹¹³ See the tax treaties concluded between Zimbabwe-Kuwait and Zimbabwe-Malaysia. It is noted that Malaysia has entered a position on the OECD MTC (2010:443 – para. 2) to include a provision to this effect in its tax treaties.

2.5.9. Conclusion

The SADC countries do not appear to adopt the **'limited force of attraction'** rule advocated by the UN Model and prefer to follow the provisions of the OECD Model. These findings would appear to be consistent with international tax treaty practice where it has been accepted that such a rule is undesirable and creates uncertainty for investors.

However, of the 8 SADC tax treaties which include a **'limited force of attraction'** rule or a variation thereof, 6 have been concluded with developed countries, predominately concluded with Canada. Therefore, while the application of the rule is limited, the UN Model has assisted (to some extent) the SADC countries in negotiating the inclusion of this rule in their tax treaties concluded with developed countries which is the primary aim of the UN Model.

The SADC countries have, however, been slightly more successful in negotiating the inclusion of the **'prohibited expenditure'** provision in their tax treaties, but the majority of the tax treaties still exclude this provision. Furthermore, of the tax treaties which include this provision, only 7 have been concluded with developed countries which suggest that the SADC countries have not been very successful in negotiating the inclusion of this provision in their tax treaties concluded with developed countries.

Furthermore, almost all of the tax treaties concluded by the SADC countries include the **'purchasing office'** provision recommended by the OECD Model.

Therefore, the findings of the analysis would suggest that the application of Article 7 of the UN Model is very limited and to a large extent non-existent in the tax treaties concluded by the SADC countries.

3. EMPLOYMENT AND PENSION ARTICLES

3.1. Introduction

The most common type of income from the exertion of personal services may be income from employment¹¹⁴. This category of income may be of particular importance to the SADC countries because as their economies grow and develop so should the deployment of foreign employees increase within the SADC region as foreign enterprise begin to set-up business operations or carry on operating activities within the SADC countries borders.

The key rule contained in the UN and OECD models regarding income from employment is that the exercise of employment must create a nexus between the employee and the source State which is not merely of a temporary nature.

In addition, directly linked to the exercise of employment in the source State is the taxation of pensions arising from past employment exercised in the source State. The taxation of pensions is probably one of the most contentious issues in international taxation¹¹⁵ which is mostly likely due to the fact that the taxation of pensions under domestic law tends to vary across countries and can at times be very complicated. Due to these differences and complications, one could expect a number of deviations in the SADC countries tax treaties when compared to the generic provisions of the UN and OECD Models.

Both the UN and OECD Models contain similar provisions with respect to pensions except that the UN Model allows for the taxation of social security payments in the source State.

In this chapter, the provisions of Article 15 and 18 of the UN and OECD Models which address income from employment and pensions arising from past employment exercised in a source State are analysed. The chapter later evaluates whether the SADC countries have made use of or deviated from the UN Model provisions of

¹¹⁴ Holmes, 2007:309

¹¹⁵ Holmes, 2007:340

Article 15 and 18, in particular, whether the SADC countries have been able to adopt the more favourable provisions of Article 18 of the UN Model.

3.2. UN Model provisions - employment and pensions

3.2.1. Article 15 – Dependent personal services

Article 15 of the UN Model (2011) reads as follows¹¹⁶:

“1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

(a) The recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; and

(b) The remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and

*(c) The remuneration is not borne by a permanent establishment **or a fixed base** which the employer has in the other State.*

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.”(Emphasis added)¹¹⁷

¹¹⁶ UN Model, 2011:21-22

¹¹⁷ An emphasis has been added to highlight the differences between the UN and OECD Models.

There has been 1 amendment to Article 15 of the UN Model since it was first introduced in 1980, when sub-paragraph 2(a) was amended in 2001 to include the following additional wording “*in any twelve month period commencing or ending*” before the words “*in the fiscal year concerned*”¹¹⁸.

For the purpose of this analysis, each provision of Article 15 of the UN Model shall hereinafter be referred to as:

- Article 15(1) – exercise of employment
- Article 15(2) – days of physical presence¹¹⁹, residency of employer¹²⁰ and PE or fixed base¹²¹
- Article 15(3) – employment exercised aboard a ship, aircraft or boat

3.2.2. Article 18 – Pensions and social security payments

Article 18 of the UN Model (2011) reads as follows¹²²:

Article 18 (alternative A)

*“1. Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.”*¹²³

¹¹⁸ This amendment was introduced as the previous version of the provision created opportunities for tax avoidance when the fiscal years of the contracting States did not coincide with one another. Prior to this amendment, sub-paragraph 2(a) of Article 15 of the UN Model (1980:8) read as follows:

“2(a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned”

¹¹⁹ This shall refer to paragraph 15(2)(a) of the UN Model.

¹²⁰ This shall refer to paragraph 15(2)(b) of the UN Model.

¹²¹ This shall refer to paragraph 15(2)(c) of the UN Model.

¹²² UN Model, 2011:23

¹²³ Paragraph 18(1) of the SADC MTA (2011) differs to the UN and OECD Model provision as it provides for non-exclusive taxing rights to the source State and does not refer to ‘past employment’. The provision reads as follows:

“Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration, and annuities, arising in a Contracting State and paid to a resident of the other Contracting State, may be taxed in the first-mentioned State.”

In addition the SADC MTA (2011) defines the term ‘annuity’ as follows:

“The term “annuity” means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money’s worth.”

2. Notwithstanding the provisions of paragraph 1, pensions paid and other payments made under a public scheme which is part of the social security system of a Contracting State or a political subdivision or a local authority thereof shall be taxable only in that State.”¹²⁴

Article 18 (alternative B)

“1. Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment may be taxed in that State.

2. However, such pensions and other similar remuneration may also be taxed in the other Contracting State if the payment is made by a resident of that other State or a permanent establishment situated therein.

3. Notwithstanding the provisions of paragraphs 1 and 2, pensions paid and other payments made under a public scheme which is part of the social security system of a Contracting State or a political subdivision or a local authority thereof shall be taxable only in that State.” (Emphasis added)¹²⁵

There have been no amendments to either alternative under Article 18 of the UN Model since it was first introduced in 1980.

For the purpose of this analysis, each provision of Article 18A of the UN Model shall hereinafter be referred to as:

- Article 18 A(1) – past employment
- Article 18 A(2) – social security payments

For the purpose of this analysis, alternative B of the UN Model has not been named as none of the SADC countries had adopted this alternative in their tax treaties.

¹²⁴ The SADC MTA (2011) contains an identical ‘social security payments’ provision as the UN Model (2011).

¹²⁵ An emphasis has been added to highlight the differences between the UN and OECD Model.

3.3. OECD Model provisions – employment and pensions

3.3.1. Article 15 – Income from employment

Article 15 of the OECD Model (2010)¹²⁶ reads as follows¹²⁷:

“1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

- a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and*
- b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and¹²⁸*
- c) the remuneration is not borne by a permanent establishment which the employer has in the other State.*

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft

¹²⁶ OECD Model, 2010:31

¹²⁷ The provisions of Article 15 of the SADC MTA (2011) essentially follow those of the OECD Model (2010) except that paragraph 3 of the SADC MTA (2011) reads as follows:

“3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship, aircraft or rail or road transport vehicle operated in international traffic by an enterprise of a Contracting State may be taxed in that State”

¹²⁸ It is noted in the OECD MTC (2011:253 – para. 6) that some member countries may consider that it is inappropriate to extend the exception of paragraph 2 to cases where the employer is not a resident of the State of residence of the employee, as there might then be administrative difficulties in determining the employment income of the employee or in enforcing withholding obligations on the employer. Contracting States that share this view are therefore free to adopt bilaterally the following alternative wording:

“b) the remuneration is paid by, or on behalf of, an employer who is a resident of the first-mentioned State, and”

operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.”

Since 1977, the following amendments have been made to Article 15 of the OECD Model:

- sub-paragraph 2(a) was amended in 1992 to include the words “*in any twelve month period commencing or ending*” before the words “*in the fiscal year concerned*”. Prior to this amendment sub-paragraph 2(a) read exactly as the UN Model (1980).
- sub-paragraph 2(c) was amended in 2000 to exclude the term “*or a fixed base*”. Prior to this amendment sub-paragraph (c) read exactly as the UN Model.¹²⁹
- the heading to Article 15 was amended in 2000 to refer to “*Income from employment*”. Prior to this amendment, the heading to Article 15 read as “*Dependent personal services*”¹³⁰.

3.3.2. Article 18 – Pensions

Article 18 of the OECD Model (2010) reads as follows¹³¹:

“Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.”

There have been no amendments to Article 18 of the OECD Model since 1977.

¹²⁹ This amendment was introduced as a result of the elimination of Article 14 of the OECD Model dealing with independent personal services.

¹³⁰ It is explained by Honiball & Olivier (2011:415) that “*this change was not intended to affect the scope of the article in any way, but is rather intended to utilise a term which is more commonly used to describe the relevant activities*”.

¹³¹ OECD Model, 2010:32

3.4. A comparison of the provisions of the UN and OECD Models

3.4.1. Article 15 - Dependent personal services

The heading to Article 15 of the UN Model refers to “*Dependent Personal Services*” whereas the OECD Model refers to “*Income from Employment*”¹³².

Paragraph 1 of Article 15 of the UN Model reproduces the provision of Article 15(1) of the OECD Model by providing that the State of residence shall have primary taxing rights unless the employment is exercised in the source State.

Paragraph 2 of Article 15 of the UN Model essentially reproduces the provision of Article 15(2) of the OECD Model by providing under which circumstances the source State may tax income from employment exercised in the source State. However, Article 15(2)(c) of the UN Model includes the term “*or a fixed base*” whereas this has been omitted from the OECD Model¹³³.

Paragraph 3 of Article 15 of the UN Model reproduces the provision of Article 15(3) of the OECD Model by providing that remuneration derived from employment exercised aboard a ship, aircraft or boat shall be taxable in the State of which the place of effective management of the enterprise is situated.

3.4.2. Article 18 - Pensions and social security payments

The heading to Article 18 of the UN Model refers to “*Pensions and social security payments*” whereas the OECD Model refers only to “*Pensions*”.

Article 18A(1) of the UN Model reproduces the provision of the OECD Model by providing exclusive taxing rights to the State of residence in respect of pensions and other similar remuneration derived in respect of past employment.

¹³² Prior to 2000, the heading to the OECD Model was identical to that of the UN Model.

¹³³ Prior to 2000, the OECD Model did make reference to a fixed base in sub-paragraph (c).

Article 18A(2) of the UN Model is not included in Article 18 of the OECD Model and provides exclusive taxing rights to the source State in respect of pensions paid and other payments made under a public scheme which is part of the social security system of the source State¹³⁴. However, while the OECD Model does not include a ‘**social security payments**’ provision, it does propose that States are free to include a provision along the following lines in their bilateral tax treaties¹³⁵:

"Notwithstanding the provisions of paragraph 1, pensions and other payments made under the social security legislation of a Contracting State may be taxed in that State"

A further difference is that the UN Model provides an alternative Article, 18B, which essentially provides for non-exclusive taxing rights to the source State in respect of pensions and other similar remuneration¹³⁶.

3.5. Comparison of SADC countries tax treaties to Article 15 of the UN Model

3.5.1. Exercise of employment

All 62 tax treaties analysed contain an ‘**exercise of employment**’ provision similar to either the UN Model or OECD Model.

Of the 24 tax treaties concluded post 2001, 13 (54%) use the heading “*Dependent personal services*”. Of these tax treaties, only 1¹³⁷ has been concluded with a developed country. This finding could suggest that the provisions of the UN Model were considered by the SADC countries when negotiating these tax treaties.

¹³⁴ This additional provision was included in the UN Model (UN MTC, 2011:274 – para 7) as part of Article 18A on the basis that payments of this nature are in large part financed out of the tax revenues of the source State and as a result it was felt the Source State should have exclusive taxing rights in such situations.

¹³⁵ OECD MTC, 2010:282-283

¹³⁶ This alternative option was included in the UN Model (UN MTC, 2011:274-275) as several countries considered that the State of residence should not have exclusive taxing rights over pensions and other similar remuneration on the basis that such payments are in substance deferred compensation for services performed in the source State.

¹³⁷ See the tax treaty concluded between Botswana-UK.

There are 27 tax treaties which provide that the provisions of paragraph 1 of Article 15 is subject to the provisions of other specific Articles contained in the tax treaties besides those Articles which consider directors' fees, pensions and government services. The majority of these other specific Articles deal mainly with Professors, teachers and research scholars, and Students and business apprentices that render services in the source State.

3.5.2. Days of physical presence

Of the 62 tax treaties analysed, 31 contain a '**days of physical presence**' provision similar to either the UN Model or OECD Model. Of these tax treaties, 15 still contain the former wording of the UN Model (1980). The use of this former wording could lead to inappropriate results which were not intended by the UN Model as it may give rise to tax avoidance when the fiscal years do not coincide with one another¹³⁸.

There are 31 tax treaties which contain a variation of the UN and OECD Model provision. The most notable variations are summarised as follows:

- 15¹³⁹ tax treaties have replaced the wording "*in any 12 month period commencing or ending in the fiscal year concerned*" with the wording "*within any period of 12 months*".

Of these tax treaties, 13 have been concluded prior to 2001 and 3 post 2001. Of the tax treaties concluded prior to 2001, all have adopted the wording "*within any 12 month period*". This finding could suggest that the SADC countries have made use of the OECD Model provisions, as the OECD Model was amended in 1992 to refer to "*in any 12 month period*"

¹³⁸ It is explained by Vogel (1997:897 – para.s 23a & b) that there was nothing in the former wording to suggest that it would result in a limitation of the application of Article 15(2). The current wording is merely a legal improvement to the former wording. However, it should not be overlooked that the time limits may also lead to considerable practical difficulties.

It is also noted by Vogel (1997:897 – para. 23b) that Germany would not follow the change in the former wording. The tax treaty between Namibia and Germany, which was concluded in 1993, still makes use of the former wording.

¹³⁹ In the tax treaty concluded between Botswana-Barbados, only the wording "*commencing or ending in the fiscal year concerned*" has been omitted.

commencing or ending in the fiscal year concerned” and therefore the SADC countries may have simply omitted the last part of this sentence. The reason for excluding these words are most likely due to the fact that the fiscal years of States do not coincide within one another and in order to avoid any confusion and possible opportunities for tax avoidance, the SADC countries may have agreed to omit this wording when negotiating their tax treaties¹⁴⁰.

- 12 tax treaties have replaced the words *“fiscal year”* with either *“year of assessment”*, *“calendar year”*, *“tax year”*, *“and relevant tax year”* or *“year of income”*.

Only 1¹⁴¹ tax treaty has adopted a period of stay less than 183 days.

3.5.3. Residency of employer

Of the 62 tax treaties analysed, 59 contain a **‘residency of employer’** provision similar to either the UN or OECD Model.

There are 2¹⁴² tax treaties which expand the provision to exclude enterprises whose activities consist of the hiring out of labour.

1¹⁴³ tax treaty has adopted the alternative wording proposed by the OECD Model¹⁴⁴.

¹⁴⁰ It is noted in the OECD MTC (2010:251 - 252 – para. 4) that paragraph 15(2)(a) was amended in 1992 as the previous version of the provision had created difficulties where the fiscal years of contracting States did not coincide with one another which provided opportunities for tax avoidance.

¹⁴¹ See the tax treaty concluded between Mozambique-SA where the period of stay was 180 days. It is noted in the OECD MTC (2010:455 – para. 5) that only India has reserved the right to determine the period of stay in paragraph 15(2)(a). However, none of the tax treaties concluded with India in this sample have used a period of stay different to 183 days.

¹⁴² See the tax treaties concluded between Malawi-Norway and Zimbabwe-Norway. It is noted that Norway has entered in the OECD MTC (2010:268 – para. 16) a reservation to include an express reference to income earned by hired-out personnel working in the source State. Germany has also entered a similar reservation, but none of the tax treaties concluded with Germany have referred to the hiring out of personnel.

¹⁴³ See the tax treaty concluded between Malawi-Norway.

¹⁴⁴ For an example of this provision, refer to point 3.3.1 above.

3.5.4. PE or fixed base

Of the 62 tax treaties analysed, 61 contain a “**PE or fixed base**” provision similar to either the UN or OECD Model.

1¹⁴⁵ tax treaty which has been concluded prior to 2000 has omitted the reference to a *‘fixed base’*.¹⁴⁶

Of the tax treaties which contain a ‘**PE or fixed base**’ provision similar to the UN Model, 13¹⁴⁷ had been concluded post 2001. All of these tax treaties contain an Article dealing with independent personal services.

3.5.5. Employment exercised aboard a ship, aircraft or boat

Of the 62 tax treaties analysed, only 5 contain an ‘**employment exercised aboard a ship, aircraft or boat**’ provision similar to the UN Model.

There are 55 (89%) tax treaties which contain a variation of the UN Model provision. The most notable variations are summarised as follows:

- 53 (85%) tax treaties omitted the words “*or aboard a boat engaged inland waterways transport*”.
- 14 (23%) tax treaties provide for employment exercised aboard a road or rail transport vehicle¹⁴⁸.
- 28¹⁴⁹ (45%) tax treaties allocate taxing rights to the State of the enterprise operating the ships, boats or aircraft¹⁵⁰. Of these tax treaties, 25 allow for non-exclusive taxing rights while 3¹⁵¹ allow for exclusive taxing rights.

¹⁴⁵ See the tax treaty concluded between Namibia-Malaysia. The tax treaty still contains an Article dealing with independent personal services.

¹⁴⁶ This finding is interesting as paragraph 15(2)(c) of the OECD Model was only amended in 2000 to exclude the term “fixed base” as a result of the deletion of Article 14 which dealt with independent personal services.

¹⁴⁷ Only 1 of these tax treaties have been concluded with a developed country.

¹⁴⁸ This finding would be consistent with the provision proposed by the SADC MTA (2011).

¹⁴⁹ For an example of such a provision, see the tax treaty concluded between Botswana-Sweden. Of these tax treaties, 25 merely refer to the contracting State of the enterprise, 2 refer to the contracting State of which the enterprise is resident (see the tax treaties concluded between Botswana-UK and Lesotho-UK) and 1 refers to a resident of a contracting State (see the tax treaty concluded between Botswana-Barbados).

¹⁵⁰ It is noted in the OECD MTC (2010:262 – para. 9) that contracting States are free to agree in bilateral treaty negotiations to confer the right to tax such remuneration in the contracting State of the enterprise operating such ships, aircrafts or boats. The reason for this is that some contracting States may be concerned that the place of

- 1¹⁵² tax treaty provides that remuneration derived by a resident of a State from employment exercised aboard a ship or aircraft shall be taxable only in the State of residence of the recipient of the income.

There are 2¹⁵³ tax treaties which contain a provision significantly different to that of the UN or OECD Model provision where taxing rights have been allocated to the State of residence of the recipient of the remuneration.

3.5.6. Additional provisions not included in the UN or OECD Models

There are 4¹⁵⁴ tax treaties that contain a provision dealing with remuneration derived in respect of an employment exercised aboard an aircraft operated in international traffic by the air transport consortium SAS.

3.5.7. Conclusion

The findings of the analysis would suggest that the SADC countries generally apply the provisions of Article 15 of the UN Model. Where divergences from the UN Model are noted, these tend to be consistent with the provisions of the OECD Model¹⁵⁵.

However, the SADC countries appear to deviate, to some extent, from the **‘employment exercised aboard a ship, aircraft or boat’** provision in that

effective management may be situated in a different contracting State of the enterprise and would prefer allocating exclusive taxing rights to the contracting State of which the enterprise is resident (OECD MTC, 2010:174 – para. 2).

¹⁵¹ Of these tax treaties, 2 have been concluded with Canada. In the tax treaty concluded between Namibia-Canada, the remuneration shall be taxable only in the contracting State of the enterprise unless such remuneration is derived by a resident of the other contracting State.

¹⁵² See the tax treaty concluded between Zimbabwe-France.

¹⁵³ See the tax treaties concluded between Mozambique-UAE and Zimbabwe-Serbia & Montenegro. The provision contained in the Zimbabwe-Serbia & Montenegro tax treaty is consistent with the position that Serbia has entered on the OECD MTC (2010:455 – para. 4) regarding employment exercised in connection with a building site, construction or installation project.

¹⁵⁴ See the tax treaties concluded between Botswana-Sweden, Namibia-Sweden, Zimbabwe-Sweden and Zimbabwe-Norway. Both Sweden and Norway have entered in the OECD MTC (2010:268 – para. 15) a reservation to include an additional provision regarding employment exercised aboard an aircraft operated in international traffic by the air transport consortium Scandinavian Airlines Systems (SAS). However, the tax treaty concluded between Malawi-Norway did not include such a provision.

¹⁵⁵ This finding would generally be consistent with the provisions of the SADC MTA (2011) which proposes provisions identical to that of the OECD Model.

they prefer not to tax such remuneration in the State in which the PE of the enterprise is situated, but generally prefer to tax the remuneration in the State of residence of the enterprise.

3.6. Comparison of the SADC countries tax treaties to Article 18 of the UN Model

3.6.1. Past employment

Of the 62 tax treaties analysed, only 26 (42%) have adopted a **‘past employment’** provision similar to Alternative A of the UN Model. Of these tax treaties, only 10 include a **‘social security payments’** provision similar to that of the UN Model or the provision proposed by the OECD Model.

There are 20¹⁵⁶ tax treaties which allow for non-exclusive¹⁵⁷ taxing rights¹⁵⁸ to the source State of which 6¹⁵⁹ have been concluded with developed countries¹⁶⁰. However, none of these tax treaties have adopted a provision similar to paragraph 18B(2) of the UN Model.

There are 7¹⁶¹ tax treaties which allow for exclusive taxing rights¹⁶² to the source State of which 2¹⁶³ had been concluded with developed countries¹⁶⁴.

¹⁵⁶ The tax treaty concluded between Namibia-Sweden allows for exclusive taxing rights to Namibia in those cases where any pension has been financed through deductions from taxable income derived in Namibia.

¹⁵⁷ The tax treaty concluded between the Botswana-Namibia has used the words “***shall be taxed*** in the first mentioned contracting State”. It is noted by Honiball & Olivier (2011:282) that the use of the words “*shall be taxed*” should be interpreted in their context. It was decided in the Chong v COT 2000 FCA 635, where the tax treaty had used the words “*shall be taxable in that State*”, that although the use of the word “shall” generally indicates that the pension may be taxed only in that State, the context in which it is used may also suggest that the pension is taxable in the other State (Honiball & Olivier, 2011:282).

¹⁵⁸ Of these tax treaties, 5 have been concluded with SA, where SA has entered a position on the OECD MTC (2003:333 – para. 1) to allow for non-exclusive taxing rights to the source State.

¹⁵⁹ Of these tax treaties, 3 have been concluded with Sweden, prior to 2005, when Sweden had entered in the OECD MTC (2003:218 – para. 41) a reservation to tax pensions from a source within Sweden in respect of past services mainly rendered in Sweden. However, in all 3 of these tax treaties, the provision made no reference to past employment exercised in the other State and simply applied in respect of pensions and other similar remuneration arising in a contracting State and paid to a resident of the other State.

¹⁶⁰ This finding would be consistent with the SADC MTA (2011) which provides for non-exclusive taxing rights to the source State.

¹⁶¹ For an example of such a provision, see the tax treaty concluded between Zimbabwe-Germany.

¹⁶² 1 of these tax treaties have been concluded with Russia where Russia had entered a position on the OECD MTC (2003:333 – para. 3) to allow for exclusive taxing rights in the source State.

¹⁶³ See the tax treaties concluded between Zimbabwe-Germany and Zimbabwe-UK.

¹⁶⁴ These tax treaties utilised either the wording “*shall be taxable only*” or “*may be taxed only*”. The use of the word “**only**” would deprive the other State of taxing rights (Vogel, 1997:359 – para. 5).

There are 6¹⁶⁵ tax treaties allowing pensions and other similar remuneration to be taxed in the source State to the extent that such income is not subject to tax in the recipient's State of residence¹⁶⁶. Of these tax treaties, 2 have been concluded with developed countries.

There are 3¹⁶⁷ tax treaties which allow for non-exclusive taxing rights to the source State, except such taxing rights shall be limited¹⁶⁸ in respect of periodic pension payments.

These findings would appear to suggest that the SADC countries are reluctant to give up taxing rights in respect of pensions and other similar remuneration. It may further suggest that there are differences in the general tax policy of SADC countries and other States with respect to retirement savings¹⁶⁹.

There are 7¹⁷⁰ (11%) tax treaties which do not distinguish between pensions from government and non-government employment. This would result in a uniform treatment of pensions from government and non-government employment.

¹⁶⁵ For an example of such a provision, see the tax treaty concluded between Namibia-Canada.

¹⁶⁶ For example, two of the tax treaties have been concluded with SA prior to 2000 when SA had adopted a source-based taxation system. According to Vogel (1997:1015 – para. 33), this is because it takes into account *“the ‘territoriality principle’ followed in South Africa according to which that country taxes only such income as arises from domestic sources. This is the case where pensions are concerned if the services giving rise to them were performed with the domestic territory.”*

¹⁶⁷ For an example of such a provision, see the tax treaty concluded between Zimbabwe-Canada.

¹⁶⁸ All 3 tax treaties have been concluded with Canada prior to 2005, when Canada had entered in the OECD MTC (2003:218 – para. 40) a reservation to limit the source States taxing rights in respect of pensions.

¹⁶⁹ See the OECD MTC (2010:277 – para 9).

It is explained by Honiball & Olivier (2011:432) that due to *“various factors, including the fact that contributions to the pension fund may have been deductible in the state where the past employment was exercised, have led many countries to negotiate that pensions ‘arising in’ a Contracting State, may be taxed in that State as well as in the State of residence. Often countries with a sourced-based tax system will take such a position.”* Of the 10 SADC countries included in the analysis, 8 apply the source-basis of taxation (*“Guide to Fiscal Information: Key Economies in Africa 2011/12”*).

For example, of the tax treaties concluded with SA, 5 have been concluded post 2001 when SA changed to a residence-based tax system, however, all still provide for non-exclusive taxing rights to the source state. It is noted by Honiball & Olivier (2011:432) that SA does not appear to apply a consistent approach with respect to pensions, as there are many variations in its tax treaties.

However, these findings would still be contrary to the view expressed in the OECD MTC (2010:276 – para. 1) that State of residence should have exclusive taxing rights for various policy and administration reasons.

¹⁷⁰ Of these tax treaties, 3 have been concluded with Canada. However, only 2 have been concluded prior 2005 when Canada had entered in the OECD MTC (2003:219 – para. 45) a reservation to include government pensions as part of the provisions of Article 18 in order to achieve uniformity of treatment. However, post 2005, no such reservation has been noted by Canada in the OECD MTC.

There are 19¹⁷¹ (31%) tax treaties which do not refer to past employment exercised in the State and merely refer to pensions and other similar remuneration arising in a State. Of these tax treaties 5 provide for either exclusive or limited source State taxing rights. However, none of these tax treaties clarify the source of the pensions and other similar remuneration¹⁷² which may give rise to difficulties in determining the source of the pension payments or other similar remuneration¹⁷³.

There are a further 6 tax treaties which also make no reference to past employment, but had reference to pensions and other similar remuneration derived from a source within a State.

In 42¹⁷⁴ (68%) tax treaties analysed, the provision specifically refers to ‘annuities’¹⁷⁵. It is noted in the OECD MTC¹⁷⁶ that annuities would fall under other similar payments, but would not include an annuity acquired directly from capital that has not been funded from an employment scheme. Of these tax treaties, 32 simply refer to annuities arising in a contracting State with no reference to past employment. This would suggest that the provision covers all types of annuities irrespective of whether or not they are in consideration of past employment.

¹⁷¹ This finding would be consistent with the SADC MTA (2011) which does not refer to past employment exercised in the source State.

¹⁷² This may suggest that the provision intends to cover all types of pensions, similar remuneration or annuities, irrespective of whether or not they are in consideration of past employment or not (i.e. both non-employment and employment related pensions).

¹⁷³ It is noted in the OECD MTC (2010:280 – para. 19) that where there are exclusive or limited taxing rights with respect to pensions, a determination of the source of the pensions must be made. The mere reference to “arising in a Contracting State” could be construed as meaning either pensions paid by a fund established in that State or a pension derived from work performed in that State. It is recommended that States using such wording should clarify how it should be interpreted and applied.

¹⁷⁴ Of these tax treaties: 3 have been concluded with Canada, 3 with UK and 7 with SA. The Canada and UK have entered in the OECD MTC (2003:219 – para. 44) a reservation to include a reference to annuities while South Africa has entered a similar one on the OECD MTC (2003: 333 – para. 2).

¹⁷⁵ This finding would be consistent with the SADC MTA (2011) which refers to annuities arising in a contracting State.

¹⁷⁶ 2010:276 – para. 3

3.6.2. Social security payments

Of the 62 tax treaties analysed, 18¹⁷⁷ contain a ‘**social security payments**’ provision similar to that of the UN Model of which 4¹⁷⁸ have been concluded with developed countries. However, 2 of these tax treaties allowed for non-exclusive taxing rights to the source State.

There are 12¹⁷⁹ tax treaties which contained provision similar to that proposed in the OECD MTC¹⁸⁰. However, of these tax treaties, 10 provide for exclusive taxing rights to the source State. Therefore, while the provision is similar to that proposed by OECD Model, the majority of the SADC countries allow for exclusive taxing rights to the source State as does the UN Model.

There are 3¹⁸¹ tax treaties which contain a variation of the ‘**social security payments**’ provision of the UN Model, but all still allow for exclusive taxing rights to the source State.

There are 29¹⁸² tax treaties which do not contain a ‘**social security payments**’ provision at all. However, of these tax treaties, 4 have expanded paragraph 1 of Article 18 to specifically include social security payments.

3.6.3. Additional provisions not included in the UN or OECD Models

As noted in 3.6.1 above, 42¹⁸³ tax treaties include an explicit reference to ‘annuities’. As a result there are 45 (73%) tax treaties which contain a provision defining the term ‘annuity’¹⁸⁴.

¹⁷⁷ 1 of these tax treaties have been concluded with Bulgaria where Bulgaria entered a position on the OECD MTC (2003:333 – para. 4) a reservation to include a provision in respect of social security payments providing for exclusive taxing rights to the source State.

¹⁷⁸ Of these tax treaties, 3 have been concluded with Canada and 1 with France.

¹⁷⁹ 3 of these tax treaties have been concluded with a developed country, 1 of which was between Congo-Belgium. Prior to 2003, Belgium entered in the OECD MTC (2000:196 – para. 42) a reservation that the source State be allowed to tax social security payments. However, this tax treaty was concluded in 2007 when Belgium no longer had such a reservation in the OECD MTC.

¹⁸⁰ For an example of this provision, see point 3.4.2 above.

¹⁸¹ See the tax treaties concluded between: Mozambique-UAE, Zambia-Canada and Zambia-China.

¹⁸² This finding would not be consistent with the SADC MTA (2011) which proposed a ‘social security payments’ provision identical to the UN Model.

3.6.4. Conclusion

The findings of the analysis suggest that the application of the Article 18 of the UN Model is at most inconsistent in the tax treaties concluded by the SADC countries and as a result does not appear to have made much of an impact on the negotiation of tax treaties by the SADC countries.

The majority of the SADC tax treaties prefer not to allocate exclusive taxing rights to the State of residence, rather preferring to provide for non-exclusive, exclusive or limited taxing rights to the source State. Furthermore, there are a number of tax treaties which make no reference to past employment and appear to allow for the taxation of all pensions, similar remuneration or annuities irrespective of whether or not they relate to past employment exercised in the source State or not. These findings may have been expected as the taxation of pensions remains a contentious issue and is often complicated due to the differences in the tax treatment of pensions under the domestic laws of each State. These complications in respect of the taxation of pensions under domestic laws may be a reason for the deviations from the UN Model. Furthermore, the SADC countries may not be willing to give up taxing rights over pensions and other similar remuneration where such payments are in substance deferred payments for services rendered within the SADC countries borders.

However, the SADC countries do appear to favour the inclusion of a social security provision in their tax treaties with more than half of their tax treaties including such a provision. While the SADC countries may favour the inclusion of such a provision in their tax treaties, they have not been very successful in negotiating the inclusion thereof with developed countries (only included in 7 tax treaties).

¹⁸³ This would be consistent with the SADC MTA (2011) which proposes a provision defining the term 'annuity'.

¹⁸⁴ For an example of such a provision, see the tax treaty concluded between Botswana-Sweden.

4. PASSIVE INCOME

4.1. Introduction

Passive income is most probably one of the more common forms of income that arise from FDI contributed by business enterprises and private individuals. It generally arises in the form of dividends, interest and royalties derived from the initial investment of capital. Another form of passive income is capital gains that arise from the disposal of an investment.

However, unlike active income, passive income does not involve any sort of physical exertion or effort¹⁸⁵ and tends to have less of a direct link or nexus to the source State. Therefore, tax treaties tend to limit the taxing rights of the source State by stipulating a maximum withholding tax rate that may be imposed on passive income by the source State.

Both the UN and OECD Models provide for similar limitations when it comes to passive income. However, the UN Model provides greater latitude for contracting States to negotiate higher withholding tax rates than those proposed by the OECD Model as it leaves the rate unspecified to be determined during tax treaty negotiations.

In this chapter, we analyse the provisions of Articles 6, 10, 11, 12 and 13 of the UN and OECD Models which address passive income derived in the form of rental income, dividends, interest, royalties and capital gains. The following chapter will seek to evaluate whether the SADC countries have made use of or deviated from the UN Model provisions of these Articles, in particular, the ability of the SADC countries to negotiate higher withholding tax rates than those proposed by the OECD Model.

¹⁸⁵ Holmes, 2007:213

4.2. UN Model provisions – passive income

4.2.1. Article 6 – Income from immovable property

Article 6 of the UN Model (2011) reads as follows¹⁸⁶:

“1. Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.

2. The term “immovable property” shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.

*3. The provisions of paragraph 1 shall **also** apply to income derived from the direct use, letting or use in any other form of immovable property.*

*4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise **and to income from immovable property used for the performance of independent personal services. (Emphasis added)***¹⁸⁷

There have been no amendments to Article 6 of the UN Model since it was first introduced in 1980.

¹⁸⁶ UN Model, 2011:12

¹⁸⁷ An emphasis has been added to highlight the differences between the UN and OECD Models.

For the purpose of this analysis, each provision of Article 6 of the UN Model shall hereinafter be referred to as:

- Article 6(1) – income from immovable property
- Article 6(2) – definition of immovable property
- Article 6(3) – direct use, letting or use
- Article 6(4) – PE and IPSs

4.2.2. Article 10 – Dividends

Article 10 of the UN Model (2011) reads as follows¹⁸⁸:

“1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:

*(a) ____ **per cent** (the percentage is to be established through bilateral negotiations) of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least **10 per cent of the capital** of the company paying the dividends;*

*(b) ____ **per cent** (the percentage is to be established through bilateral negotiations) of the gross amount of the dividends in all other cases.*

The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

¹⁸⁸ UN Model, 2011:16-17

3. The term “dividends” as used in this Article means income from shares, “jouissance” shares or “jouissance” rights, mining shares, founders’ shares or other rights, not being debt claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, **or performs in that other State independent personal services from a fixed base situated therein**, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment **or fixed base**. In such case the provisions of Article 7 **or Article 14, as the case may be**, shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except in so far as such dividends are paid to a resident of that other State or in so far as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment **or a fixed base** situated in that other State, nor subject the company’s undistributed profits to a tax on the company’s undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State. **(Emphasis added)**¹⁸⁹

The only amendment to Article 10 was in 2001 when the current wording “but if the beneficial owner of the dividends is a resident of the other Contracting State” replaced the former wording “**but if the recipient is the beneficial owner of the dividends**”.

¹⁸⁹ An emphasis has been added to highlight the differences between the UN and OECD Models.

For the purpose of this analysis, each provision of Article 10 of the UN Model shall hereinafter be referred to as:

- Article 10(1) – taxation of dividends
- Article 10(2) – limited right to tax dividends, mode of application and taxation of profits
- Article 10(3) – definition of dividend
- Article 10(4) – dividends connected with a PE or fixed base
- Article 10(5) – extra-territorial taxation

4.2.3. Article 11 – Interest

Article 11 of the UN Model (2011) reads as follows¹⁹⁰:

“1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

*2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed ___ **per cent** (the percentage is to be established through bilateral negotiations) of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.*

3. The term “interest” as used in this Article means income from debt claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor’s profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

¹⁹⁰ UN Model, 2011:17-18

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, **or performs in that other State independent personal services from a fixed base situated therein**, and the debt claim in respect of which the interest is paid is effectively connected with (a) such permanent establishment **or fixed base, or with (b) business activities referred to in (c) of paragraph 1 of Article 7**. In such cases the provisions of Article 7 or Article 14, **as the case may be**, shall apply.

5. Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment **or a fixed base** in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment **or fixed base**, then such interest shall be deemed to arise in the State in which the permanent establishment **or fixed base** is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.” **(Emphasis added)**¹⁹¹

The only amendments to Article 11 of the UN Model were in 2001 when:

- paragraph 2 was amended by replacing the former wording “**but if the recipient is the beneficial owner of the interest**” with the current wording

¹⁹¹ An emphasis has been added to highlight the differences between the UN and OECD Models.

“but if the beneficial owner of the interest is a resident of the other Contracting State”.

- paragraph 5 was amended by deleting the wording **“is that State itself, a political subdivision, a local authority or”**.

For the purpose of this analysis, each provision of Article 11 of the UN Model shall hereinafter be referred to as:

- Article 11(1) – taxation of interest
- Article 11(2) – limited right to tax interest
- Article 11(3) – definition of interest
- Article 11(4) – interest connected with a PE or fixed base
- Article 11(5) – source of interest
- Article 11(6) – excessive interest

4.2.4. Article 12 – Royalties

Article 12 of the UN Model (2011)¹⁹² reads as follows¹⁹³:

*“1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State **may be taxed** in that other State.*

2. However, such royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed ____ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the royalties. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

¹⁹² UN Model, 2011:18-19

¹⁹³ The provisions of Article 10 of the SADC MTA (2011) essentially follow those of the UN Model (2011) except that:

- Article 10(2) of the SADC MTA excludes the ‘**mode of application**’ sentence.
- Article 10(3) of the SADC MTA inserts the words ‘**or discs**’ after the words ‘**tapes**’ and omits the wording “**for the use of, or the right to use, industrial, commercial or scientific equipment**”.
- Articles 10(4) and (5) of the SADC MTA do not refer to ‘**independent personal services**’ or ‘**fixed base**’.

3. The term “royalties” as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, **or films or tapes used for radio or television broadcasting**, any patent, trademark, design or model, plan, secret formula or process, **or for the use of, or the right to use, industrial, commercial or scientific equipment** or for information concerning industrial, commercial or scientific experience.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, **or performs in that other State independent personal services from a fixed base situated therein**, and the right or property in respect of which the royalties are paid is effectively connected with (a) such permanent establishment **or fixed base, or with (b) business activities referred to in (c) of paragraph 1 of Article 7**. In such cases the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. Where by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to

the laws of each Contracting State, due regard being had to the other provisions of this Convention.” (Emphasis added)¹⁹⁴

The only amendments to Article 12 of the UN Model were in 2001 when:

- paragraph 2 was amended by replacing the former wording “**but if the recipient is the beneficial owner of the royalties**” with the current wording “but if the beneficial owner of the royalties is a resident of the other Contracting State”.
- paragraph 5 was amended by deleting the wording “**is that State itself, a political subdivision, a local authority or**”.

For the purpose of this analysis, each provision of Article 12 of the UN Model shall hereinafter be referred to as:

- Article 12(1) – taxation of royalties
- Article 12(2) – limited right to tax royalties
- Article 12(3) – definition of royalties
- Article 12(4) – royalties connected with a PE or fixed base
- Article 12(5) – source of royalties
- Article 12(6) – excessive royalties

4.2.5. Article 13 – Capital gains

Article 13 of the UN Model (2011) reads as follows¹⁹⁵:

“1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.

*2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State **or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other***

¹⁹⁴ An emphasis has been added to highlight the differences between the UN and OECD Models.

¹⁹⁵ UN Model, 2011:20-21

Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic, boats engaged in inland waterways transport or movable property pertaining to the operation of such ships, aircraft or boats, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. Gains from the alienation of shares of the capital stock of a company, or of an interest in a partnership, trust or estate, the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State. In particular:

(a) Nothing contained in this paragraph shall apply to a company, partnership, trust or estate, other than a company, partnership, trust or estate engaged in the business of management of immovable properties, the property of which consists directly or indirectly principally of immovable property used by such company, partnership, trust or estate in its business activities.

(b) For the purposes of this paragraph, "principally" in relation to ownership of immovable property means the value of such immovable property exceeding 50 per cent of the aggregate value of all assets owned by the company, partnership, trust or estate.

5. Gains, other than those to which paragraph 4 applies, derived by a resident of a Contracting State from the alienation of shares of a company which is a resident of the other Contracting State, may be taxed in that other State if the alienator, at any time during the 12 month period preceding such alienation, held directly or indirectly at least ____ per cent (the percentage is to be established through bilateral negotiations) of the capital of that company.

6. *Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5 shall be taxable only in the Contracting State of which the alienator is a resident.*” (**Emphasis added**)¹⁹⁶

The only amendments to Article 13 of the UN Model were in 2001 and 2011 when:

- paragraph 4 was amended in 2001 to reflect the current provision of the UN Model (2011)¹⁹⁷.
- paragraph 5 was amended in 2011 to reflect the current provision of the UN Model (2011)¹⁹⁸.

For the purpose of this analysis, each provision of Article 13 of the UN Model shall hereinafter be referred to as:

- Article 13(1) – immovable property
- Article 13(2) – movable property of a PE or fixed base
- Article 13(3) – ships, aircraft and boats
- Article 13(4) – real property shares
- Article 13(5) – shares
- Article 13(6) – other property

¹⁹⁶ An emphasis has been added to highlight the differences between the UN and OECD Models.

¹⁹⁷ Prior to this amendment, paragraph 4 read as follows (UN Model, 1980:8):

“Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State”

¹⁹⁸ Prior to this amendment, paragraph 5 read as follows (UN Model, 1980: 8):

“Gains from the alienation of shares other than those mentioned in paragraph 4 representing a participation of ... per cent (the percentage is to be established through bilateral negotiations) in a company which is a resident of a Contracting State of which the alienator is a resident”

4.3. OECD Model provisions – passive income

4.3.1. Article 6 – Income from immovable property

Article 6 of the OECD Model (2010)¹⁹⁹ reads as follows²⁰⁰:

“1. Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.

2. The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise.”

The only amendment to Article 6 of the OECD Model since 1977 was in 2000 when the wording **“and to income from immovable property used for the performance of independent personal services”** was deleted from paragraph 4²⁰¹.

¹⁹⁹ OECD Model, 2010:26

²⁰⁰ The provisions of Article 6 of the SADC MTA (2011) essentially follow those of the OECD Model (2010), except that paragraph 2 of the SADC MTA (2011) excludes ‘**rail or road transport vehicles**’ as immovable property.

²⁰¹ This amendment was as a result of the deletion of Article 14 of the OECD Model dealing with independent personal services. Prior to this amendment, paragraph 4 was identical to that of the UN Model.

4.3.2. Article 10 – Dividends

Article 10 of the OECD Model (2010)²⁰² reads as follows²⁰³:

“1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:

a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;

b) 15 per cent of the gross amount of the dividends in all other cases. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business

²⁰² OECD Model, 2010:28-29

²⁰³ The provisions of Article 10 of the SADC MTA (2011) essentially follow those of the OECD Model (2010) except:

- The withholding tax rate on ‘substantial direct investments’ and ‘portfolio investments’ has been left unspecified;
- The percentage shareholding has been left unspecified; and
- The definition of dividend has been condensed to exclude "jouissance" shares or "jouissance" rights, mining shares, founders' shares.

in the other Contracting State of which the company paying the dividends is a resident through a permanent establishment situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.”(Emphasis added)²⁰⁴

Since 1977, the following amendments have been made to Article 10 of the OECD Model:

- paragraph 2 was amended in 1995 by replacing the former wording “**but if the recipient is the beneficial owner of the dividends**” with the wording “but if the beneficial owner of the dividends is a resident of the other Contracting State”.
- paragraph 4 was amended in 2000 by deleting the terms “**or performs in that other State independent personal services from a fixed base situated therein**”, “**or a fixed base**”²⁰⁵ and “**or Article 14, as the case may be**”²⁰⁶.

²⁰⁴ An emphasis has been added to highlight the differences between the UN and OECD Models.

²⁰⁵ This term was also deleted from paragraph 5 of Article 10 of the OECD Model.

²⁰⁶ These amendments were as a result of the deletion of Article 14 of the OECD Model dealing with independent personal services.

4.3.3. Article 11 – Interest

Article 11 of the OECD Model (2010)²⁰⁷ reads as follows²⁰⁸:

“1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

*2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed **10 per cent** of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.*

3. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises through a permanent establishment situated therein and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

5. Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the interest, whether

²⁰⁷ (OECD Model, 2010:29-30)

²⁰⁸ The provisions of Article 11 of the SADC MTA (2011) essentially follow those of the OECD Model (2010), except that paragraph 2 of the SADC MTA (2011) omits the ‘**mode of application**’ sentence.

he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the State in which the permanent establishment is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.”
(**Emphasis added**)²⁰⁹

Since 1977, the following amendments have been made to Article 11 of the OECD Model:

- paragraph 2 was amended in 1995 by replacing the former wording “**but if the recipient is the beneficial owner of the interest**” with the current wording “but if the beneficial owner of the interest is a resident of the other Contracting State”.
- paragraph 4 was amended in 2000 by deleting the terms “**or performs in that other State independent personal services from a fixed base situated therein**”, “**or a fixed base**”²¹⁰ and “**or Article 14, as the case may be**”²¹¹.

²⁰⁹ An emphasis has been added to highlight the differences between the UN and OECD Models.

²¹⁰ This term was also deleted from paragraph 5 of Article 11 of the OECD Model.

²¹¹ These amendments were as a result of the deletion of Article 14 of the OECD Model dealing with independent personal services.

4.3.4. Article 12 – Royalties

Article 12 of the OECD Model (2010) reads as follows²¹²:

*“1. Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State **shall be taxable only** in that other State.*

2. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

4. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.” (Emphasis added)²¹³

²¹² OECD Model, 2010:30

²¹³ An emphasis has been added to highlight the differences between the UN and OECD Models.

Since 1977, the following amendments have been made to Article 12 of the OECD Model:

- paragraph 1 was amended in 1997 to reflect the current provision as contained in the OECD Model (2010)²¹⁴.
- paragraph 2 was amended in 1992 by deleting phrase “**or for the use of, or the right to use, industrial, commercial or scientific equipment**”²¹⁵.
- paragraph 3 was amended in 2000 by deleting the terms “**or performs in that other State independent personal services from a fixed base situated therein**”, “**or a fixed base**” and “**or Article 14, as the case may be**”²¹⁶.

4.3.5. Article 13 – Capital gains

Article 13 of the OECD Model (2010)²¹⁷ reads as follows²¹⁸:

“1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other State.

²¹⁴ Prior to this amendment, paragraph 1 read as follows (OECD, 1963:4):

“Royalties arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable only in that other State if such resident is the beneficial owner of the royalties”

²¹⁵ This so-called cross border leasing is now included under Article 7 – business profits.

²¹⁶ This amendment was as a result of the deletion of Article 14 of the OECD Model which dealt with independent personal services.

²¹⁷ OECD Model, 2010:30-31

²¹⁸ The provisions of Article 14 of the SADC MTA (2011) essentially follow those of Article 13 of the OECD Model (2010), except that paragraph 3 of the SADC MTA has been expanded to include ‘**rail or road transport vehicles**’ and does not refer to the ‘**place of effective management**’ of the enterprise.

3. *Gains from the alienation of ships or aircraft operated in international traffic, boats engaged in inland waterways transport or movable property pertaining to the operation of such ships, aircraft or boats, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.*

4. ***Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.***

5. *Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3 and 4, shall be taxable only in the Contracting State of which the alienator is a resident.” (Emphasis added)²¹⁹*

Since 1977, the following amendments have been made to Article 13 of the OECD Model:

- paragraph 2 was amended in 2000 by deleting the phrases “***or movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services***” and “***or of such fixed base***”²²⁰.
- Paragraph 4 was inserted in 2003 to deal with the alienation of real property shares.

4.4. Comparison of the UN Model and OECD Model

4.4.1. Article 6 – immovable property

Paragraph 1 of Article 6 of the UN Model reproduces the provision of Article 6(1) of the OECD Model by providing for exclusive taxing rights to the source

²¹⁹ An emphasis has been added to highlight the differences between the UN and OECD Models.

²²⁰ This amendment was as a result of the deletion of Article 14 of the OECD Model dealing with independent personal services.

State in respect of income derived from immovable property situated in the source State.

Paragraph 2 of Article 6 of the UN Model reproduces the provision of Article 6(2) of the OECD Model by providing that the definition of immovable property shall be determined in accordance with domestic law.

Paragraph 3 of Article 6 of the UN Model essentially reproduces the provision of Article 6(3) of the OECD Model by providing that income from direct use, letting or use shall fall within the provisions of Article 6. The only minor drafting difference is that the UN Model inserts the word “*only*” between the words “*shall*” and “*apply*”.

Paragraph 4 of Article 6 of the UN Model essentially reproduces the provision of Article 6(4) of the OECD Model by providing that the provisions of Article 6 shall apply to income from immovable property of an enterprise. The only drafting difference is that the UN Model also refers to ‘income from immovable property used for the performance of independent personal services’.

4.4.2. Article 10 – Dividends

Paragraph 1 of Article 10 of the UN Model reproduces the provision of Article 10(1) of the OECD Model by providing for non-exclusive taxing rights to the State of residence.

Paragraph 2 of Article 10 of the UN Model essentially reproduces the provision of Article 10(2) of the OECD Model by providing for limited taxing rights to the source State and distinguishes between substantial investments (“substantial direct investments”) and minor investments (“portfolio investments”)²²¹. However, there are fundamental differences between the two Models, which are summarised as follows:

²²¹ The reason for this distinction is that substantial investments by a non-resident should be less heavily taxed so as to encourage and facilitate FDI (OECD MTC 2010:187 – para. 10)

- The UN Model leaves the rates unspecified to be established during bilateral negotiations, while the OECD Model restricts the rate to 5% for substantial direct investments and 15% for portfolio investments²²².
- The UN Model provides for a minimum direct ownership of 10% for substantial direct investments whereas under the OECD Model this is 25%.

Paragraph 3 of Article 10 of the UN Model reproduces the provision of Article 10(3) of the OECD Model by providing a general definition of the term “dividend”²²³.

Paragraph 4 of the UN Model essentially reproduces the provision of Article 10(4) of the OECD Model by providing that dividends received by a resident of a State which are effectively connected with a PE or a fixed base, which the resident has in the source State, shall not be subject to the provisions of paragraph 1 and 2. The only drafting difference is that UN Model refers to the ‘performance of independent personal services from a fixed base’.

Paragraph 5 of the UN Model essentially reproduces the provision of Article 10(5) of the OECD Model by providing that the source State may not impose tax on dividends paid by a company which is resident of the other State merely because it derives profits or income from the source State. The only minor drafting difference is that UN Model refers to a ‘fixed base’.

²²²It is noted in the UN MTC (2011:178-179) that members from developing countries felt that the rates prescribed by the OECD Model could entail too large a loss of revenue from the source State. Also, it is noted that some developing countries have preferred to apply lower withholding tax rates on the basis that the loss of revenue should result in increased FDI in the medium and long terms. Due to these differences, the Group of Experts decided not to recommend maximum withholding tax rates for substantial direct investments and portfolio investments, but rather left these open to be determined during bilateral negotiations.

²²³ It is noted in the UN MTC (2011:184 – para 14) that this paragraph is not intended to be exhaustive, but may be broadened or varied so as to accommodate any peculiarities that may be present in the domestic laws of the contracting States.

4.4.3. Article 11 – Interest

Paragraph 1 of Article 11 of the UN Model reproduces the provision of Article 11(1) of the OECD Model by providing for non-exclusive taxing rights in the State of residence of the beneficial owner.

Paragraph 2 of Article 11 of the UN Model essentially reproduces the provision of Article 11(2) of the OECD Model by providing for limited taxing rights in the source State. However, there is a fundamental difference in that the UN Model leaves the maximum withholding tax rate unspecified to be established during bilateral tax treaty negotiations whereas the OECD Model restricts the rate to 10%²²⁴.

Paragraph 3 of the UN Model reproduces the provision of Article 11(3) of the OECD Model by providing a general definition of the term “interest”.

Paragraph 4 of the UN Model essentially reproduces the provision of Article 11(4) of the OECD Model by providing that interest received by a resident of a State who carries on business in the source State, where such interest arises through a PE or a fixed base situated in the Source State, will not be subject to the provisions of paragraph 1 and 2. The only drafting differences are as follows:

- the UN Model refers to a ‘fixed base’ whereas the OECD Model has deleted this reference.
- the UN Model provides that any interest which is effectively connected with business activities which are of the same or similar kind as those effected through a PE, shall not be subject to the provisions 1 and 2 of Article 11. This interest will be taxed as business profits under Article 7.

²²⁴ It is noted in the UN MTC (2011:194-195) that the maximum withholding tax rate of tax was left open as members from developing countries found the rate of 10% to be unacceptable and the former Group of Experts could not reach a consensus on an alternative rate. It is further noted that the withholding tax rates that are adopted between developing and developed countries tend to range quite widely with some developing countries tending to reduce the withholding tax rate to below 10% on the basis that it may attract more FDI.

Paragraph 5 of the UN Model essentially reproduces the provision of Article 11(5) of the OECD Model by providing that the source of the interest shall be where the payer is resident unless the interest is effectively connected with a PE or fixed base, in which case, the source of the interest shall be where the PE or fixed base is situated. The only drafting difference is that UN Model refers to a 'fixed base'.

Paragraph 6 of the UN Model reproduces the provision of Article 11(6) of the OECD Model by providing that the provisions of Article 11 shall only apply to arm's length interest and not to any portion of excessive interest where there exists a special relationship between the payer and beneficial owner.

4.4.4. Article 12 – Royalties

Paragraph 1 of Article 12 of the UN Model differs substantially from Article 12(1) of the OECD Model as it provides for non-exclusive taxing rights to the State of residence, whereas the OECD Model provides for exclusive taxing rights to the State of residency²²⁵.

Paragraph 2 of the UN Model does not appear in the OECD Model. This provision essentially reproduces the provision of Article 11(2) of the UN Model by providing for limited taxing rights in the source State.

Paragraph 3 of the UN Model reproduces the provision of Article 12(2) of the OECD Model by providing a definition of the term "royalties". The only drafting differences are as follows:

- The UN Model contains the term "*or films or tapes used for radio or television broadcasting*" which is not contained in the OECD Model.

²²⁵ It is noted by Vogel (1997: 772 - para 7b) that "*there is a consensus among the majority of the OECD member States that one reason for advocating a complete waiver of taxation by the State of source in favour of unrestricted taxation by the State of residence is that the State of residence has forfeited tax by having had to allow as a deduction the costs of developing the rights etc. in respect of which the royalties are paid. There is normally no comparable underlying burden of costs on the State of residence where interest payments are concerned*".

- The UN Model contains the term “*or for the use of, or the right to use, industrial, commercial or scientific equipment*” which was deleted from the OECD Model in 1992²²⁶.

Paragraph 4 of the UN Model essentially reproduces the provision of Article 11(3) of the OECD Model by providing that royalties received by a resident of a State who carries on business in the source State, where the royalties arise through a PE or a fixed base, will not be subject to the provisions of paragraph 1 and 2. The only drafting differences are as follows:

- The UN Model refers to a ‘fixed base’ whereas the OECD Model omits the reference to a fixed base.
- The UN Model provides that any royalties which are effectively connected with business activities which are of the same or similar kind as those affected through the PE, shall not be subject to provisions 1 and 2 of Article 12. These royalties will be taxed as business profits under Article 7.

Paragraph 5 of the UN Model does not appear in the OECD Model. This provision essentially reproduces the provision of Article 11(5) of the UN Model by providing that the source of the royalties shall be where the payer is resident unless the royalties are effectively connected with a PE or fixed base, in which case, the source of the royalties shall be where the PE or fixed base is situated.

Paragraph 6 of the UN Model reproduces the provision of Article 12(4) of the OECD Model by providing that the provisions of Article 12 shall only apply to arm’s length royalties and not to any portion of excessive royalties where there exists a special relationship between the payer and beneficial owner.

²²⁶ It has been noted that a number of OECD member countries have concluded reservations on this particular amendment.

4.4.5. Article 13 – Capital gains

Paragraph 1 of the UN Model reproduces the provision of Article 13(1) of the OECD Model by providing that gains derived from the alienation of immovable property situated in the source State may be taxed in the source State.

Paragraph 2 of the UN Model essentially reproduces the provision of Article 13(2) of the OECD Model by providing that gains derived from the alienation of movable property forming part of the business property of a permanent establishment or pertaining to a fixed base used for the purpose of performing independent personal services, may be taxed in the source State if such PE or fixed base is situated in the source State. The only drafting difference is that the UN Model refers to ‘movable property pertaining to a fixed base used for the purpose of performing independent personal services’ whereas the OECD Model has deleted this reference.

Paragraph 3 of the UN Model reproduces the provision of Article 13(3) of the OECD Model by providing that gains derived from the alienation of ships and aircrafts operated in international traffic, and boats engaged in inland waterways transport, including movable property attaching to such assets, shall be taxable only in the contracting State in which the place of effective management of the enterprise is situated.

Paragraph 4 of the UN Model broadly reproduces the provision of Article 13(4) of the OECD Model by providing that gains derived from the alienation of shares or interests in partnerships, trusts or estates which consist principally of immovable property situated in the Source State may be taxed in the Source State. However, the OECD Model only refers to the alienation of shares, the value of which principally consists of immovable property.

Paragraph 5 of the UN Model does not appear in the OECD Model. This provision provides that gains from the alienation of shares of a company

which is resident of the Source State may be taxed in the source State under certain circumstances.

Paragraph 6 of the UN Model essentially reproduces the provision of Article 13(5) of the OECD Model by providing that gains other than those referred to in Article 13 shall be taxable only in the State of residence of the alienator.

4.5. Comparison of the SADC countries tax treaties to Article 6 of the UN Model

4.5.1. Income from immovable property

Of the 62 tax treaties analysed, 54²²⁷ (87%) contain a provision similar to the **‘income from immovable property’** provision of the UN Model.

1²²⁸ tax treaty allows for exclusive taxing rights in the source State.

There are 7 tax treaties which omit the wording *“including income from agriculture or forestry”*²²⁹. The omission of this wording would result in income from agriculture and forestry being treated as business profits under Article 7²³⁰.

4.5.2. Definition of immovable property

Of the 62 tax treaties analysed, 33 (53%) contain a provision similar to the **‘definition of immovable property’** provision of the UN Model.

²²⁷ Of these tax treaties, 5 use the wording *“is taxable in that contracting State in which such property is situated”*. The use of the words *‘is taxable’* does not necessarily deprive the other State of taxing rights as it should be read in its context which would suggest that it may also be taxed in the other State (Honiball & Olivier, 2011:282). Furthermore, it is explained by Vogel (1997:359 – para. 5) that a State would be deprived of taxing rights if the word **‘only’** had been used. For an example of such a provision, see the tax treaty concluded between Lesotho-Mauritius.

²²⁸ See the tax treaty concluded between Namibia-Mauritius. This tax treaty uses of the words **“shall be taxable only”** which clearly deprives the other State of taxing rights.

²²⁹ Of these tax treaties, 2 have been concluded with India. It is noted that India has entered a position on the OECD MTC (2010:440 – para 1) to address the inclusion of this wording during bilateral tax treaty negotiations.

²³⁰ It is noted in the OECD MTC (2010:128 – para. 1) that States are free to agree in their bilateral negotiations to exclude this wording and to treat such income as business profits under Article 7.

There are 27 (44%) tax treaties which include a variation of the ‘**definition of immovable property**’ provision. The most notable variations are summarised as follows:

- 10²³¹ tax treaties specifically list “*buildings*” as forming part of the definition of immovable property²³².
- 13 tax treaties omit the word “*boats*” from the definition of immovable property.
- 5 tax treaties specifically exclude “*rail or road transport vehicles*” from the definition of immovable property²³³.
- 3 tax treaties specifically list “*any option or similar right in respect of immovable property*” as forming part of the definition of immovable property.
- 3²³⁴ tax treaties specifically list “*oil or gas wells, quarries, and other places of extracting of natural resources including timber or other forest produce*” as forming part of the definition of immovable property.
- 1²³⁵ tax treaty simply provides that the term “*immovable property*” shall be defined with reference to the domestic law of the State in which the property is situated without enumerating any positive examples of immovable property, while 1²³⁶ tax treaty does not include the ‘definition of immovable property’ provision at all²³⁷.

²³¹ Of these tax treaties, 6 have been concluded by Botswana.

²³² It is explained by Vogel (1997:377 – para. 25) that “*appurtenant property primarily includes buildings, machinery, etc. as well as cash, securities, and similar assets of an agricultural or forestry enterprise, if such items are economically connected with the operation of the enterprise*”. Therefore, the inclusion of the word “**buildings**” would merely appear to be a clarification and in substance does not change the overall definition of immovable property.

²³³ This wording has been included in 4 tax treaties concluded by Botswana. This finding would be consistent with the provision proposed by the SADC MTA (2011) which specifically excludes “**rail or road transport vehicles**” as forming part of immovable property.

²³⁴ See the tax treaties concluded between Namibia-Malaysia, Zambia-India and Zimbabwe-Malaysia. The tax treaty concluded between Zambia-India did not list “*timber or other forest produce*” as forming part of the definition of immovable property

²³⁵ See the tax treaty concluded between Zimbabwe-Bulgaria.

²³⁶ See the tax treaty concluded between Namibia-Germany.

²³⁷ The exclusion of this provision from the tax treaty would mean that recourse should be had to the general rule of interpretation provided under Article 3(2) of the tax treaty which provides that it will have the meaning which it has under the domestic law of the State applying the tax treaty (Vogel, 1997:381 – para. 29).

4.5.3. Direct use, letting or use

Of the 62 tax treaties analysed, 52 (84%) contain a provision identical to Article 7(3) of the OECD Model while 5²³⁸ contained a provision identical to the ‘**direct use, letting or use**’ provision of the UN Model.

There are 5 tax treaties which expand the ‘**direct use, letting or use**’ provision to specifically include “*income from the alienation of such property*”²³⁹.

4.5.4. PE and IPSs

Of the 62 tax treaties analysed, 52 (84%) contain a provision similar to the ‘**PE and IPSs**’ provision of the UN Model.

Of these tax treaties, 15 have been concluded post 2001 of which 2²⁴⁰ have been concluded with developed countries. However, only 13 tax treaties contain an Article similar to Article 14 of the UN Model dealing with income from independent personal services, while 2²⁴¹ did not contain such an Article.

4.5.5. Additional provisions not included in the UN or OECD Models

There are 9 tax treaties which specifically provide that where a shareholder or legal person is entitled to the enjoyment of immovable property which is held by a company or legal person, the income derived by the owner from direct use, letting or use may be taxed in the State in which the property is situated²⁴². Of these tax treaties, 5²⁴³ have been concluded with developed countries.

²³⁸ All of these tax treaties have made use of the word “*also*”.

²³⁹ Of these tax treaties 4 have been concluded with Canada where it is noted that Canada has entered in the OECD MTC (2010:129 – para. 8) a reservation to include such wording in paragraph 3 of Article 6. It is further noted that this reservation was only entered in the OECD MTC in 2000; however 3 of these tax treaties had been concluded prior to 2000.

²⁴⁰ See the tax treaties concluded between Botswana-UK and Namibia-Canada.

²⁴¹ See the tax treaties concluded between Namibia-Canada and Zambia-Seychelles. The exclusion of Article 14 should not in substance change this rule as income from independent personal services would merely be considered under Article 7 which applies to the business profits of a PE.

²⁴² For an example of such a provision, see the tax treaty concluded between Botswana-France.

1²⁴⁴ tax treaty specifically provides that the provisions of Article 6 shall apply to income from movable property which, under the domestic laws of the State in which the property is situated, is assimilated to income from immovable property.

1²⁴⁵ tax treaty contains a provision defining the term “*agriculture*”.

1²⁴⁶ tax treaty specifically provides that profits derived by an agricultural, forestry or plantation enterprise shall be dealt with under Article 7 - business profits.

4.5.6. Conclusion

The findings of the analysis would suggest that the SADC countries generally follow the provisions of Article 6 of the UN or OECD Models and tend to apply these provisions consistently in their tax treaties²⁴⁷. This finding may have been expected due to the fact that the UN and OECD Models are probably the two most commonly used models in tax treaty negotiations and there are no substantial differences between Article 6 of the UN and OECD Models.

However, there are a few tax treaties which appear to deviate from the ‘definition of immovable property’ provision, but these deviations would appear to be merely clarifications of the definition and would not appear in substance to change the general definition of immovable property as contained in the UN and OECD Models²⁴⁸.

²⁴³ Of these tax treaties, 3 have been concluded with France where it is noted that France has entered in the OECD MTC (2010: 129 – para. 6) a reservation to tax income from shares or rights which are treated as income from immovable property.

²⁴⁴ See the tax treaty concluded between Mozambique-Portugal.

²⁴⁵ See the tax treaty concluded between Zambia-Seychelles.

²⁴⁶ See the tax treaty concluded between Zimbabwe-Mauritius.

²⁴⁷ This finding would be consistent with the provisions proposed by the SADC MTA (2011) which are identical to the OECD Model provisions.

²⁴⁸ Some of the deviations have been expanded to exclude ‘rail or road transport vehicles’ as immovable property which appears to be consistent with the definition of immovable property in the SADC Model.

4.6. Comparison of the SADC countries tax treaties to Article 10 of the UN Model

4.6.1. Taxation of dividends

Of the 62 tax treaties analysed, 56²⁴⁹ (90%) contain a provision similar to the **‘taxation of dividends’** provision of the UN Model.

There are 2²⁵⁰ tax treaties that allow for exclusive taxing rights in the State of residence of the beneficial owner²⁵¹.

There are 3²⁵² tax treaties which deviate from the **‘taxation of dividends’** provision, but still allow for tax sharing between contracting States.

1²⁵³ tax treaty combines the **‘taxation of dividends’** and **‘limited right to tax dividends’** provisions into a single provision, but still provides for tax sharing between contracting States.

4.6.2. Limited right to tax dividends, mode of application and taxation of profits

Of the 62 tax treaties analysed, only 5²⁵⁴ contain a **‘limited right to tax dividends’** provision similar to the UN Model. Of these tax treaties, 4²⁵⁵ have been concluded with developed countries.

²⁴⁹ All of the tax treaties concluded with developed countries have allowed for non-exclusive taxing rights to the source State which would appear to be consistent with the current practice adopted between developing/developed countries (UN MTC, 2011:177 – para. 2).

²⁵⁰ See the tax treaties concluded between Congo-Zimbabwe and Mozambique-UAE.

²⁵¹ It is noted in the OECD MTC (2010:186 – para. 6) that the taxation of dividends exclusively in the State of residence is not feasible as a general rule, even if it is keeping with the nature of dividends, being investment income. Therefore, these countries may want to resolve this and allow for tax sharing in respect of dividends.

²⁵² See the tax treaties concluded between Zimbabwe-Germany, Zimbabwe-Netherlands and Zimbabwe-UK. In particular, the tax treaty between Zimbabwe-UK provides that a resident of Zimbabwe may, under certain circumstances, be entitled to a tax credit in respect of dividends paid by a company resident of the UK.

²⁵³ See the tax treaty concluded between Namibia-Germany.

²⁵⁴ The tax treaty concluded between Malawi-Norway contains a provision identical to the UN Model.

²⁵⁵ The tax treaty concluded between Zimbabwe-Germany (not included in the above tax treaties) refers to a holding of at least 25%. However, it was noted by Vogel (1997:620 – para. 94) that the minimum capital holding was reduced in almost all instances to 10% under German domestic law back in 1984 and that the new German law would override those tax treaties where the minimum holding is 10% or more. Therefore, while the tax treaty between Zimbabwe-Germany still includes the minimum holding of 25%, it would appear as though the 10% minimum holding would apply.

There are 36²⁵⁶ (58%) tax treaties which contain a provision similar to Article 10(2) of the OECD Model.

The most notable variations of the ‘**limited right to tax dividends**’ provision are summarised as follows²⁵⁷:

- 1²⁵⁸ tax treaty allows for exclusive taxing rights in the State of residence of the beneficial owner in those instances where the beneficial owner is a company that holds directly more than 50% of the share capital of the company paying the dividends and more than 50% of the share capital of the beneficial owner is held by residents of the State of the beneficial owner.
- 6 tax treaties provide that the beneficial owner may hold²⁵⁹ ***indirectly*** at least 10% (or 25%) of the share capital for substantial direct investments.
- 23 tax treaties omit the term ‘*other than a partnership*’²⁶⁰.
- 3 tax treaties replace the word “*holds*” with the word “*owns*”²⁶¹.
- 8 tax treaties omit the word “*directly*”²⁶².
- 5 tax treaties required that the beneficial owner must hold at least 25% of the “*voting power*”²⁶³ of the company.

There are 16²⁶⁴ (26%) tax treaties which do not distinguish between substantial direct investments and portfolio investments, but simply allow for one maximum withholding tax rate to be applied to all dividends²⁶⁵.

²⁵⁶ This finding would be consistent with the provision proposed by the SADC MTA (2011) as it is identical to the OECD Model provision, except that it leaves open the withholding tax rates as does the UN Model.

²⁵⁷ These findings also include those tax treaties which contain a variation of Article 10(2) of the OECD Model.

²⁵⁸ See the tax treaty concluded between Namibia-Sweden.

²⁵⁹ In the tax treaty concluded between Zimbabwe-Kuwait, the word “*holds*” has been replaced with the word “*controls*”.

²⁶⁰ It is explained by Vogel (1997:599 – para. 74) that “*the bracketed phrase ‘other than a partnership’ is irrelevant if the domestic tax systems of the two contracting States do not allow partnerships to be considered independent taxable entities; if so, it merely serves to clarify the situation*”. For example, of the 8 tax treaties concluded with SA, 7 exclude the phrase ‘*other than a partnership*’. This is most likely due to the fact that under SA domestic tax legislation partnerships are not considered to be separate legal entities.

²⁶¹ This finding is interesting as the OECD MTC (2010:189 - para. 16) appears to use these words interchangeably, for example in paragraph 16 of the OECD MTC it refers to must have “*owned at least 25%*”. Therefore the use of the word “*owns*” should not in substance change the general rule under this paragraph.

²⁶² The omission of the word “*directly*” suggests that the beneficial owner may hold indirectly the minimum required share capital in order to qualify for a reduced rate of withholding tax for substantial direct investments.

²⁶³ It is noted in the OECD MTC (2010:189 - para. 15) that States may depart from the term “*capital*” when negotiating tax treaties and instead use the term “*voting power*”. However, the use of the term “*voting power*” may have the result that different classes of shares (e.g. non-voting preference shares) will not be entitled to a reduced rate of tax as these shares would have no voting power (Vogel, 1997:596 – para. 58).

There are 3²⁶⁶ tax treaties which provide that the beneficial owner must hold **at least 15%** of the capital of the company paying the dividend.

There are 32 (52%) tax treaties which still use the former wording of the UN Model (1980) and OECD Model (1992). This is despite the fact that 13 of these tax treaties have been concluded post 1995 when the OECD Model had been amended to reflect the current wording of OECD Model (2010). There are a further 3 tax treaties which make no reference to the beneficial owner of the dividends.

It is explained by Olivier et al. (2000:310) that *“the notion of beneficial ownership plays an important role in determining whether a person qualifies for tax treaty benefits and in the allocation of the right to tax between two Contracting States”*. This use of the former wording of the UN Model (1980) and OECD Model (1992) could therefore lead to inappropriate results which were not intended by the later versions of the OECD or UN Models²⁶⁷.

Furthermore, while some of the tax treaties make reference to ‘beneficial owner’, none have attempted to define its use or meaning within the Article. This finding is interesting given that there has been a considerable amount of

²⁶⁴ 1 of these tax treaties have been concluded with Portugal where it noted that Portugal has entered in the OECD MTC (2010:204 – para. 75) a reservation on the position of the tax rates that may be applied. In addition, two of these tax treaties have been concluded with India which has entered a similar reservation to that of Portugal (OECD, 2010:448 – para. 7.2).

1 tax treaty has been concluded with Romania where it is noted that Romania has entered in the OECD MTC (2010:447 – para. 5) a reservation to expressly apply a uniform rate of tax to all dividends.

It is further noted that there is a reservation by Serbia to tax all dividends at a uniform rate of tax of 10% (OECD MTC, 2010: 447 – para. 3). However, the Serbia & Montenegro tax treaty does not provide for a uniform rate of tax and therefore Serbia may want to renegotiate a new tax treaty with Zimbabwe.

²⁶⁵ The application of a uniform rate of tax for all dividends may have the result that it discourages FDI and therefore the SADC countries may want to renegotiate these tax treaties.

²⁶⁶ 1 of these tax treaties has been concluded between Tanzania-SA where SA has entered a position on the OECD MTC (2010:448 – para. 6) regarding the minimum percentage shareholding.

²⁶⁷ It is explained by Vogel (1997:563 – para. 11) that *“the former wording of 1977 might have been taken to imply that in cases where the formal owner and the beneficial owner are not identical, the former owner, and he alone, is the ‘recipient’ to whom dividends etc., are ‘paid’ within the meaning of the article, so that treaty benefits would have to be refused even if the beneficial owner were also resident in State of the recipient. This, however, was not in line with MC Comm. and in some cases might have led to inappropriate results.”*

debate²⁶⁸ as to the meaning of the term ‘beneficial owner’ since its introduction²⁶⁹.

As noted from Tables A and B below, the majority of the SADC tax treaties allow for a maximum withholding tax rate of 5% for substantial direct investments (24 tax treaties or 39%) and 15% for portfolio investments (23 tax treaties or 37%).

Of the 44 tax treaties which provide for a reduced rate of withholding tax for substantial direct investments, 20²⁷⁰ have concluded withholding tax rates greater than 5%²⁷¹ of which 10 have been concluded with developed countries. The majority of these tax treaties have been concluded by Zimbabwe with a maximum withholding tax rate of either 10% (7 tax treaties) or 15% (2 tax treaties). Also, Tanzania has been able to conclude a maximum withholding tax rate of 20% in 1 of its tax treaties.

Of the 60 tax treaties allowing for a maximum withholding tax rate for portfolio investments²⁷², 25 (40%) have concluded withholding tax rates less than 15% while 12 have concluded rates greater than 15%.

Of the tax treaties which have negotiated withholding tax rates greater than 15%, 8²⁷³ have been concluded with developed countries. Once again,

²⁶⁸ While the beneficial ownership concept is derived from the UK, it finds greater understanding in a common law jurisdiction like South Africa as it is understood more easily within the trust environment

²⁶⁹ This finding may suggest that the term ‘beneficial ownership’ is a concept that is unknown to the SADC countries as it may not be defined in their domestic tax legislation. For example, in SA this term is unknown to common law and has not been comprehensively defined in Statute law for tax purposes (Honiball & Olivier, 2011:540). Furthermore, none of the SADC countries or the countries with which they have concluded a tax treaty have entered any reservations as to the use or meaning of the term “beneficial owner”.

²⁷⁰ 4 of these tax treaties had been concluded with SA where it is noted that SA has entered in the OECD MTC (2010:448 – para. 6) a reservation on the maximum tax rate to be applied in respect of substantial direct investments.

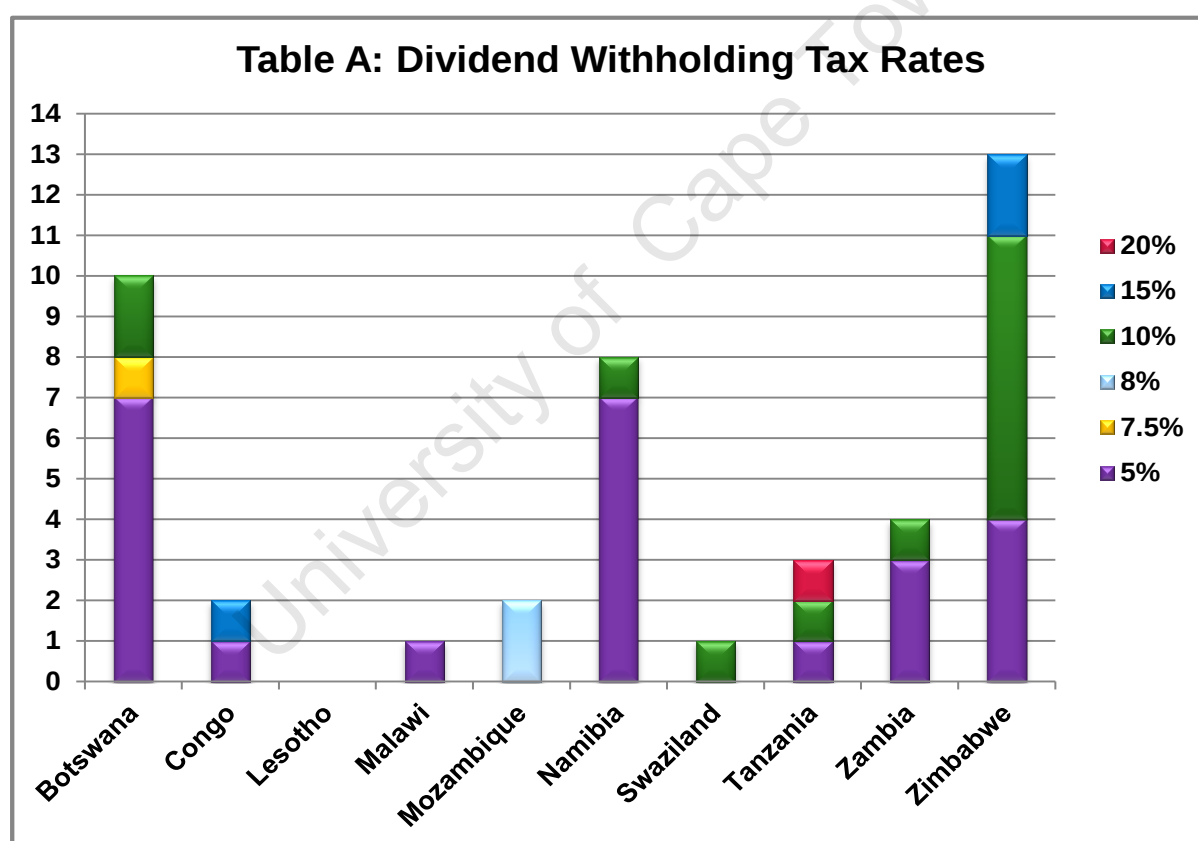
²⁷¹ It is noted in the OECD MTC (2010:187 – para. 10) that dividends paid by a subsidiary to a foreign parent company should be taxed less heavily to avoid recurrent taxation and to facilitate international investment. However, it is noted in the UN MTC (2011:178 – para. 7) that some developing countries felt that the rates proposed by the OECD Model would entail too large a loss of revenue for the source country. Therefore, the SADC countries may have felt that a rate of 10% in these tax treaties would entail too large a loss of revenue and preferred to tax dividends at a higher rate in order to collect more tax revenues.

²⁷² Those tax treaties which do not distinguish between substantial direct investments and portfolio investments have been included as part of the analysis of portfolio investments.

Zimbabwe managed to negotiate rates greater than 15% in 10 of its tax treaties²⁷⁴.

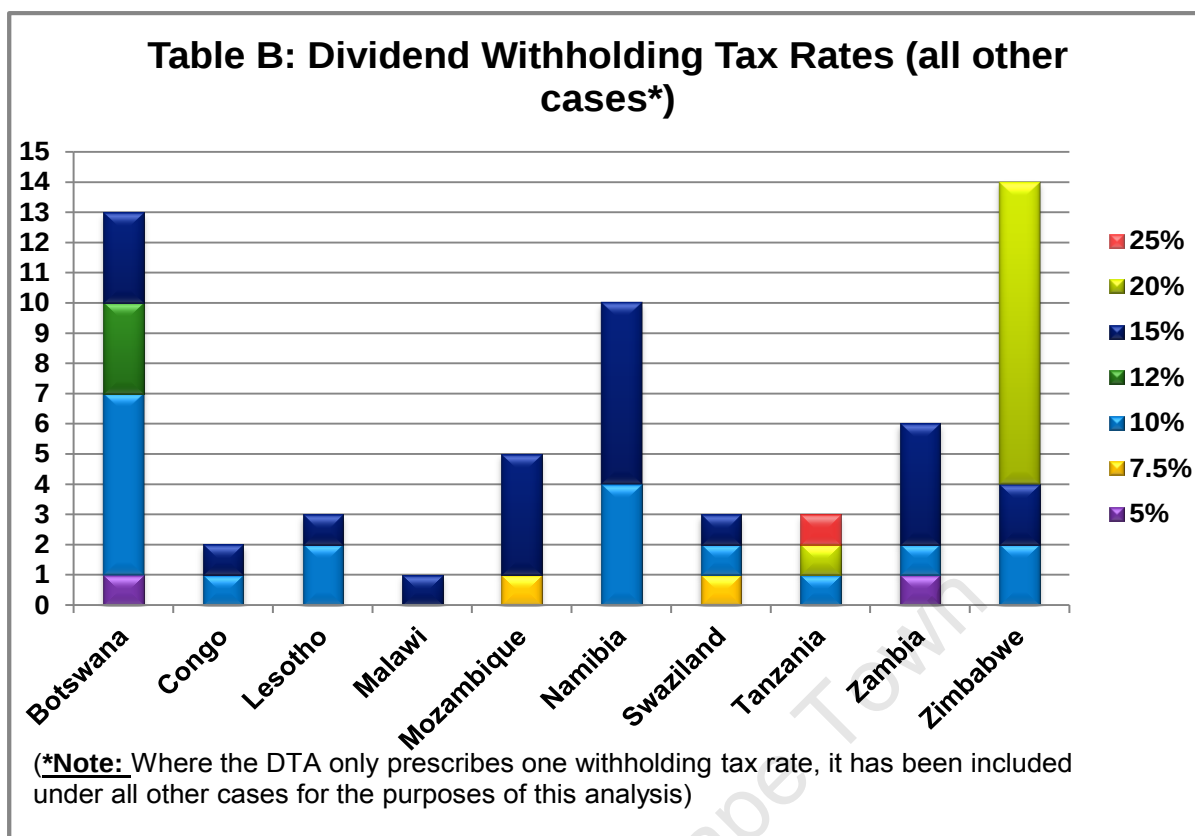
Of the 25 tax treaties containing a withholding tax rate less than 15%, 4 have been concluded with developed countries.

Furthermore, of the 5 tax treaties containing a provision similar to the ‘**limited right to tax dividends**’ provision of the UN Model, 4 provide for a withholding tax rate of 5% and 1 a withholding tax rate of 10% for substantial direct investments, while all provide for a withholding tax rate of 15% for portfolio investments.



²⁷³ In the tax treaties concluded between Zimbabwe-Canada and Zimbabwe-France, the rate will be reduced to 15% if the State of source is Canada or France.

²⁷⁴ In all of these tax treaties Zimbabwe was able to negotiate a rate of 20%. This rate is higher than the current withholding tax rate imposed under Zimbabwe’s domestic tax law which provides for a rate of 10% if the company is listed and 15% for any other company (“Guide to Fiscal Information – Key Economies in Africa 2011/2012 Deloitte”). However, this does not necessarily entitle Zimbabwe to impose a tax of 20% on dividends as it is noted by Baker (2012:11-2) that these provisions do not require the state of source to impose tax at such a level, it is a question of the domestic law of the state concerned whether it imposes this tax or not. The Article merely restricts contracting States from imposing tax under their domestic law in excess of this maximum rate.



There are 39 tax treaties which omit the ‘**mode of application**’ provision. Of these tax treaties, 7²⁷⁵ have entered positions on the OECD MTC to exclude this paragraph²⁷⁶.

There are only 5 tax treaties which omit the ‘**taxation of profits**’ provision.

4.6.3. Definition of dividend

Of the 62 tax treaties analysed, only 5²⁷⁷ contain a ‘**definition of dividend**’ provision identical to the UN Model while 57²⁷⁸ (95%) contain a variation of this provision²⁷⁹. The most notable variations are summarised as follows:

²⁷⁵ The tax treaty concluded between Zimbabwe-Bulgaria includes the ‘mode of application’ provision despite Bulgaria entering a position on the OECD MTC to omit this provision.

²⁷⁶ 2010:447 – para. 3

²⁷⁷ See the tax treaties concluded between Botswana-Seychelles, Congo-SA, Mozambique-Italy, Mozambique-UAE, Namibia-Romania and Zimbabwe-Mauritius.

²⁷⁸ It is noted in the OECD MTC (2010:191 – para. 23) that it is impossible to define the term ‘dividend’ accurately and exhaustively as a result of the dissimilarities between company and taxation laws of OECD Member countries. As a result, countries are open to provide for any peculiarities of their laws when negotiating tax treaties. Therefore, these findings may not be unusual and any variations are most likely clarifications as to the treatment of certain distributions under the domestic laws of the respective countries.

- 45²⁸⁰ tax treaties omit the term “*jouissance*” *shares or jouissance rights*”²⁸¹.
- 32²⁸² tax treaties omit the term “*mining shares, founders’ shares*”.
- 1²⁸³ tax treaty makes no reference to the domestic law of the source State.
- 4²⁸⁴ tax treaties specifically include as dividends any other item that is treated as a dividend or distribution of a company in the State of which the company paying the dividend is resident.
- 2²⁸⁵ tax treaties specifically include as dividends ‘*distributions*’.
- 2²⁸⁶ tax treaties specifically include as dividends income from arrangements carrying a right to participate in profits.
- 2 tax treaties include as dividends any other item which is deemed to be a dividend.
- 1²⁸⁷ tax treaty replaces the term “*other corporate rights*” with the term “*even if paid in the form of interest*”.

²⁷⁹ These finding would also not be consistent with the provision proposed by the SADC MTA (2011).

²⁸⁰ This term had been omitted from the tax treaty concluded between Zimbabwe-Bulgaria. It is noted that Bulgaria has entered a position on the OECD MTC (2010:448 – para. 9) to omit this term from its bilateral tax treaties. However, the terms “*mining shares and founders’ shares*” have not been omitted despite Bulgaria reserving the right to exclude these terms. Also, the term “*income from other corporate rights*” has not been replaced with the term “*income from other rights*” despite Bulgaria reserving the right to do so (OECD MTC, 2010:448 – para. 10).

²⁸¹ The omission of this term by the majority of the SADC countries is most likely due to fact that these terms are not familiar to the domestic laws of the SADC countries. For example, of the 8 tax treaties concluded with SA, 7 have excluded these terms as they are not familiar to SA domestic tax law and are generally excluded from tax treaties concluded with SA (Honiball & Olivier, 2011:101).

Another example is that this term is quite common in Germany domestic law (Vogel, 1997:653 & 683) and as a result has been included in all of the tax treaties concluded with Germany.

²⁸² The tax treaties concluded between Botswana-China and Mozambique-India have only omitted the term “*founder shares*” and not “*mining shares*”.

²⁸³ See the tax treaty concluded between Botswana-Zimbabwe. The omission of a reference to the domestic law of the State would mean the general rule of interpretation provided under Article 3(2) of the tax treaty would apply and therefore the term ‘dividend’ would have the meaning which it has under the domestic law of the contracting State applying the tax treaty (Vogel, 1997:381 – para. 29).

²⁸⁴ All of these tax treaties have been concluded with developed countries. 1 has been concluded between Zambia-Canada where it is noted that Canada has entered in the OECD MTC (2010:204 – para. 81) a reservation to include interest payments which are treated as distributions under its domestic law.

²⁸⁵ Both of these tax treaties have been concluded with France where it is noted that France has entered in the OECD MTC (2010:204 – para. 80) a reservation to expand the definition to include all income subjected to the taxation treatment of distributions.

²⁸⁶ Both of these tax treaties have been concluded with developed countries. 1 has been concluded between Mozambique-Portugal where it is noted that Portugal has entered in the OECD MTC (2010:204 – para. 81.1) a reservation regarding profit participation agreements.

²⁸⁷ See the tax treaty concluded between Congo-Belgium. It is noted that Belgium has entered in the OECD MTC (2010:204 – para. 78) a reservation to include income which is subjected to the same taxation treatment as income from shares by its internal laws

- 2 tax treaties specifically include as dividends income derived by a sleeping partner²⁸⁸.

4.6.4. Dividends connected with a PE or fixed base

Of the 62 tax treaties analysed, 45 contain a ‘**dividends connected with a PE or fixed base**’ provision similar to the UN Model. Of these tax treaties, 12 have been concluded post 2001 of which 1²⁸⁹ has been concluded with a developed country. All of these tax treaties contain an Article similar to Article 14 of the UN Model dealing with independent personal services.

4.6.5. Extra-territorial taxation

Of the 62 tax treaties analysed, 45 contain an ‘**extra-territorial taxation**’ provision similar to the UN Model. Of these tax treaties, 12 have been concluded post 2001 with 1 having been concluded with a developed country. All of these tax treaties contain an Article similar to Article 14 of the UN Model dealing with independent personal services.

4.6.6. Additional provisions not included in the UN or OECD Models

There are 7²⁹⁰ tax treaties which provide for a remittance tax (or branch profit’s tax)²⁹¹ on remittances or deemed remittances of the profits of a PE or company situated in a State.

²⁸⁸ Both of these tax treaties have been concluded with Germany. It is noted by Vogel (1997:642 – para. 165) that most German tax treaties expressly include the phrase “*income derived by a sleeping partner from his participation as such*”. It is further noted by Vogel (1997:643 – para. 166) that if the tax treaty fails to expressly include a special rule on silent partnerships, other than including it in the definition of dividend, then the income will be subject to the same rate of withholding tax that applies to portfolio investments.

²⁸⁹ See the tax treaty concluded with Botswana-UK. However, as noted in 4.5.4 above, the tax treaty concluded with Namibia-Canada has referred to the performance of independent personal services whereas no such reference has been made in this paragraph. Therefore, there appears to be conflicting provisions in the tax treaty concluded with Namibia-Canada which both countries may wish to rectify.

²⁹⁰ For an example of such a provision, see the tax treaty concluded between Botswana-Barbados. All of these tax treaties have limited the tax that may be imposed on the profits of the PE or company.

²⁹¹ Two of these tax treaties have been concluded between Tanzania-Canada and Zambia-Canada. It is noted that Canada has entered in the OECD MTC (2010:205 – para. 83) a reservation to impose a branch tax on the earnings of a PE situated in Canada.

There are 3²⁹² tax treaties which specifically address anti-avoidance mechanisms where the main purpose is to take advantage of the provisions of the Article 10 by means of the assignment or creation of shares or rights.

There are 2²⁹³ tax treaties which contain a MFN²⁹⁴ clause under which the SADC country would reduce the withholding tax rate if it concludes a tax treaty with another State in which the withholding tax rate is more favourable than the withholding tax rate provided for in these tax treaties.

4.6.7. Conclusion

The findings of the analysis would suggest that the SADC countries generally do not follow the provisions of Article 10 of the UN Model, but appear to favour the provisions of Article 10 of the OECD Model. This is particularly the case with regards to the maximum withholding tax rates that have been negotiated by the SADC countries with the majority adopting the maximum withholding tax rates proposed by the OECD Model for substantial direct investments and portfolio investments.

In addition, there are a number of SADC tax treaties which make use of the former wording of the UN Model (1980) or OECD Model (1992) which could lead to inappropriate results and therefore the SADC countries may need to renegotiate these tax treaties.

There are a number of tax treaties which do not distinguish between substantial direct investments and portfolio investments. The SADC countries may want to consider renegotiating these tax treaties to include such a distinction as it could help increase FDI by promoting substantial capital investments by enterprises.

²⁹² Two of these tax treaties have been concluded between Botswana-UK and Lesotho-UK.

²⁹³ See the tax treaties been concluded between Botswana-Sweden and Namibia-Sweden.

²⁹⁴ Hernandez-Gomez, 2012:404

Furthermore, the majority of the tax treaties contain a variation of the **‘definition of dividends’** provision of the UN and OECD Models. These variations would appear to mainly take into account the treatment of certain items of income which are considered to be dividends under the domestic laws of that particular country. This finding is not unusual given that the OECD MTC recognises that the definition is not exhaustive and that there is no complete international definition of dividends that could be applied to all countries.

Overall there are a number of variations of Article 10 of the UN and OECD Models, particularly between developing countries. However, this is not necessarily unusual and specific to the SADC countries tax treaties as it is recognised that the dividend article is the one article that is least likely to be found in its model form due to the fact that many States employ different methods of integrating corporate level and shareholder level taxes²⁹⁵.

4.7. Comparison of the SADC countries tax treaties to Article 11 of the UN Model

4.7.1. Taxation of interest

Of the 62 tax treaties analysed, 58 (93%) contain a provision similar to the **‘taxation of interest’** provision of the UN Model.

There are 5²⁹⁶ tax treaties which provide for exclusive taxing rights to the State of residence of the beneficial owner of the interest. However, 1²⁹⁷ of these tax treaties still contains the **‘limited right to tax interest’** provision.

²⁹⁵ Baker, 2012:10-2

²⁹⁶ See the tax treaties concluded between Congo-Zimbabwe, Mozambique-UAE, Namibia-Germany, Zimbabwe-Kuwait and Zimbabwe-Seychelles. The words “*may be taxed only*” have been used which would deprive the other State of any taxing rights.

²⁹⁷ See the tax treaty concluded between Zimbabwe-Seychelles.

4.7.2. Limited right to tax interest

Of the 62 tax treaties analysed, 10 contain a provision identical to the **‘limited right to interest’** provision of the UN Model while 49 (79%) contain a variation of this provision. The most notable variations are summarised as follows:

- 41²⁹⁸ tax treaties omit the **‘mode of application’** sentence²⁹⁹.
- 3³⁰⁰ tax treaties provide that the withholding tax rate would only be limited in those instances where the recipient of the interest was subject to tax on the interest in the State of residence of the recipient.
- 1³⁰¹ tax treaty specifically provides that interest paid in respect of a loan made and guaranteed, directly or indirectly, by certain spheres of government, National or Central Banks shall not be exempt from withholdings tax on interest.

There are 36 (58%) tax treaties which still use the former wording³⁰² of the UN Model (1980) and OECD Model (1992). This is despite the fact that 17 of these tax treaties had been concluded post 1995 when the OECD Model had been amended to reflect the current wording of OECD Model (2010). There are a further 3 tax treaties which make no reference to the beneficial owner of the interest³⁰³.

²⁹⁸ The **‘mode of application’** sentence has been omitted from all the tax treaties concluded by the SADC countries with Russia and India. Both Russia and India have entered positions on the OECD MTC (2010:449 – para. 4) to omit the **‘mode of application’** sentence. It is also noted that Bulgaria made a similar reservation; however, the tax treaty concluded with Bulgaria contains the **‘mode of application’** sentence.

²⁹⁹ This would be consistent with the provision proposed by the SADC MTA (2011) which also omits the **‘mode of application’** sentence.

³⁰⁰ See the tax treaties concluded between Lesotho-UK, Zambia-Canada and Zimbabwe-UK.

³⁰¹ See the tax treaty concluded between Namibia-Romania.

³⁰² See points 4.2.3 and 4.3.4 above.

³⁰³ It is noted in the OECD MTC (2010:211 – para. 9) that the term ‘beneficial owner’ was included in paragraph 2 of the Article 11 in order clarify the meaning of the words *“paid to a resident”* as used in paragraph 1. The purpose was to make it clear that the source State is not obliged to give up taxing rights merely because the interest is paid to a resident of the other State.

It is further noted by Vogel (1997:722) that the use of the term ‘beneficial owner’ is *“designed to avoid improper use of the DTA by the interposition of intermediaries in cases where the beneficial owner is not entitled to treaty protection”*. However, it is noted by Vogel (1997: 722-723) that the limitations that the term ‘beneficial owner’ are intended to avoid may be achieved through the use of the term ‘interest’ as the term ‘beneficial owner’ does not always help to avoid improper use of Article 11 (for e.g. back-to-back loans).

As noted above, the use of this former wording could lead to inappropriate results which were not intended by the OECD or UN Models³⁰⁴.

As one can see from the Table below, the majority of the SADC tax treaties allow for a maximum withholding tax rate of 10% (46 tax treaties or 74%). These findings may suggest that the SADC countries are reluctant to allow for a maximum withholding tax rate greater than 10% and appear to follow the comments made in the OECD MTC that 10% is an appropriate maximum withholding tax rate³⁰⁵.

There are 6 tax treaties providing for a withholding tax rate of less than 10%. It is noted in the UN MTC³⁰⁶ that developing countries tend to reduce the withholding tax rate on interest in order to attract FDI. However, whether this is the case in this analysis is debatable, as none of these tax treaties have been concluded with developed countries which is where one would expect a large portion of FDI to come from.

There are 5³⁰⁷ tax treaties providing for a maximum withholding tax rate of greater than 10%. Of these tax treaties, 4³⁰⁸ have been concluded with developed countries. It is noted in the UN MTC³⁰⁹ that withholding tax rates adopted between developed/developing countries tend to range more widely than those for dividends – between complete exemption and 25%. However, this does not appear to be the case in this analysis, as the withholding tax rates for dividends tend to range more widely than those for interest³¹⁰.

³⁰⁴ For a detailed discussion on 'beneficial ownership', see point 4.6.2 above.

³⁰⁵ It is noted in the OECD MTC (2010:207 – para.s 7 and 7.1) that the rate of 10% may be considered a reasonable maximum rate given that the State of source may be entitled to tax profits or income derived in its territory from investments financed out of borrowed capital. Furthermore, to allow source State non-exclusive taxing rights may act as an obstacle to international trade.

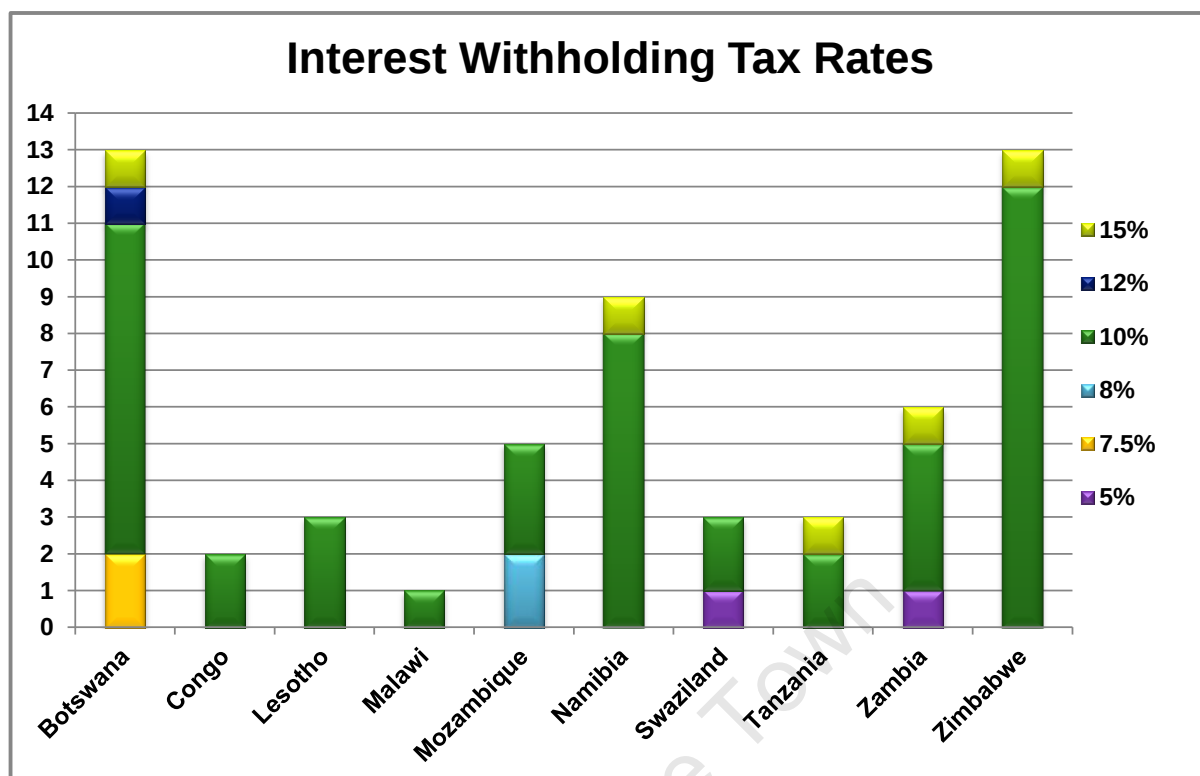
³⁰⁶ 2011:195 – para. 10 & 11

³⁰⁷ Of these tax treaties, only the tax treaty concluded between Namibia-Romania has Romania entered in the OECD MTC (2010:449 – para. 2) a reservation on the rate of withholding tax that may be applied.

³⁰⁸ See the tax treaties concluded between Botswana-Sweden, Tanzania-Canada, Zambia-Canada and Zimbabwe-Canada.

³⁰⁹ 2011:194-195 – para. 10

³¹⁰ See point 4.6.2 above for a detailed analysis of dividend withholding tax rates.



4.7.3. Article 11(3) – Definition of interest

Of the 62 tax treaties analysed, 34 (55%) contain a ‘**definition of interest**’ provision identical to the UN Model while 28 (45%) contain a variation of this provision. The most notable variations are summarised as follows:

- 15³¹¹ tax treaties specifically exclude as interest any item of income which is considered to be a dividend under Article 10³¹². In addition, 2³¹³ of these tax treaties further provide that income derived from shipping and air transport under Article 8 shall be excluded from the definition of ‘interest’.
- 12 tax treaties omit the phrase “*penalty charges for late payment shall not be regarded as interest for the purpose of this Article*”³¹⁴.
- 8³¹⁵ tax treaties omit the phrase “*including premiums and prizes attaching to such securities, bonds or debentures*”³¹⁶.

³¹¹ Of these tax treaties, 1 has been concluded with Belgium and 4 with Canada. Both Belgium and Canada have entered reservations in the OECD MTC (2010:219 – para. 42) to exclude interest payments which are treated as distributions under their domestic law from the definition of interest and are dealt with under Article 10.

³¹² This appears to be merely a clarification as it is noted in the OECD MTC (2010:212 – para. 19) that the term ‘interest’ “*does not include items of income which are dealt with under Article 10*”.

³¹³ See that tax treaties concluded between Namibia-Canada and Tanzania-Canada.

³¹⁴ It is noted in the OECD MTC (2010:213-214 – para. 22) that States are free to omit this sentence from their tax treaties and treat such charges as interest. Therefore, it appears that this particular type of interest would be taxable under these SADC tax treaties.

- 8 tax treaties expand the definition to include wording along the lines of the former wording contained in the OECD Model (1963) which previously read as follows:

“as well as all other income assimilated to income from money lent by the taxation law of the State in which the income arises”³¹⁷.

- 3³¹⁸ tax treaties had omitted the phrase *“whether or not carrying a right to participate in the debtor’s profits”*.

4.7.4. Interest connected with a PE of fixed base

Of the 62 tax treaties analysed, only 3³¹⁹ contain an **‘interest connected with a PE or fixed base’** provision similar to the UN Model.

This finding is generally consistent with those findings under point 2.5.1 above, as only a small number of the SADC countries’ tax treaties include a ‘limited force of attraction’ rule. However, there are 3³²⁰ tax treaties which provide for a provision similar to Article 7(1)(c) of the UN Model, but none have expressly referred to these activities in this provision³²¹.

There are 13 tax treaties concluded post 2001 which refer to independent personal services performed from a fixed base situated in the source State. All of these tax treaties contain an article dealing with independent personal services similar to Article 14 of the UN Model.

³¹⁵ This term had been omitted from all the tax treaties concluded with Malaysia. It is noted that Malaysia has entered in the OECD MTC (2010:449 – para. 6) a reservation to exclude this term from the definition in accordance with the treatment of such interest under its domestic law.

³¹⁶ Of these tax treaties, only 2 omit prizes from the definition, 1 of which was concluded with Malaysia.

³¹⁷ OECD Model, 1963:4

³¹⁸ See the tax treaties concluded between Malawi-Norway, Namibia-Canada and Zimbabwe-Canada. Both Norway and Canada have entered in the OECD MTC (2010:219 – para. 43) a reservation to delete the reference to ‘debt-claims carrying the right to participation in a debtor’s profits’.

³¹⁹ See the tax treaties concluded between Tanzania-Canada, Zimbabwe-Canada and Zimbabwe-Norway. All of these tax treaties include a ‘limited force of attraction’ rule in Article 7.

³²⁰ See the tax treaties concluded between Zimbabwe-Sweden, Botswana-Barbados and Zambia-Canada.

³²¹ The tax treaties concluded between Botswana-Barbados and Zimbabwe-Sweden both limit the application of the **‘limited force of attraction’** rule to state that only those activities that can be shown to be related to the activities of the PE shall result in the profits of these activities being attributed to the PE. Therefore, the exclusion of the reference to these activities under this provision should not in substance change the provision as it still refers to the activities of a PE which should cover any other activities which may be attributed to that PE.

4.7.5. Source of interest

Of the 62 tax treaties analysed, 36 (58%) contain a ‘**source of interest**’ provision similar to the UN Model.

There were 15 tax treaties which contain a variation of the ‘**source of interest**’ provision. The most notable variations are summarised as follows:

- 12 tax treaties concluded prior to 2001, omit the term “*a political subdivision*”.
- 2³²² tax treaties concluded prior to 2001; make no reference to a “*fixed base*”.

Of the tax treaties which contain a ‘**source of interest**’ provision similar to the UN Model, 12 had been concluded post 2001. However, 6 of these tax treaties still contain the old provision of the UN Model (1980). All of these tax treaties contain an article similar to Article 14 of the UN Model dealing with independent personal services.

Of the 4 tax treaties which allocate exclusive taxing rights to the State of residence of the beneficial owner of the interest, 3 include a ‘**source of interest**’ provision. It is explained by Vogel (1997:750 - para. 88) that such a provision is not necessary where exclusive taxing rights have been allocated to the State of residence.

4.7.6. Excessive interest

Of the 62 tax treaties analysed, 58 (94%) contain an ‘**excessive interest**’ provision similar to the UN Model.

In all of the tax treaties concluded with the UK³²³, the words “*for whatever reason*” have been inserted in place of the words “*having regard to the debt claim for which it is paid*” after the word “*exceeds*”³²⁴.

³²² See the tax treaties concluded between Namibia-Malaysia and Zimbabwe-Malaysia. This finding is interesting as both tax treaties contain an Article dealing with income from independent personal services.

4.7.7. Additional provisions not included in the UN or OECD Models

There are 39³²⁵ (63%) tax treaties which generally provide that interest paid to governments or government agencies, central banks, banks, other financial institutions or export type finance shall be exempt from withholding tax in the source State, while 11 (18%) provide that such interest shall be taxable only in the State of residence of the beneficial owner. These findings appear to be consistent with the international tax treatment of such interest³²⁶.

There are 2 tax treaties containing a provision which specifically addresses anti-avoidance mechanisms that are designed to take advantage of the provisions of Article 11³²⁷.

³²³ It is noted that the UK had entered in the OECD MTC (2000:152 – para. 46) a reservation “to include after *“exceeds”* the words *“for whatever reason”* in place of *“having regard to the debt-claim for which it is paid”*. This permits interest and other payments in respect of certain loans to be dealt with as distributions in a range of circumstances provided for in its domestic law, including those where the amount of the loan or the rate of interest or other terms relating to it are not what would have been agreed in the absence of a special relationship”.

However, the tax treaty between Botswana-UK which was concluded post 2003, still includes a similar variation despite the UK no longer including such a reservation in the OECD MTC.

³²⁴ It is noted in the OECD MTC (2010:218- para. 35) that the exact nature of the excess interest “will need to be ascertained according to the circumstances of each case, in order to determine the category of income in which it should be classified for the purposes of applying the provisions of the tax laws of the States concerned and the provisions of the Convention. This paragraph permits only the adjustment of the rate at which interest is charged and not the reclassification of the loan in such a way as to give it the character of a contribution to equity capital. For such an adjustment to be possible under paragraph 6 of Article 11 it would be necessary as a minimum to remove the limiting phrase *“having regard to the debt-claim for which it is paid”*. If greater clarity of intent is felt appropriate, a phrase such as ***“for whatever reason”*** might be added after *“exceeds”*.” Also see comments by Vogel (1997:759 – para. 112a).

³²⁵ For an example of these provisions, see the tax treaties concluded between Congo-Belgium and Botswana-Mauritius.

³²⁶ It is noted by Vogel (1997:728 – para. 48) that a withholding tax of 10% on “interest paid to commercial enterprises, banks and the like in respect of purchases on credit or of loans may prove to be too high because, as a result of the cost incurred by the enterprise in borrowing money to finance the operation producing the interest, will often be very small indeed. That is why many DTAs provide for relief for qualified interest recipients, while maintaining the general rule that the rate of tax in the State of source shall be 10%”. A similar comment is also noted in the UN MTC (2011:195 – para. 12) and OECD MTC (2010:207 - 208 para. 7.2).

It is further noted in the UN MTC (2011:196 – para. 16) that interest income received by government agencies should be exempt from source country taxation as this would facilitate the financing of development projects. It is further noted that “the predominant treaty practice is to exempt governmental interest from source country tax, but there is a wide range of practice on the details”.

³²⁷ For an example of such a provision, see the tax treaty concluded between Botswana-China. The provision is similar to the provision proposed in the UN MTC (2011:206 – para. 23).

4.7.8. Conclusion

The findings of the analysis would suggest that the SADC countries predominantly follow the provisions of Article 11 the OECD Model with respect to interest³²⁸. This is particularly the case with the withholding tax rate as the majority of the tax treaties allow for a maximum withholding tax rate of 10%.

In addition, there are a number of SADC tax treaties which make use of the former wording of the UN Model (1980) or OECD Model (1992) which may lead to inappropriate results and therefore the SADC countries may need to renegotiate these tax treaties.

The majority of the SADC countries appear to follow the **‘definition of interest’** provision proposed by the UN and OECD Models. This finding may have been expected as it is recognised that the definition of interest is in principle exhaustive and practically covers all kinds of income which may be regarded as interest under domestic laws³²⁹. There are a few tax treaties which contain variations of the definition, but these variations do not appear in substance to change the general definition of interest.

The application of the **‘interest connected with a PE or fixed base’** provision is almost non-existent in the SADC countries tax treaties. This finding is generally consistent with the findings in relation to the application of the ‘limited force of attraction’ rule in the SADC countries tax treaties.

³²⁸ This would be consistent with the SADC MTA (2011) which generally follows the provisions of the OECD Model.

³²⁹ OECD MTC, 2010:213 – para. 21

4.8. Comparison of the SADC countries tax treaties to Article 12 of the UN Model

4.8.1. Taxation of royalties

Of the 62 tax treaties analysed, 60³³⁰ (97%) contain a provision similar to the **‘taxation of royalties’** provision contained in the UN Model³³¹. Of these tax treaties, 23³³² have been concluded with developed countries. These findings appear to be consistent with international tax treaty practice of tax sharing between contracting States with regards to royalties³³³.

1³³⁴ tax treaty allocates exclusive taxing rights to the State of residence of the beneficial owner of the royalties³³⁵.

1³³⁶ tax treaty allocates exclusive taxing rights to the State of residence of the beneficial owner of the royalties, but still contains a **‘limited right to tax royalties’** provision.

1³³⁷ tax treaty specifically includes technical fees as falling within the provisions of Article 12.

³³⁰ The following non-OECD members have all entered positions on the OECD MTC (2010:450-451 – para. 3) to tax royalties at source: Bulgaria, China, Congo, India, Malaysia, Romania, Russia, Serbia and SA. All of the tax treaties concluded with these countries have provided for tax sharing, except for the tax treaty concluded between Congo-Zimbabwe which allocates exclusive taxing rights to the State of residence of the beneficial owner of the royalties.

³³¹ This finding is promising as this can be a source of additional tax revenue for the SADC countries as it is recognised that the importation of technology and other intangible property may be vital to the economic development of these countries (Holmes, 2007:261).

³³² All of the tax treaties concluded with Canada, Italy, Poland and Portugal provide for tax sharing and all of these countries have entered in the OECD MTC (2010:235 – paras. 35-37) a reservation to tax royalties in the source State.

³³³ Baker (2012:12-1) commented that “*in practice, many conventions provide for the state of source to levy tax up to a maximum level; a significant number of OECD Member Countries have entered reservations to the exemption of tax at source in Article 12, as have many of the non-member Countries that have stated their positions on the OECD Model. Approximately two thirds (in 2004) of the United Kingdom’s double taxation conventions provide for taxation in the state of source.*” All of the tax treaties concluded with the UK in this analysis provide for tax sharing.

It is further noted by Honiball & Olivier (2011:372) that “*art 12(1) is highly controversial and about 50% of the OECD Member countries do not follow the rule laid down in the article but rather award limited taxing rights to the source state*”.

³³⁴ See the tax treaty concluded between Congo-Zimbabwe.

³³⁵ All of the tax treaties concluded with SA allow for tax sharing which is interesting as it is noted by Honiball & Olivier (2011:372) that SA generally follows the OECD Model by allowing for exclusive taxing rights to the State of residence.

³³⁶ See the tax treaty concluded between Botswana-Seychelles.

³³⁷ See the tax treaty concluded between Zimbabwe-Germany.

4.8.2. Limited right to tax royalties

Of the 62 tax treaties analysed, 14 contain a provision identical to the **‘limited right to tax royalties’** provision of the UN Model while 47 (96%)³³⁸ contained a variation of the provision. The most notable variations are summarised as follows:

- 45 (73%) tax treaties omit the **‘Mode of Application’** sentence³³⁹.
- 1³⁴⁰ tax treaty provides that only royalty payments in respect of *“the use of, or the right to use, any copyright of literary or artistic work (including cinematograph films, and films or tapes for radio or television broadcasting)”* shall be subject to withholding tax.
- 1³⁴¹ tax treaty provides that royalty payments in respect of *“the production or reproduction of any literary, dramatic, musical or other artistic work (but not including royalties in respect of motion picture films nor royalties in respect of works on film or videotape or other means of reproduction for use in connection with television broadcasting)”* shall be taxable only in the State of residence of the beneficial owner.
- 1³⁴² tax treaty provides that royalty payments in respect of *“the use of, or right to use, any copyright, or similar right”* shall be taxable only in the State of residence of the beneficial owner.
- 1³⁴³ tax treaty provides for a reduced rate of withholding tax in respect of payments for *“any patent, secret formula, or process, or for information concerning industrial or scientific experience”*.

³³⁸ It is explained by Vogel (1997:773 para 8 & 775 para 16) that many tax treaties grant limited taxing rights to the State of source in accordance with the UN Model and nearly all tax treaties with developing countries provide for limited taxing rights to the State of source.

It is further noted in the UN MTC (2011: 209 – para. 6) that members from developing countries felt that in order to facilitate the conclusion of the tax treaties, the primary right to tax royalties should be given to the country where the income arose.

³³⁹ All of the tax treaties concluded with Russia and India have excluded the **‘mode of application’** sentence which may be as a result of the position these countries had made in the OECD MTC (see point 4.7.2 above) with regards to interest.

³⁴⁰ See the tax treaty concluded between Mozambique-UAE.

³⁴¹ See the tax treaty concluded between Namibia-Canada. It was noted that Canada had entered in the OECD MTC (2010:235 – para. 35) a reservation to provide an exemption in respect of certain royalty payments.

³⁴² See the tax treaty concluded between Namibia-France.

³⁴³ See the tax treaty concluded between Namibia-Sweden.

- 3³⁴⁴ tax treaties provide that the withholding tax rate shall only be limited where the recipient of the royalties was subject to tax on the royalties in the State of residence of the recipient.
- 1 tax treaty provides that the SADC country shall reduce the withholding tax rate if it concludes a tax treaty with another State in which the withholding tax rate is more favourable than the withholding tax rate provided for in the first mentioned tax treaty.

As one can see from the Table below, the majority of the SADC tax treaties allow for a maximum withholding tax rate of 10%³⁴⁵ (43³⁴⁶ tax treaties or 69%).

There are 12 tax treaties providing for a withholding tax rate of less than 10%. Of these tax treaties, 2³⁴⁷ have been concluded with developed countries.

There are 6 tax treaties providing for a withholding tax rate greater than 10%. Of these tax treaties, 4³⁴⁸ have been concluded with developed countries.

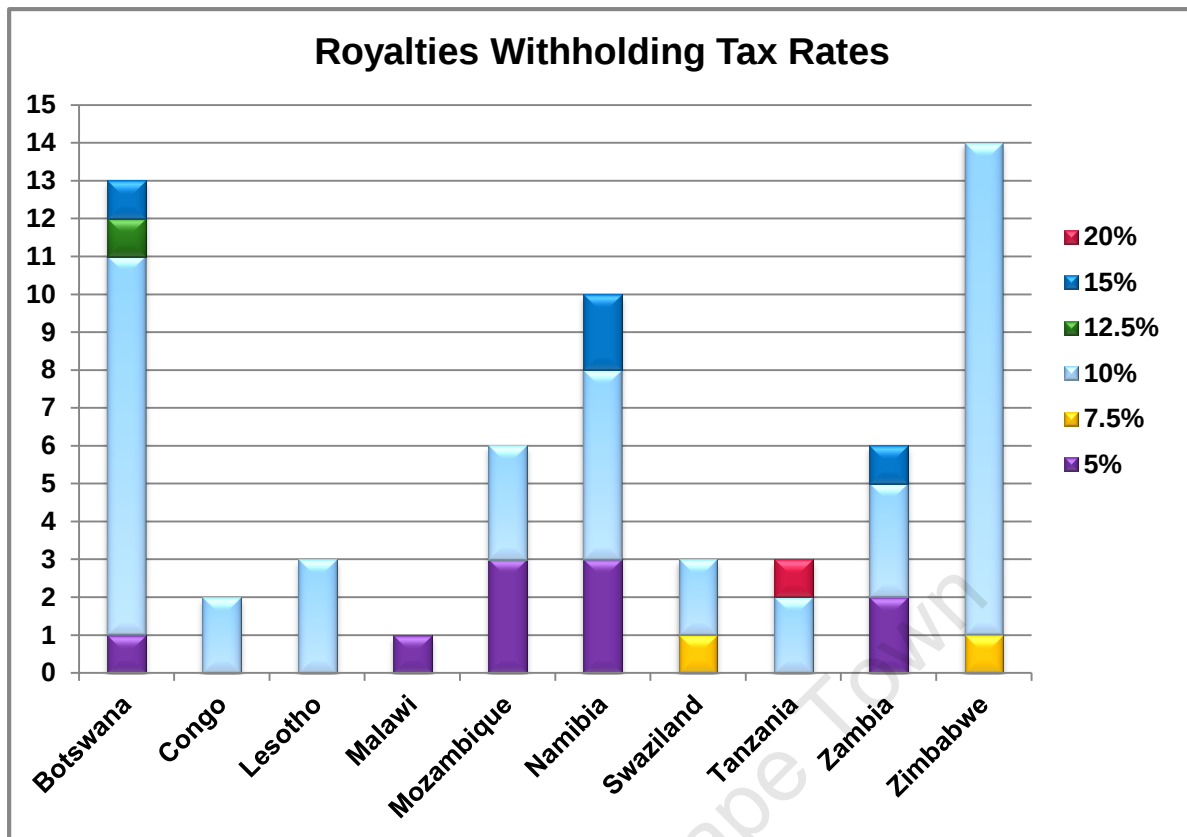
³⁴⁴ See the tax treaties concluded between Lesotho-UK, Zambia-Canada and Zimbabwe-UK.

³⁴⁵ It is noted in the UN MTC (2011:210 – para. 9) that there are a number of factors which influence the determination of the withholding tax rate on royalties, namely: the desirability of obtaining and encouraging the flow of technology and the importance of revenue sacrifice. Therefore, the SADC countries may have felt that a rate of 10%, in most cases, would be desirable so as not to sacrifice too much tax revenue but at the same not to discourage the flow of technology to the SADC countries.

³⁴⁶ A maximum withholding tax rate of 10% has been included in the tax treaties concluded with Namibia-Canada and Zimbabwe-Canada. It is noted that Canada has entered in the OECD MTC (2010:235 – para. 35) a reservation that it retains the right to include in its tax treaties a withholding tax of 10% on royalties in the source State. However, for the tax treaties concluded between Tanzania-Canada and Zambia-Canada, the withholding tax rates are 20% and 15%, respectively.

³⁴⁷ See the tax treaties concluded between Malawi-Norway and Zimbabwe-Germany.

³⁴⁸ See the tax treaties concluded between Botswana-Sweden, Namibia-Sweden, Tanzania-Canada and Zambia-Canada. However, in the Namibia-Sweden tax treaty, the withholding tax rate would be reduced if Namibia concludes a tax treaty with another State in which the withholding tax rate is more favourable than the withholding tax rate provided for in the Namibia-Sweden tax treaty. Also, in the Namibia-Sweden tax treaty a withholding tax rate of 5% will apply in respect of payments for “*any patent, secret formula, or process, or for information concerning industrial or scientific experience*”.



4.8.3. Definition of royalties

Of the 62 tax treaties analysed, only 7 contain a **‘definition of royalties’** provision identical to the UN Model while 52 (84%) contain a variation of the provision.

There are 56 (90%) tax treaties which make some sort of reference to *“films or tapes used for radio or television broadcasting”*. Of these tax treaties, 16 have been concluded with developed countries.

There are 3³⁴⁹ tax treaties which make no reference to *“films or tapes used radio or television broadcasting”*, but all still make reference to *“for the use of, or the right to use, industrial, commercial or scientific equipment”*. However, in the tax treaty between Mozambique-Italy, reference is made to *“recordings for radio and broadcasting”*. In the Namibia-Canada tax

³⁴⁹ All of these tax treaties have been concluded post 1992 when the OECD Model no longer made reference to *‘for the use of, or the right to use, industrial, commercial or scientific equipment’*.

treaty³⁵⁰, reference is made to “...payments of any kind in respect of motion picture films and works on film, videotape or other means of reproduction for use in connection with television”³⁵¹. In the tax treaty between Zambia-Canada, reference is made to “video tapes for use in connection with television or tapes for use in connection with radio”.

There are 14³⁵² tax treaties which omit the wording “for the use of, or the right to use industrial, commercial or scientific equipment”³⁵³. However, all of these tax treaties still make reference to “films or tapes used for radio or television broadcasting”.

There were 26 tax treaties which included payments made in consideration for the use of or right to use, discs for radio or television broadcasting³⁵⁴.

There are 5 tax treaties which include payments made in consideration of any services of a technical, managerial or consultancy nature³⁵⁵ as being a royalty. Of these tax treaties, 3 have been concluded with developed countries.

³⁵⁰ This tax treaty was concluded post 1992 and still includes a reference to ‘for the use of, or the right to use, industrial, commercial or scientific equipment’ which is consistent with the reservation that Canada has entered in the OECD MTC (2010:236 – para. 40) to retain this wording. Similarly, all the tax treaties which were concluded post 1992 between Tanzania-Canada and Zimbabwe-Canada still includes this wording in the ‘definition of royalties’.

Furthermore, the tax treaties concluded between Mozambique-Italy, Zambia-Poland and Zimbabwe-Poland include this wording. All of these developed countries have entered similar reservations in the OECD MTC as that of Canada.

³⁵¹ A similar provision has been included in the tax treaties concluded with Tanzania-Canada and Zimbabwe-Canada. It is noted that Canada has entered in the OECD MTC (2010:235 – para. 35) a reservation that it is prepared to exempt from tax copyright royalties in respect of cultural, dramatic, musical or artistic work, but not royalties in respect of motion picture films and works on films or video tape or other means of reproduction for use in connection with television.

³⁵² Of these tax treaties, only 2 have been concluded with developed countries. Furthermore, in the tax treaties concluded by the SADC countries with China, China has omitted this term even though it has made a reservation in the OECD MTC (2010:451 – para. 8) to reserve the right to include in the definition of royalties such payments.

³⁵³ All of the tax treaties concluded with India, Malaysia, Romania, Russia and Serbia which have been concluded post 1992, make reference to this term in their tax treaties. All of these countries have entered positions on the OECD MTC (2010:451 – para. 8) to continue to include such a reference in their tax treaties.

³⁵⁴ This finding would be consistent with the provision proposed by the SADC MTA (2011) which refers to the use or right of use of discs.

³⁵⁵ It is explained by Vogel (1997:801 - para. 68b) that while the inclusion of technical assistance in the definition of ‘royalties’ may be in the interests of both states as it removes the problems of distinguishing between assistance and licences, it creates a new problem in that it may be difficult to distinguish between royalties and payments for assistance rendered and payments for business activities or independent personal services.

There are 6 tax treaties which include in the definition of royalties payments made in respect of industrial, commercial or scientific equipment **involving a transfer of know-how**³⁵⁶.

There are 9³⁵⁷ tax treaties which refer to know-how as falling within the definition of royalties³⁵⁸.

There are 11 tax treaties which include payments made in consideration *“for the use of or right to use of computer programs”*³⁵⁹.

The tax treaty concluded between Congo-Belgium includes payments received as consideration *“for the use of or the right to use computer software”*³⁶⁰.

4.8.4. Royalties connected with a PE or fixed base

Of the 62 tax treaties analysed, only 4³⁶¹ contained a **‘royalties connected with a PE or fixed base’** provision similar to the UN Model.

This finding is generally consistent with those findings under point 2.5.1 above, as only a small number of the SADC countries’ tax treaties include a

³⁵⁶ The insertion of the term ‘involving a transfer of know-how’ would appear to cover those instances where there has been a contract for supply of know-how which may involve the use or right of use of industrial, commercial or scientific equipment connected with that supply of know-how.

³⁵⁷ For an example of such a provision, see the tax treaty concluded between Botswana-UK.

³⁵⁸ The only purpose of this would be clarification as the OECD MTC (2010:225 – para. 11) makes it clear that payments for ‘know-how’ fall within the definition of ‘royalties’ by reference to ‘information concerning industrial, commercial or scientific experience’.

³⁵⁹ It is explained by Honiball & Olivier (2011:377) that *“it is often difficult to characterise payments for the use of computer software. Even where a payment falls within the ambit of a royalty as described in the Commentary to the OECD MTC, it still needs to be classified as a royalty as defined in art 12(2)”* which in itself gives rise to several problems. Therefore, given these difficulties these tax treaties may have included the term ‘computer programs’ to make it clear that these payments fall within the ambit of Article 12. However, it still raises the issue as to whether a payment may be classified as consideration for the use of computer software and essentially a royalty.

The OECD Model recognises that computer software poses problems and provides various examples of the use of software. However, the UN MTC does not agree with all of the OECD MTC examples of computer software. Therefore, there are different points of views on this matter and it is very much an area of uncertainty as to when the use of computer software may be classified as a royalty.

³⁶⁰ It is noted that Congo has entered in the OECD MTC (2010:452 – para. 12.2) a reservation on the treatment of software.

³⁶¹ See to the tax treaties concluded between Zimbabwe-Canada, Zimbabwe-Norway, Zimbabwe-Sweden and Tanzania-Canada.

‘limited force of attraction’ rule. However, there are 2³⁶² tax treaties which provide for a provision similar to Article 7(1)(c) of the UN Model, but none have expressly referred to these activities in this provision³⁶³.

There are 12 tax treaties concluded post 2001 which make reference to independent personal services performed from a fixed base situated in the source State. All of these tax treaties contain an article dealing with independent personal services similar to Article 14 of the UN Model.

The tax treaty concluded between Mozambique-Italy replaces term “*In such cases the provisions of article 7 or article 14, as the case may be, shall apply*” with the term “*In such case, the royalties may be taxed in that other Contracting State in accordance with its domestic law*”³⁶⁴.

4.8.5. Source of royalties

Of the 62 tax treaties analysed, 30 (48%) contain a ‘**source of royalties**’ provision similar to the UN Model³⁶⁵.

There are 30 tax treaties which contain a variation of the ‘**source of royalties**’ provision. The most notable variations are summarised as follows:

- 19 tax treaties replace the wording “[...] *in connection with which the liability to pay the royalties was incurred* [...]” with the wording “[...] *in*”

³⁶² See the tax treaties concluded between Botswana-Barbados and Zambia-Canada.

³⁶³ The tax treaty concluded between Botswana-Barbados limits the application of the ‘**limited force of attraction**’ rule to state that only those activities that can be shown to be related to the activities of the PE shall result in the profits of these activities being attributed to the PE. Therefore, the exclusion of the reference to these activities under this provision should not in substance change the provision as it still refers to the activities of a PE which should cover any other activities which may be attributed to a PE.

³⁶⁴ It was noted that Italy had entered in the OECD MTC (1992:143 – para. 42) a reservation “*to subject royalties and profits from the alienation of rights or property giving rise to royalties to the taxes imposed by its law whenever the recipient thereof has a permanent establishment in Italy, even if the rights or property in respect of which the royalties are paid is not effectively connected with such permanent establishment*”.

³⁶⁵ All of the tax treaties concluded with Belgium, Bulgaria, Canada, China, France, Malaysia, Romania, Russia and SA include a ‘source of royalties’ provision similar to that of the UN Model. It is noted that all of these countries have entered reservations in the OECD MTC (2010:236 – para. 48 & 452 – para. 12) to include such a provision in their tax treaties.

connection with which the right or property of which the royalties are paid is effectively connected [...]".³⁶⁶

- 9 tax treaties omit the term "[...] or a fixed base [...]". Of these tax treaties, 8 have been concluded post 2001.
- 2³⁶⁷ tax treaties provided that where royalties do not arise in one of the States, but relate to the use of or right to use the right or property in one of the States, such royalties shall be deemed to arise in the State in which the right or property is used.

Of the tax treaties which contain a '**source of royalties**' provision similar to the UN Model, 17 had been concluded post 2001. However, 4 of these tax treaties still contain the old provision of the UN Model (1980). All of these tax treaties contain an article dealing with independent services similar to Article 14 of the UN Model.

4.8.6. Excessive royalties

Of the 62 tax treaties analysed, all contain an '**excessive royalties**' provision similar to the UN Model.

In all of the tax treaties concluded with the UK, the words "*for whatever reason*" have been inserted in place of the words "*having regard to the debt claim for which it is paid*" after the word "*exceeds*"³⁶⁸. This is identical to the reservation that the UK has entered in the OECD MTC for interest³⁶⁹.

³⁶⁶ It is noted in the UN MTC (2011:223 – para. 19) that countries may wish to include a rule that identifies the source of a royalty as the State in which the property or right giving rise to the royalty is used. Therefore, it appears as though the use of this wording is to clarify that the right or property for which the royalty is paid must be connected to the PE in order for the royalty payment to be deemed to arise in the State in which the PE is situated (i.e. the source of royalty would be where right or property is used).

³⁶⁷ Both tax treaties have been concluded with India.

³⁶⁸ The tax treaty concluded between Zimbabwe-Mauritius had used the same wording.

³⁶⁹ See point 4.7.6 above.

4.8.7. Additional provisions not included in the UN or OECD Models

There are 3³⁷⁰ tax treaties which specifically address anti-avoidance mechanisms designed to take advantage of the provisions of Article 12³⁷¹.

4.8.8. Conclusion

The findings of the analysis suggest that the SADC countries predominantly follow the provisions of Article 12 the UN Model³⁷². This is probably the one Article of the UN Model that the SADC countries tend to apply consistently compared to the other Articles of the UN Model. Furthermore, these findings would be consistent with international tax treaty practice which is to provide for tax sharing in respect of royalties rather than adopting the restrictive provisions of the OECD Model.

The majority SADC countries allow for a maximum withholding tax rate of 10% which is identical to the withholding tax rate proposed by the OECD Model in respect of interest. This finding may be due to the fact the SADC countries consider that this is a reasonable maximum withholding tax rate that would achieve a balance between tax revenues and FDI.

The one provision of Article 12 of the UN Model that the SADC countries tend deviate from is the **‘royalties connected with a PE or fixed base’** provision. This is generally consistent with the findings in relation to the application of the ‘limited force of attraction’ rule in the SADC countries tax treaties.

³⁷⁰ For an example of such a provision, see the tax treaty concluded between Botswana-China.

³⁷¹ This provision is identical to the provision proposed by the former Group of Experts that contracting States are free to include such a provision in their tax treaties to specifically address the issue of artificial devices entered into by persons so as to take advantage of the provisions of Article 12 – royalties (UN MTC, 2011:224 - para. 21).

³⁷² This finding would be consistent with the provisions of Article 12 of the SADC MTA (2011) which generally follows the provisions of Article 12 of the UN Model.

4.9. Comparison of the SADC countries tax treaties to Article 13 of the UN Model

4.9.1. Immovable property

Of the 62 tax treaties analysed, 32 (52%) contain an **‘immovable property’** provision similar to the UN Model.

There are 13 (21%) tax treaties which specifically include the alienation of shares in a company the assets of which consist principally of immovable property, as forming part of immovable property³⁷³. However, none of these tax treaties contain a **‘real property shares’** provision.

There are 3³⁷⁴ tax treaties which do not contain an Article dealing with the taxation of capital gains.

There are 6³⁷⁵ tax treaties which include a variation of the **‘immovable property’** provision contained in the UN Model, but still provided for non-exclusive taxing rights to the source State³⁷⁶.

There are 2³⁷⁷ treaties providing that gains from the alienation of shares or other rights in a company, a trust or a comparable institution, may be taxed in the other State, if such shares or rights predominantly derive (directly or indirectly) more than 50% or their value consists of more than 50% of immovable property situated in the other State. However, this would not apply to immovable property pertaining to industrial, commercial or agricultural operations of a company or the performance of independent personal services. Thus, gains from the alienation of such property would continue to be governed by the **‘movable property of a PE or fixed base’** provision.

³⁷³ This variation has been included in 9 tax treaties concluded by Botswana.

³⁷⁴ See the tax treaties concluded between Lesotho-SA, Namibia-Malaysia and Zambia-Mauritius.

³⁷⁵ Of these tax treaties, 3 had been concluded with developed countries.

³⁷⁶ For an example of such a provision, see the tax treaty concluded between Zimbabwe-Mauritius.

³⁷⁷ See the tax treaties concluded between Botswana-France and Namibia-France. It is noted that France has entered in the OECD MTC (2010:248 – para. 36) a reservation to tax gains from the alienation of share or other rights which from part of a substantial participation in a company.

There are 4³⁷⁸ tax treaties which make no reference to immovable property referred to in Article 6.

1³⁷⁹ tax treaty merely provides that capital gains may be taxed according to the provisions of the domestic law of each State.

4.9.2. Movable property of a PE or fixed base

Of the 62 tax treaties analysed, 40 (65%) contain a **‘movable property of a PE or fixed base’** provision similar to the UN Model. Of these tax treaties, 14 have been concluded post 2001 of which 2 have been concluded with developed countries. All of these tax treaties contain an Article dealing with independent personal services similar to Article 14 of the UN Model.

1³⁸⁰ tax treaty combines the **‘movable property of a PE or fixed base’** and **‘ships, aircraft and boats’** provisions into a single provision.

1³⁸¹ tax treaty refers to gains from the alienation of movable property forming part of a PE which an enterprise had in the other State.

1³⁸² tax treaty, concluded prior to 2000, omits the wording *“for the purposes of performing independent personnel services”*.³⁸³

4.9.3. Ships, aircraft and boats

Of the 62 tax treaties analysed, only 2³⁸⁴ contain a **‘ships, aircraft and boats’** provision identical to the UN Model while 58 (94%) contain a variation of this provision. The most notable variations are summarised as follows:

³⁷⁸ See the tax treaties concluded between Namibia-Canada, Namibia-Germany, Tanzania-Canada and Zimbabwe-Canada.

³⁷⁹ See the tax treaty concluded between Lesotho-UK.

³⁸⁰ See the tax treaty concluded between Zimbabwe-Malaysia.

³⁸¹ See the tax treaty concluded between Namibia-Canada.

³⁸² See the tax treaty concluded between Zimbabwe-France.

³⁸³ It is explained by Vogel (1997:832 – para. 57) that the omission of a specific rule dealing with the provision of independent personal services from a fixed base would, as a general rule, have the result that capital gains from the alienation of such property being taxable in the State of residence of the alienator. Thus, all capital gains must be excluded from the profits attributable to a fixed base.

- 24 tax treaties commence the provision with either the following wording: *“Gains derived by a resident of a Contracting State”* or *“Gains of an enterprise of a Contracting State”*.
- 55 tax treaties omit the wording *“boats engaged in inland waterways transport”* and *“boats”*³⁸⁵.
- 27 tax treaties provide that gains from the alienation of ships, boats or aircraft shall be taxable only in the contracting State of the enterprise and not in the State in which the place of effective management of the enterprise is situated.

There are a further 4 tax treaties providing that gains from the alienation of ships, boats or aircraft shall be taxable only in the State of which the alienator is resident and not in the State in which the place of effective management of the enterprise is situated.

These findings³⁸⁶ suggest that the SADC countries are reluctant to adopt the provision of the UN or OECD Model and rather prefer to tax such capital gains in the State of residence of the enterprise³⁸⁷.

- 15 tax treaties specifically include capital gains from the alienation of *“rail or road transport vehicles”* operated in international traffic as falling within the ‘ships, boats and aircraft’ provision³⁸⁸.
- 1³⁸⁹ tax treaty specifically provides that capital gains from the alienation of containers shall be taxable in the State of which the PE of enterprise is situated.

³⁸⁴ See the tax treaties concluded between Zimbabwe-Bulgaria and Zimbabwe-Poland.

³⁸⁵ It is explained by Vogel (1997:837 – para. 69) that the failure to include a special rule on gains from the alienation of boats engaged in inland waterways transport or movable property pertaining to the operation of such boats would mean that such gains are governed by the **‘movable property of a PE or fixed base’** or **‘other property’** provisions of Article 13.

³⁸⁶ These findings would be consistent with the provisions of Article 14 of the SADC MTA (2011) which allows for exclusive taxing rights to the State of residence.

³⁸⁷ It is noted in the OECD MTC (2010:244 – para. 28) that States are free, in bilateral negotiations, to substitute the place of effective management of the enterprise with alternative wording which may confer exclusive taxing rights on the State of residence.

³⁸⁸ These findings would be consistent with the provisions of Article 14 of the SADC MTA (2011) which provides for taxation of capital gains from the alienation of rail or road transport vehicles.

³⁸⁹ See the tax treaty concluded between Zimbabwe-Norway.

- 3³⁹⁰ tax treaties specifically provide that the provision shall only apply to gains derived by an air transport consortium to the extent that such gains relate to a participation in the consortium.

4.9.4. Real property shares

Of the 62 tax treaties analysed, 25³⁹¹ (40%) did not contain a ‘**real property shares**’ provision³⁹². Of these tax treaties, 7 had been concluded with developed countries.

There are 9 tax treaties containing a ‘**real property shares**’ provision identical to the UN Model (1980). Of these tax treaties, 2³⁹³ have been concluded with developed countries. Furthermore, 5 of these tax treaties have been concluded post 2001.

There are 3 tax treaties which have adopted a provision identical Article 13(4) of the OECD Model.

There are 13 tax treaties which do not contain a separate provision dealing with the real property shares. However, all have expanded the ‘**immovable property**’ provision to specifically include the alienation of shares in a company the assets of which consist principally of immovable property.

³⁹⁰ All of these tax treaties have been concluded with Sweden. It is noted that Sweden has entered in the OECD MTC (2010:248 – para. 44) a reservation to include a provision dealing with gains derived by the air transport consortium SAS. Norway has entered a similar reservation in the OECD MTC, but none of the tax treaties concluded with Norway have included such a provision.

³⁹¹ This finding is interesting as it is noted in the UN MTC (2011:233 – para. 8) that this provision “*is designed to prevent the avoidance of taxes on the gains from the sale of immovable property. Since it is often relatively easy to avoid taxes on such gains through the incorporation of a company to hold such property, it is necessary to tax the sale of shares in such a company*”. Therefore, the exclusion of this provision from these tax treaties may give rise to opportunities for tax avoidance and the SADC countries may want to renegotiate these tax treaties to eliminate any opportunities for tax avoidance.

³⁹² These findings would not be consistent with Article 14 of the SADC MTA (2011) which proposes a similar ‘real property share’ provision as that of the OECD Model.

³⁹³ See the tax treaties concluded between Zambia-Poland and Zimbabwe-Poland.

There are a further 2³⁹⁴ tax treaties including capital gains from the alienation of shares or similar rights in a company or other legal person the assets of which consist principally of immovable property.

Of the tax treaties concluded post 2001, none contain a ‘**real property shares**’ provision identical to either the UN Model (2001) or (2010). However, there are 6³⁹⁵ tax treaties containing a variation of the UN Model provision and provide that gains from the alienation of:

- shares which derive their value principally from immovable property³⁹⁶; or
- an interest in partnership, trust or estate assets which consist principally of immovable property³⁹⁷, situated in the source State may be taxed in the source State.

Of these tax treaties, 5 have been concluded post 2001 while 1 had been concluded pre 2001. Five of these tax treaties have been concluded with developed countries. Furthermore, only 3³⁹⁸ specifically exclude immovable property (other than rental) used to carry on the business of the company, partnership, trust or estate.

There are 4 tax treaties providing that gains from the alienation of shares, corporate rights in a company, or any other legal person which owns, directly or indirectly, immovable property situated in the source State, may be taxed in the source State according to the laws of the source State³⁹⁹.

³⁹⁴ Both of these tax treaties have been concluded with France, prior to 2001. 1 of the tax treaties provides that the value of the shares or rights must derive 50% or more of their value from immovable property.

³⁹⁵ See the tax treaties concluded between Botswana-UK, Mozambique-UAE, Namibia-Canada, Tanzania-Canada, Zambia-Canada and Zimbabwe-Canada.

³⁹⁶ The tax treaties concluded between Botswana-UK and Tanzania-Canada specifically exclude shares traded regularly on a recognised stock exchange. It is noted in the UN MTC (2011:235 – para. 13) that “*it is costly to tax gains from the alienation of quoted shares. In addition, developing countries may find it economically rewarding to boost their capital markets by not taxing gains from the alienation of quoted shares*”.

³⁹⁷ Only the tax treaties concluded between Tanzania-Canada and Zimbabwe-Canada refer to partnerships, trusts or estates. The remaining tax treaties either refer only to partnerships or both partnerships and trusts.

³⁹⁸ These tax treaties have all been concluded with Canada.

³⁹⁹ The tax treaty concluded between Zimbabwe-France specifically excludes property which is used to carry on business activities.

4.9.5. Shares

There were 36⁴⁰⁰ tax treaties which do not include a ‘shares’⁴⁰¹ provision⁴⁰². Of these tax treaties, 13 have been concluded with developed countries.

There are 10⁴⁰³ tax treaties providing that gains from the alienation of shares may be taxed in the source State, but none provide for a minimum percentage participation or shareholding in the company⁴⁰⁴.

Only 1⁴⁰⁵ tax treaty provides that capital gains from the alienation shares will be subject to tax in the source State if such shares represent a participation of 51%.

There are 9 tax treaties providing that capital gains from the alienation of shares or other corporate rights of a company that is resident of a contracting State by a resident of the other contracting State shall be taxable in the first-mentioned State if that person had been a resident of the first-mentioned State at the time the shares were acquired and the shares are disposed of within a certain period after the person ceased to be a resident of the first-mentioned State. The most common restriction period contained in the tax treaties was 10

⁴⁰⁰ It is noted that China has entered a position on the OECD MTC (2010:454 - para. 2) to include a “*right to tax gains from the alienation of shares or rights that are part of a substantial participation in a resident company*”. However, none of the tax treaties concluded with China have included such a provision.

The tax treaty concluded between Congo-Belgium excludes the ‘shares’ provision. It is noted that Belgium has entered in the OECD MTC (2010:249 – para. 51) a reservation to exclude this provision from their tax treaties.

⁴⁰¹ It is noted in the UN MTC (2011:236 – para. 15) that “*countries engaged in bilateral negotiations might seek to have paragraph 5 omitted entirely, where they take the view that taxation in the source State of capital gains in these situations may create economic double taxation in the corporate chain, thus hampering foreign direct investment. This consideration is, in particular, relevant for countries that apply a participation exemption not only to dividends received from a substantial shareholding, but also to capital gains made on shares in relation to such substantial holdings*”.

⁴⁰² This finding would be consistent with Article 14 of the SADC MTA (2011) which does not propose a provision for the taxation capital gains from the disposal of shares in the source State.

⁴⁰³ 4 of these tax treaties have been concluded with India where India has entered a position on the OECD MTC (2010:454 – para. 5) “*to tax gains from the alienation of shares or rights in a company that is a resident of the country*”.

⁴⁰⁴ It is noted in the UN MTC (2011:234 – para. 9) that the ‘substantial participation’ was included in order to avoid administrative difficulties that may arise for minor portfolio investments.

⁴⁰⁵ See the tax treaty concluded between Zimbabwe-Serbia & Montenegro. It is noted that Serbia has entered a position on the OECD MTC (2010:277 - para. 2) to include a “*right to tax gains from the alienation of shares or rights that are part of a substantial participation in a resident company*”.

years⁴⁰⁶. This provision has been included in 8 tax treaties concluded by Botswana.

In the tax treaty concluded between Mozambique-Portugal, capital gains from the alienation of participations in the capital of a company of a State may be taxed in that State, but such tax shall not exceed 10%.

In the tax treaty concluded between Namibia-India, capital gains from the sale, exchange or other disposition (directly or indirectly) of shares or similar rights, may be taxed in the source State.

In the tax treaty concluded between Tanzania-Canada, capital gains from the alienation of shares of a company of Tanzania may be taxed in Tanzania, provided that the person alienating the shares holds less than 25% of the shares of the company⁴⁰⁷.

4.9.6. Other property

Of the 62 tax treaties analysed, 58⁴⁰⁸ contained a provision similar to the ‘**other property**’ provision contained in the UN Model. There were no significant variations from the provision of the UN Model.

4.9.7. Additional provisions not included in the UN or OECD Models

There are 3⁴⁰⁹ tax treaties providing that capital gains from the alienation of **any property** of an individual of a contracting State shall be taxable in the source State if such individual had been a resident of the source State at any

⁴⁰⁶ A restriction period of 10 years is included in 6 tax treaties while 1 has a restriction period of 5 years and 2 a restriction period of 6 years.

⁴⁰⁷ This provision could be seen to encourage FDI as it may promote foreign enterprises to set up companies in Tanzania without the risk of being subject to tax on the disposal of shares where such enterprises hold greater than 25% of the share capital.

⁴⁰⁸ None of the SADC countries have adopted the alternative wording proposed in the UN MTC (2011:237 – para. 18) which provides that either State may tax the capital gains in accordance with the domestic law of that State.

⁴⁰⁹ All these tax treaties have been concluded with Canada.

time during a period of 6 years immediately preceding the alienation of the property.

The tax treaty concluded between Malawi-Norway provides that capital gains from the alienation of containers used for international transport may only be taxed in the State of residency of the enterprise.

4.9.8. Conclusion

The findings of the analysis suggest that the application of Article 12 of the UN Model is at most inconsistent in the tax treaties concluded by the SADC countries. Even where it may appear that the SADC countries have made use of the provisions of the UN Model, they tend to deviate substantially from the provisions proposed by the UN Model.

Where the SADC countries tax treaties include a 'real property share' provision, they tend to deviate from the provision of the UN Model. In particular, very few tax treaties concluded post 2001 include a provision similar to either the UN Model (2001) or (2010) and where they do include such a provision, they tend to deviate substantially from the provision proposed by the UN Model

In addition, the majority of the tax treaties tend to not allow the source state to tax capital gains from the disposal of shares. Where the tax treaties allow for the taxation of capital gains from the disposal of shares, they tend to not provide for a participation limit as proposed by the UN Model and therefore would prefer to tax all capital gains from the disposal of shares irrespective of any participation limit. Furthermore, some tax treaties tend to limit the application of the provision.

5. CONCLUSION AND RECOMMENDATIONS

The purpose of this dissertation has been to analyse whether a group of SADC countries have made use of or deviated from the provisions of the UN Model. In particular, the analysis focused on the distributive rules of the UN Model concerning business profits, employment income, pensions, income from immovable property, dividends, interest, royalties and capital gains as these are probably the most common sources of income that may arise from FDI due to increased growth and development.

This dissertation involved analysing 62 tax treaties concluded by the SADC countries since 1980, by comparing the provisions of these tax treaties with those of the UN and OECD Models. This comparison has allowed for a useful and meaningful analysis of the use of the UN Model by the SADC countries and to some extent, the tax treaty policies of the SADC countries.

The overall findings of the analysis appear to suggest that the SADC countries do not make extensive use of the provisions of the UN Model, but appear to adopt the provisions of the OECD Model in the majority of their tax treaties. This lack of use of the UN Model by the SADC countries could be due to a number of factors, one of which could be the reluctance by the SADC countries to adopt tax treaty policies that may be considered to have a negative impact on the inflow of FDI. Another factor could be that there is a belief amongst the SADC countries that a sacrifice of tax revenue should be offset by a greater inflow of FDI in the short term.

The findings further suggest that the SADC countries may not have substantial bargaining power when it comes to negotiating tax treaties with developed countries. This could be another factor contributing to the lack of use of the UN Model by the SADC countries as developed countries tend to follow the provisions of the OECD Model.

As the majority of the SADC countries' tax treaties have been concluded with developing countries, there may be an argument that the SADC countries have greater bargaining powers when it comes to negotiating tax treaties with developing countries. This greater bargaining power could result in the SADC countries adopting

the more favourable provisions of the OECD Model which would allow for greater taxing rights to be retained by the SADC countries when negotiating tax treaties with developed countries.

However, from the analysis, one could possibly conclude that the SADC countries do, to some extent, consider the provisions of the UN Model during bilateral tax treaty negotiations. The reason for this conclusion is that there are some provisions of the UN Model that have been included in the SADC countries tax treaties that are not contained in the OECD Model. This is particularly the case with regards to pensions, royalties and capital gains where the UN Model proposes alternative provisions which are more favourable for developing countries.

On the other hand, the lack of use of the UN Model by the SADC countries could be as a result of international tax treaty practices rejecting certain rules for allocating tax rights amongst contracting States. This may be particularly true with regards to the Article 7 of the UN Model where it is recognised that the 'limited force of attraction' rule is undesirable and merely interferes with international trade. The findings in the analysis are consistent with this view, as this rule is almost non-existent in the SADC countries' tax treaties. Even where the SADC countries tax treaties include such a rule, the application of this rule has been limited in most circumstances.

The converse could be true in regards to the findings for Article 12 of the UN Model, where almost all of the SADC countries tax treaties have adopted the provisions of Article 12 of the UN Model with some variations. The reason for this conclusion is that it is recognised in international tax treaty practice, that tax sharing is more desirable and beneficial than exclusive taxing rights to the State of residence for royalty payments.

There tends to be a number of deviations or variations amongst the provisions of the SADC countries' tax treaties when compared to the provisions of the UN and OECD Models. These deviations also tend to be inconsistent amongst the SADC countries' tax treaties. The exact rationale for these deviations has not been considered in any detail in this dissertation and therefore it is recommended that further analysis be carried out to fully understand these deviations in order to better understand the tax

treaty policies of the SADC countries. In particular, in understanding these deviations and inconsistencies, one should consider whether they are necessary and conducive to promoting trade and economic growth.

In addition, the SADC countries should consider whether these inconsistencies are creating any uncertainty or lack of transparency in their tax treaty policies which could impact on the quality of the SADC countries' tax systems. This could lead to uncertainty amongst potential investors which in turn could have a direct impact on the inflow of FDI. Therefore, it is recommended that the SADC countries work together to design and implement effective tax treaty policies that will achieve consistency and conformity in their tax treaty practices which should promote good governance, reliable and transparent tax policies.

Furthermore, the SADC has recently published its own Model Tax Agreement for use amongst the SADC countries; the application and benefit of this Model to the SADC countries should be investigated in greater detail as this analysis has only briefly touched on the provisions of the SADC MTA (2011). In particular, the analysis suggests that a number of the SADC countries' tax treaties may require revision or amendment if they are to adopt the provisions of the SADC MTA.

The analysis also suggests that some of the SADC countries' tax treaties may require amendment or revision as they appear outdated, specifically with advances in technology, globalisation of trade, investment and international tax policies. This is particularly evident with regards to the Articles dealing with dividends, interest and royalties where a number of the SADC countries still make use of the former wording of the OECD and UN Models in their tax treaties. The use of this former wording may create opportunities for tax avoidance which could result in a loss of tax revenues for the SADC countries.

It is further noted that a large number of the SADC countries tax treaties have been concluded prior to 1980 and as a result have not been considered in the analysis. As there have been a number of amendments or revisions to the OECD and UN Models since 1980, these tax treaties may require amendment or revision.

Therefore, it is recommended that the SADC countries consider undertaking a review of all their tax treaties, particularly those concluded prior to 2001, to ensure that their tax treaties are up to date and consistent with international tax policies.

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ANNEXURE A: SUMMARY OF SADC TAX TREATIES INCLUDED IN ANALYSIS

Table 1: Summary of SADC tax treaties excluded from analysis

Country	No of treaties concluded	Concluded prior to 1980	Not available in English/no text available	DTAs concluded with SADC countries to be excluded from analysis	No of treaties included in research
Botswana	15	-	2	-	13
Congo	3	-	-	-	3
Lesotho	3	-	-	-	3
Malawi	6	5	-	-	1
Mozambique	9	-	3	-	6
Namibia	12	1	-	1 ⁴¹⁰	10
Swaziland	5	1	-	1 ⁴¹¹	3
Tanzania	9	6	-	-	3
Zambia	24	16	2	-	6
Zimbabwe	17	1	-	2 ⁴¹²	14
Total	103	30	7	4	62

Table 2: Summary of SADC tax treaties concluded between 1980 and 2011

Country	No of treaties included in research	Concluded between 1980 and 2001	Concluded between 2001 and 2011	Concluded after 2011
Botswana	13	3	8	2
Congo	3	-	3	-
Lesotho	3	3	-	-
Malawi	1	-	1	-
Mozambique	6	3	3	-
Namibia	10	9	1	-
Swaziland	3	2	1	-
Tanzania	3	1	2	-
Zambia	6	3	3	-
Zimbabwe	14	12	2	-
Total	62	36	24	2

⁴¹⁰ The Namibia-Botswana tax treaty has been excluded as it has been analysed as part of the tax treaties concluded by Botswana.

⁴¹¹ The Swaziland-Botswana tax treaty has been excluded as it has been analysed as part of the tax treaties concluded by Botswana.

⁴¹² The Zimbabwe-Botswana and Zimbabwe-Congo tax treaties have been excluded as these have been analysed as part of the tax treaties concluded by Botswana and Congo.

Table 3: Summary of SADC tax treaties in force and not yet in force

Country	No of treaties included in research	In force	Not yet in force
Botswana	13	9	4
Congo	3	2	1
Lesotho	3	3	-
Malawi ⁴¹³	1	-	1
Mozambique	6	6	-
Namibia	10	9	1
Swaziland	3	3	-
Tanzania	3	3	-
Zambia	6	5	1
Zimbabwe	14	12	2
Total	62	52	10

Table 4: Summary of OECD and non-OECD member countries included in the analysis

Country	OECD Member country	Non-OECD member country	Date became a OECD Member country
Botswana	-	Yes	-
Barbados	-	Yes	-
Belgium	Yes	-	13 September 1961
Bulgaria	-	Yes	-
Canada	Yes	-	10 April 1961
China	-	Yes	-
Congo	-	Yes	-
France	Yes	-	7 August 1961
Germany	Yes	-	27 September 1961
India	-	Yes	-
Italy	Yes	-	29 March 1962
Kuwait	-	No	-
Lesotho	-	No	-
Malaysia	-	No	-
Malawi	-	No	-
Mauritius	-	No	-
Mozambique	-	No	-
Namibia	-	No	-
Netherlands	Yes	-	13 November 1961
Norway	Yes	-	4 July 1961
Poland	Yes	-	22 November 1996
Portugal	Yes	-	4 August 1961
Romania	-	No	-

⁴¹³ **Note:** There is currently a tax treaty in force between Malawi-Norway which was concluded in 1961, but has been excluded from the analysis as it was concluded prior to 1980. However, there is a new tax treaty which has been concluded in 2009 (not yet in force) which has been included as part of the analysis.

Russia	-	No	-
Serbia & Montenegro	-	No	-
Seychelles	-	No	-
South Africa	-	No	-
Swaziland	-	No	-
Sweden	Yes	-	28 September 1961
Tanzania	-	No	-
Taiwan	-	No	-
United Arab Emirates	-	No	-
United Kingdom	Yes	-	2 May 1961
Zambia	-	No	-
Zimbabwe	-	No	-
Total	12	24	

Table 5: Summary of SADC tax treaties concluded by continent

SADC Country	Asia	Africa	Europe	North America
Botswana	2	6	4	1
Congo	-	2	1	-
Lesotho	-	2	1	-
Malawi	-	-	1	-
Mozambique	2	2	2	-
Namibia	2	2	5	1
Swaziland	1	2	-	-
Tanzania	1	1	-	1
Zambia	2	2	1	1
Zimbabwe	2	2	9	1
Total	12	21	24	5

ANNEXURE B: SUMMARY TABLE OF SADC TAX TREATIES CONCLUDED BETWEEN DEVELOPING AND DEVELOPED COUNTRIES

	SADC Country									
Tax treaty country	Botswana	Congo	Lesotho	Malawi	Mozambique	Namibia	Swaziland	Tanzania	Zambia	Zimbabwe
<i>Developing countries</i>										
Barbados	1	-	-	-	-	-	-	-	-	-
Bulgaria	-	-	-	-	-	-	-	-	-	1
China	1	-	-	-	-	-	-	-	1	-
India	1	-	-	-	1	1	-	1	1	-
Kuwait	-	-	-	-	-	-	-	-	-	1
Malaysia	-	-	-	-	-	1	-	-	-	1
Mauritius	1	-	1	-	1	1	1	-	1	1
Namibia	1	-	-	-	-	-	-	-	-	-
Romania	-	-	-	-	-	1	-	-	-	-
Russia	1	-	-	-	-	1	-	-	-	-
Serbia & Montenegro	-	-	-	-	-	-	-	-	-	1
Seychelles	1	-	-	-	-	-	-	-	1	1
South Africa	1	1	1	-	1	1	1	1	-	-
Swaziland	1	-	-	-	-	-	-	-	-	-
Taiwan	-	-	-	-	-	-	1	-	-	-
United Arab Emirates	-	-	-	-	1	-	-	-	-	-
Zimbabwe	1	1	-	-	-	-	-	-	-	-
	10	2	2	-	4	6	3	2	4	6

<u>Developed countries</u>										
Belgium	-	1	-	-	-	-	-	-	-	-
Canada	-	-	-	-	-	1	-	1	1	1
France	1	-	-	-	-	1	-	-	-	1
Germany	-	-	-	-	-	1	-	-	-	1
Italy	-	-	-	-	1	-	-	-	-	-
Netherlands	-	-	-	-	-	-	-	-	-	1
Norway	-	-	-	1	-	-	-	-	-	1
Poland	-	-	-	-	-	-	-	-	1	1
Portugal	-	-	-	-	1	-	-	-	-	-
Sweden	1	-	-	-	-	1	-	-	-	1
United Kingdom	1	-	1	-	-	-	-	-	-	1
	3	1	1	1	2	4	-	1	2	8
Total	13	3	3	1	6	10	3	3	6	14

ANNEXURE C: SUMMARY OF TREATIES FOR EACH SADC COUNTRY

1. BOTSWANA

Table 1: Summary of tax treaties concluded by Botswana

Country	Between 1980 and 2001	Between 2001 and 2011	After 2011
Barbados	-	✓	-
China	-	-	✓
France	✓	-	-
India	-	✓	-
Mauritius	✓	-	-
Mozambique	-	✓	-
Namibia	-	✓	-
Russia	-	✓	-
Seychelles	-	✓	-
South Africa	-	✓	-
Swaziland	-	✓	-
Sweden	✓	-	-
United Kingdom	-	✓	-
Zambia	-	-	✓
Zimbabwe	-	-	✓

Table 2: Summary of tax treaties concluded by Botswana that are in force and not yet in force

Country	In force	Not yet in force
Barbados	✓	-
China	-	✓
France	✓	-
India	✓	-
Mauritius	✓	-
Mozambique	-	✓
Namibia	-	✓
Russia	✓	-
Seychelles	✓	-
South Africa	✓	-
Swaziland	-	✓
Sweden	✓	-
United Kingdom	✓	-
Zambia	-	✓
Zimbabwe	-	✓

Table 3: Summary of tax treaties concluded by Botswana in a foreign language or for which no text is available

Country	English	Foreign language/no text available
Barbados	✓	-
China	✓	-
France	✓	-
India	✓	-
Mauritius	✓	-
Mozambique	-	✓ (Only available in Portuguese text)
Namibia	✓	-
Russia	✓	-
Seychelles	✓	-
South Africa	✓	-
Swaziland	✓	-
Sweden	✓	-
United Kingdom	✓	-
Zambia	-	No text available
Zimbabwe	✓	-

2. CONGO

Table 1: Summary of tax treaties concluded by Congo

Country	Between 2001 and 2011
Belgium	✓
South Africa	✓
Zimbabwe	✓

Table 2: Summary of tax treaties concluded by Congo that are in force and not yet in force

Country	In force	Not yet in force
Belgium	✓	-
South Africa	✓	-
Zimbabwe	-	✓

Table 3: Summary of tax treaties concluded by Congo in a foreign language or for which no text is available

Country	English	Foreign language/no text available
Belgium	✓	-
South Africa	✓	-
Zimbabwe	✓	-

3. LESOTHO

Table 1: Summary of tax treaties concluded by Lesotho

Country	Between 1980 and 2001
Mauritius	✓
South Africa	✓
United Kingdom	✓

Table 2: Summary of tax treaties concluded by Lesotho that are in force and not yet in force

Country	In force	Not yet in force
Mauritius	✓	-
South Africa	✓	-
United Kingdom	✓	-

Table 3: Summary of tax treaties concluded by Lesotho in a foreign language or for which no text is available

Country	English	Foreign language/no text available
Mauritius	✓	-
South Africa	✓	-
United Kingdom	✓	-

4. MALAWI

Table 1: Summary of tax treaties concluded by Malawi

Country	Prior to 1980	Between 2001 and 2011
France	✓	-
Netherlands	✓	-
Norway	-	✓
South Africa	✓	-
Switzerland	✓	-
United Kingdom	✓	-

Table 2: Summary of tax treaties concluded by Malawi that are in force and not yet in force

Country	In force	Not yet in force
France	✓	-
Netherlands	✓	-
Norway	-	✓

South Africa	✓	-
Switzerland	✓	-
United Kingdom	✓	-

Table 3: Summary of tax treaties concluded by Malawi in a foreign language or for which no text is available

Country	English	Foreign language/no text available
France	✓	-
Netherlands	✓	-
Norway	✓	-
South Africa	✓	-
Switzerland	✓	-
United Kingdom	✓	-

5. MOZAMBIQUE

Table 1: Summary of tax treaties concluded by Mozambique

Country	Between 1980 and 2001	Between 2001 and 2011
Botswana	-	✓
India	-	✓
Italy	✓	-
Macau	-	✓
Mauritius	✓	-
Portugal	✓	-
South Africa	-	✓
United Arab Emirates	-	✓
Vietnam	-	✓

Table 2: Summary of tax treaties concluded by Mozambique that are in force and not yet in force

Country	In force	Not yet in force
Botswana	-	✓
India	✓	-
Italy	✓	-
Macau	✓	-
Mauritius	✓	-
Portugal	✓	-
South Africa	✓	-
United Arab Emirates	✓	-
Vietnam	-	✓

Table 3: Summary of tax treaties concluded by Mozambique in a foreign language or for which no text is available

Country	English	Foreign language/no text available
Botswana	-	✓ (Only available in Portuguese)
India	✓	-
Italy	✓	-
Macau	-	✓ (Only available in Chinese/Portuguese)
Mauritius	✓	-
Portugal	✓	-
South Africa	✓	-
United Arab Emirates	✓	-
Vietnam	-	✓ (Only available in Portuguese)

6. NAMIBIA

Table 1: Summary of tax treaties concluded by Namibia

Country	Prior to 1980	Between 1980 and 2001	Between 2001 and 2011
Botswana	-	-	✓
Canada	-	-	✓
France	-	✓	-
Germany	-	✓	-
India	-	✓	-
Malaysia	-	✓	-
Mauritius	-	✓	-
Romania	-	✓	-
Russia	-	✓	-
South Africa	-	✓	-
Sweden	-	✓	-
United Kingdom	✓	-	-

Table 2: Summary of tax treaties concluded by Namibia that are in force and not yet in force

Country	In force	Not yet in force
Botswana	-	✓
Canada	-	✓
France	✓	-
Germany	✓	-
India	✓	-
Malaysia	✓	-
Mauritius	✓	-
Romania	✓	-
Russia	✓	-
South Africa	✓	-

Sweden	✓	-
United Kingdom	✓	-

Table 3: Summary of tax treaties concluded by Namibia in a foreign language or for which no text is available

Country	English	Foreign language/no text available
Botswana	✓	-
Canada	✓	-
France	✓	-
Germany	✓	-
India	✓	-
Malaysia	✓	-
Mauritius	✓	-
Romania	✓	-
Russia	✓	-
South Africa	✓	-
Sweden	✓	-
United Kingdom	✓	-

7. SWAZILAND

Table 1: Summary of tax treaties concluded by Swaziland

Country	Prior to 1980	Between 1980 and 2001	Between 2001 and 2011
Botswana	-	-	✓
Mauritius	-	✓	-
South Africa	-	-	✓
Taiwan	-	✓	-
United Kingdom	✓	-	-

Table 2: Summary of tax treaties concluded by Swaziland that are in force and not yet in force

Country	In force	Not yet in force
Botswana	-	✓
Mauritius	✓	-
South Africa	✓	-
Taiwan	✓	-
United Kingdom	✓	-

Table 3: Summary of tax treaties concluded by Swaziland in a foreign language or for which no text is available

Country	English	Foreign language/no text available
Botswana	✓	-
Mauritius	✓	-
South Africa	✓	-
Taiwan	✓	-
United Kingdom	✓	-

8. TANZANIA

Table 1: Summary of tax treaties concluded by Tanzania

Country	Prior to 1980	Between 1980 and 2001	Between 2001 and 2011
Canada	-	✓	-
Denmark	✓	-	-
Finland	✓	-	-
India	-	-	✓
Italy	✓	-	-
Norway	✓	-	-
South Africa	-	-	✓
Sweden	✓	-	-
Zambia	✓	-	-

Table 2: Summary of tax treaties concluded by Tanzania that are in force and not yet in force

Country	In force	Not yet in force
Canada	✓	-
Denmark	✓	-
Finland	✓	-
India	✓	-
Italy	✓	-
Norway	✓	-
South Africa	✓	-
Sweden	✓	-
Zambia	✓	-

Table 3: Summary of tax treaties concluded by Tanzania in a foreign language or for which no text is available

Country	English	Foreign language/no text available
Canada	✓	-
Denmark	✓	-

Finland	✓	-
India	✓	-
Italy	✓	-
Norway	✓	-
South Africa	✓	-
Sweden	✓	-
Zambia	✓	-

9. ZAMBIA

Table 1: Summary of tax treaties concluded by Zambia

Country	Prior to 1980	Between 1980 and 2001	Between 2001 and 2011	After 2011
Botswana	-	-	-	✓
Canada	-	✓	-	-
China	-	-	✓	-
Denmark	✓	-	-	-
Finland	✓	-	-	-
France	✓	-	-	-
Germany	✓	-	-	-
India	-	✓	-	-
Ireland	✓	-	-	-
Italy	✓	-	-	-
Japan	✓	-	-	-
Kenya	✓	-	-	-
Mauritius	-	-	✓	-
Netherlands	✓	-	-	-
Norway	✓	-	-	-
Poland	-	✓	-	-
Romania	-	✓	-	-
Seychelles	-	-	✓	-
South Africa	✓	-	-	-
Sweden	✓	-	-	-
Switzerland	✓	-	-	-
Tanzania	✓	-	-	-
Uganda	✓	-	-	-
United Kingdom	✓	-	-	-

Table 2: Summary of tax treaties concluded by Zambia that are in force and not yet in force

Country	In force	Not yet in force
Botswana	-	✓
Canada	✓	-
China	✓	-
Denmark	✓	-
Finland	✓	-

France	✓	-
Germany	✓	-
India	✓	-
Ireland	✓	-
Italy	✓	-
Japan	✓	-
Kenya	✓	-
Mauritius	✓	-
Netherlands	✓	-
Norway	✓	-
Poland	-	✓
Romania	✓	-
Seychelles	✓	-
South Africa	✓	-
Sweden	✓	-
Switzerland	✓	-
Tanzania	✓	-
Uganda	✓	-
United Kingdom	✓	-

Table 3: Summary of tax treaties concluded by Zambia in a foreign language or for which no text is available

Country	English	Foreign language/no text available
Botswana	-	No text available
Canada	✓	-
China	✓	-
Denmark	✓	-
Finland	✓	-
France	✓	-
Germany	✓	-
India	✓	-
Ireland	✓	-
Italy	✓	-
Japan	✓	-
Kenya	✓	-
Mauritius	✓	-
Netherlands	✓	-
Norway	✓	-
Poland	✓	-
Romania	-	✓ (An English text is not yet available)
Seychelles	✓	-
South Africa	✓	-
Sweden	✓	-
Switzerland	✓	-
Tanzania	✓	-

Uganda	✓	-
United Kingdom	✓	-

10. ZIMBABWE

Table 1: Summary of tax treaties concluded by Zimbabwe

Country	Prior to 1980	Between 1980 and 2001	Between 2001 and 2011
Botswana	-	-	✓
Bulgaria	-	✓	-
Canada	-	✓	-
Congo	-	-	✓
France	-	✓	-
Germany	-	✓	-
Kuwait	-	-	✓
Malaysia	-	✓	-
Mauritius	-	✓	-
Netherlands	-	✓	-
Norway	-	✓	-
Poland	-	✓	-
Serbia & Montenegro	-	✓	-
Seychelles	-	-	✓
South Africa	✓	-	-
Sweden	-	✓	-
United Kingdom	-	✓	-

Table 2: Summary of tax treaties concluded by Zimbabwe that are in force and not yet in force

Country	In force	Not yet in force
Botswana	-	✓
Bulgaria	✓	-
Canada	✓	-
Congo	-	✓
France	✓	-
Germany	✓	-
Kuwait	✓	-
Malaysia	✓	-
Mauritius	✓	-
Netherlands	✓	-
Norway	✓	-
Poland	✓	-
Serbia & Montenegro	-	✓
Seychelles	-	✓
South Africa	✓	-
Sweden	✓	-
United Kingdom	✓	-

Table 3: Summary of tax treaties concluded by Zimbabwe in a foreign language or for which no text is available

Country	English	Foreign language/no text available
Botswana	✓	-
Bulgaria	✓	-
Canada	✓	-
Congo	✓	-
France	✓	-
Germany	✓	-
Kuwait	✓	-
Malaysia	✓	-
Mauritius	✓	-
Netherlands	✓	-
Norway	✓	-
Poland	✓	-
Serbia & Montenegro	✓	-
Seychelles	✓	-
South Africa	✓	-
Sweden	✓	-
United Kingdom	✓	-

ANNEXURE D: SUMMARY OF CONCLUSION DATES FOR THE SADC COUNTRIES TAX TREATIES

1. Botswana

Country	Conclusion date
Barbados	23 February 2005
China	11 April 2012
France	15 April 1999
India	8 December 2006
Mauritius	26 September 1995
Mozambique	27 February 2009
Namibia	16 June 2004
Russia	8 April 2003
Seychelles	26 August 2004
South Africa ⁴¹⁴	7 August 2003
Swaziland	21 April 2010
Sweden	19 October 1992
United Kingdom	9 September 2005
Zambia	9 March 2013
Zimbabwe	16 June 2004

2. Congo

Country	Conclusion date
Belgium	23 May 2007
South Africa	29 April 2005
Zimbabwe	22 August 2002

3. Lesotho

Country	Conclusion date
Mauritius	29 August 1997
South Africa	24 October 1995
United Kingdom	29 January 1997

4. Malawi

Country	Conclusion date
France	31 December 1963
Netherlands	18 June 1969
Norway	8 December 2009
South Africa	3 May 1971
Switzerland	30 May 1961
United Kingdom	25 November 1955

⁴¹⁴ A protocol has been signed between Botswana and SA on the 21 May 2013, but is not yet available and therefore has not been considered in this analysis.

5. Mozambique

Country	Conclusion date
Botswana	27 February 2009
India	30 September 2010
Italy	14 December 1998
Macau	15 June 2007
Mauritius	14 February 1997
Portugal	21 March 1991
South Africa	18 September 2007
United Arab Emirates	24 September 2003
Vietnam	3 September 2010

6. Namibia

Country	Conclusions date
Botswana	16 June 2004
Canada	25 March 2010
France	29 May 1996
Germany	2 December 1993
India	15 February 1997
Malaysia	28 July 1998
Mauritius	4 March 1995
Romania	25 February 1998
Russia	30 March 1998
South Africa	18 May 1998
Sweden	16 July 1993
United Kingdom	8 August 1962

7. Swaziland

Country	Conclusion date
Botswana	21 April 2010
Mauritius	29 June 1994
South Africa	23 January 2004
Taiwan	7 September 1998
United Kingdom	26 November 1968

8. Tanzania

Country	Conclusion date
Canada	15 December 1995
Denmark	6 May 1976
Finland	12 May 1976
India	27 May 2011
Italy	7 March 1973
Norway	28 April 1976

South Africa	22 September 2005
Sweden	2 May 1976
Zambia	2 March 1968

9. Zambia

Country	Conclusion date
Botswana	9 March 2013
Canada	16 February 1984
China	26 July 2010
Denmark	13 September 1973
Finland	3 November 1978
France	31 December 1963
Germany	30 May 1973
India	5 June 1981
Ireland	29 March 1971
Italy	27 October 1972
Japan	19 February 1970
Kenya	27 August 1968
Mauritius	16 September 2011
Netherlands	19 December 1977
Norway	14 July 1971
Poland	19 May 1995
Romania	21 July 1983
Seychelles	7 December 2010
South Africa	22 May 1956
Sweden	18 March 1974
Switzerland	30 May 1961
Tanzania	2 March 1968
Uganda	24 August 1968
United Kingdom	22 March 1972

10. Zimbabwe

Country	Conclusion date
Botswana	16 June 2004
Bulgaria	12 October 1988
Canada	16 April 1992
Congo	22 August 2002
France	15 December 1993
Germany	22 April 1988
Kuwait	13 May 2006
Malaysia	28 April 1994
Mauritius	6 March 1992
Netherlands	18 May 1989
Norway	9 March 1989
Poland	9 July 1993
Serbia &	19 October 1996

Montenegro	
Seychelles	6 August 2002
South Africa	10 June 1965
Sweden	10 March 1989
United Kingdom	19 October 1982

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ANNEXURE E: SUMMARY OF WITHHOLDING TAX RATES FOR DIVIDENDS, INTEREST AND ROYALTIES FOR THE SADC COUNTRIES

Table 1: Summary of dividend withholding tax rates for substantial direct investments

	Withholding Tax Rates (substantial direct investments)					
SADC Country	5%	7.5%	8%	10%	15%	20%
Botswana	7	1	-	2	-	-
Congo	1	-	-	-	1	-
Lesotho	-	-	-	-	-	-
Malawi	1	-	-	-	-	-
Mozambique	-	-	2	-	-	-
Namibia	7	-	-	1	-	-
Swaziland	-	-	-	1	-	-
Tanzania	1	-	-	1	-	1
Zambia	3	-	-	1	-	-
Zimbabwe	4	-	-	7	2	-
Total	24	1	2	13	3	1

Table 2: Summary of dividend withholding tax rates for portfolio investments⁴¹⁵

	Withholding Tax Rates (portfolio investments)						
SADC Country	5%	7.5%	10%	12%	15%	20%	25%
Botswana	1	-	6	3	3	-	-
Congo	-	-	1	-	1	-	-
Lesotho	-	-	2	-	1	-	-
Malawi	-	-	-	-	1	-	-
Mozambique	-	1	-	-	4	-	-
Namibia	-	-	4	-	6	-	-
Swaziland	-	1	1	-	1	-	-
Tanzania	-	-	1	-	-	1	1
Zambia	1	-	1	-	4	-	-
Zimbabwe	-	-	2	-	2	10	-
Total	2	2	18	3	23	11	1

⁴¹⁵ This summary includes those tax treaties which do not distinguish between substantial direct investments and portfolio investments and provide one single dividend withholding tax rate for all dividends.

Table 3: Summary of interest withholding tax rates

	Withholding Tax Rates					
SADC Country	5%	7.5%	8%	10%	12%	15%
Botswana	-	2	-	9	1	1
Congo	-	-	-	2	-	-
Lesotho	-	-	-	3	-	-
Malawi	-	-	-	1	-	-
Mozambique	-	-	2	3	-	-
Namibia	-	-	-	8	-	1
Swaziland	1	-	-	2	-	-
Tanzania	-	-	-	2	-	1
Zambia	1	-	-	4	-	1
Zimbabwe	-	-	-	12	-	1
Total	2	2	2	46	1	5

Table 4: Summary of royalty withholding tax rates

	Withholding Tax Rates					
SADC Country	5%	7.5%	10%	12.5%	15%	20%
Botswana	1	-	10	1	1	-
Congo	-	-	2	-	-	-
Lesotho	-	-	3	-	-	-
Malawi	1	-	-	-	-	-
Mozambique	3	-	3	-	-	-
Namibia	3	-	5	-	2	-
Swaziland	-	1	2	-	-	-
Tanzania	-	-	2	-	-	1
Zambia	2	-	3	-	1	-
Zimbabwe	-	1	13	-	-	-
Total	10	2	43	1	4	1

**ANNEXURE F: SUMMARY TABLE OF FINDINGS - COMPARISON OF THE
SADC COUNTRIES TAX TREATIES TO ARTICLE 7 OF THE UN MODEL**

See accompanying booklet.

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**ANNEXURE G: SUMMARY TABLE OF FINDINGS – COMPARISON OF THE
SADC COUNTRIES TAX TREATIES TO ARTICLE 15 OF THE UN MODEL**

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ANNEXURE H SUMMARY TABLE OF FINDINGS: COMPARISON OF THE SADC COUNTRIES TAX TREATIES TO ARTICLE 18 OF THE UN MODEL

See accompanying booklet.

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ANNEXURE I: SUMMARY TABLE OF FINDINGS - COMPARISON OF THE SADC COUNTRIES TAX TREATIES TO ARTICLE 6 OF UN MODEL

See accompanying booklet.

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**ANNEXURE J: SUMMARY TABLE OF FINDINGS – COMPARISON OF THE
SADC COUNTRIES TAX TREATIES TO ARTICLE 10 OF THE UN MODEL**

See accompanying booklet.

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**ANNEXURE K: SUMMARY TABLE OF FINDINGS –COMPARISON OF THE
SADC COUNTRIES TAX TREATIES TO ARTICLE 11 OF THE UN MODEL**

See accompanying booklet.

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**ANNEXURE L: SUMMARY TABLE OF FINDINGS – COMAPRISON OF THE
SADC COUNTRIES TAX TREATIES WITH ARTICLE 12 OF THE UN MODEL**

See accompanying booklet.

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**ANNEXURE M: SUMMARY TABLE OF FINDINGS: COMPARISON OF THE
SADC COUNTRIES TAX TREATIES TO ARTICLE 13 OF THE UN MODEL**

See accompanying booklet.

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