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Is the definition of "permanent establishment", as used in the Double Tax Agreements of selected 'Oil Rich' Central and North African countries, sufficient to protect the taxing rights on the natural resources of these countries?

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## **Abstract**

Given the considerable increase in international trade over the past 40 years, particularly between Africa and the rest of the world, there is a risk that the developing African countries are being exploited by the developed countries. The key to this exploitation is the fact that Africa possesses untouched natural resources (embedded with significant profits), which the developed countries, specifically profit seeking companies from these countries (“the non-resident entity”), seek to extract and exploit.

Vital to the protection of the African countries’ rights to benefit from the use of their natural resources is that an appropriate price is afforded to the African countries in this regard. The mechanism provided in this regard is the appropriate allocation of taxing rights to the African countries, which is generally governed by the conclusion of double tax agreements between the African countries and the other Contracting State, specifically the definition of a permanent establishment concluded in the double tax agreement.

Based on a review of the double tax agreements entered into by a selection of the ‘oil rich’ African countries, this dissertation considers whether these selected ‘oil rich’ African countries are actually in a position to reap the appropriate benefit, through the concluded definition of a permanent establishment, should a person/entity from another country seek to benefit from the extraction of its oil reserves.

This dissertation undertook the review of the relevant articles of the double tax agreements entered into by a selection of the ‘oil rich’ African countries to identify whether the definition of a permanent establishment, as defined in the respective double tax agreements, provides an appropriate right for the selected ‘oil rich’ African states to tax the extraction or use of their natural resources by the non-resident entity. The findings of this dissertation are based on a review of the double tax agreements from an international tax perspective. A review of the domestic tax laws of the selected ‘oil rich’ African countries was beyond the scope of this dissertation.

The review indicates that in terms of the content of the double tax agreements entered into by the selected ‘oil rich’ African countries, the majority of the double tax agreements currently

entered into force do provide the selected 'oil rich' African countries with the appropriate taxing rights. A few deviations were identified which appear to be specific to certain double tax agreements, and they raise a few pertinent questions. Given the limitations of this dissertation, the answers to the questions raised requires further analysis which would require a review of the domestic tax legislations of the selected 'oil rich' African countries, as well as the political and economic environment between the Contracting States.

Despite these relatively positive findings, looking beyond the review of the double tax agreements of the selected 'oil rich' African countries have concluded, it is noted that that these countries have not entered into double tax agreements with the appropriate Contracting States, *i.e.* the countries who are the largest oil exporters from the selected 'oil rich' African countries and the home countries of the largest oil companies.

Based on these findings the following recommendations are proposed:

- 1 All the selected 'oil rich' African countries should negotiate double tax agreements with the identified key Contracting States with respect to oil extraction activities.
- 2 It is recommended that the selected 'oil rich' African countries follow one of either the OECD or UN model tax conventions when negotiating these double tax agreements.
- 3 Where the identified deviations create uncertainty as to whether the selected 'oil rich' African countries' taxing rights are appropriately allocated with regard to oil extraction activities, clarification should be sought either through re-negotiation or issuing an appropriate protocol.
- 4 That a sub-committee(s) to either or both the OECD or UN fiscal committees is created with specific focus on the protection of the taxing rights for all African countries.

## Abbreviations and Glossary

CIA	Central Intelligence Agency
CAEU	Council of Arab Economic Unity
DTA	Double Tax Agreement
EEZ	Exclusive economic zone
EIA	Energy Information Administration
The 1958 Convention	Geneva Convention of 1958
IBFD	International Bureau of Fiscal Documentation
IFA	International Fiscal Association
OECD	Organisation for Economic Co-operation and Development
OECD Commentary	Commentary on the OECD MTC
OECD MTC	OECD Model Tax Convention on Income and on Capital
PE	Permanent establishment
UMA	The Arab Maghreb Union
UN	United Nations
UN Commentary	Commentary on the UN MTC
UN MTC	UN Model Tax Convention on Income and on Capital
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of Treaties

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# **1 Introduction and overview**

## **1.1 Background**

### **1.1.1 Africa, its natural resources and its integration with international trade**

International trade has increased considerably over the past 40 years, particularly between Africa and the rest of the world.<sup>1</sup> This is a result of the increased awareness by developed countries, more particularly profit seeking companies from these countries, of the untouched natural resources (embedded with significant profits) that the developing countries of Africa possess.

This dissertation considers a taxpayer from one tax jurisdiction (the “non-resident”) entering an African country, rich in natural resources, to earn profits. The issue arising is whether or not the so-called ‘source State’ [the African country], in which the profits are earned, has (or should have) the right to tax such profits. This consideration of international tax requires an understanding of the interaction of the domestic (source state) tax system (African country) with the tax system of the country from which the non-resident hails (resident state).

Whether or not the developing, natural resource rich African country reaps the appropriate benefits from the use by the non-resident of its natural resources becomes of critical importance where the enterprise is resident in a developed country and is operating in a developing country. To avoid the situation in which the developed country reaps all the benefits (economic and taxation) and leaves the developing African countries with nothing, improved protection of these African countries’ rights, particularly with regard to the taxing rights, is vital to their development and wealth.

This is not to say that the developing African countries allow the non-resident taxpayers to abuse their resources. The taxing authorities of the two countries will usually attempt to recover what they feel to be the appropriate amount of taxes through their domestic tax legislation. However, in such situations there are generally issues as to which countries’ taxing authority has the right to tax the profits of the taxpayer. The intention of DTAs negotiated between the

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<sup>1</sup> Increase in exports of merchandise: 1970 to 1990 = 560%; 1990 to 2009 = 260%; 1970 to 2009 = over 2000%. World Trade Organisation. (Time series data). *Statistics Database*. Available: <http://stat.wto.org/StatisticalProgram/WSDBStatProgramHome.aspx?Language=E>. Last accessed 17 December 2010.

two States is to assist in allocating the taxing rights appropriately between the residence and source States. Although DTAs do assist in clarifying the taxing rights of the Contracting States, as they generally override domestic taxation laws, they can also be detrimental to the African countries if they are not negotiated correctly, for example by limiting or denying taxing rights.

Although a DTA generally allows the country of source to tax business profits, the basic concept is that a taxpayer will not be liable to tax on profits it has earned in a country other than the taxpayer's country of residence, unless the taxpayer has a real and substantial economic nexus with the country of source, *i.e.* where the profits accrue. DTAs have established that such substantial nexus only exists if the taxpayer carries on its business in the source country through a PE in that country.

Given the focus of this dissertation on the 'oil rich' African countries and the extraction of their oil resources, it would appear that there should be no issue as to the allocation of the taxing rights and the 'oil rich' African country would have the right to benefit from the use of its natural resource, oil. However, the economic reality is such that the profit driven intention of the non-resident taxpayer is to try and structure its operations in a manner to maximise its benefit, *i.e.* minimise the taxes it would have to pay over to the relevant taxing authorities. Such practices are to the detriment of the source state, *i.e.* leaving the source state with little or no tax revenue for its now depleted natural resources.

There are, however, contradicting forces behind whether the African country would prefer to:

- a) reap the rewards from the use by the non-resident of its domestic resources, through the incidence of taxation; or
- b) obtain the investment (in more general terms) of the non-residents, particularly from the developed world, in the African country through tax incentives that can be offered.

However, given the significant increase in the demand for oil worldwide, and coupled by the increased oil production capacity of the African countries,<sup>2</sup> such incentives should not be required, as Africa is one of the key holders of the world's oil reserves. Thus, it would be

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<sup>2</sup> At the end of 2008 the oil produced by the aggregate of the African countries, amounted to 11.5% of the World's production (bbl/day). CIA. (2010). *Country Comparison: Oil - production*. Available: <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2173rank.html>. Last accessed 17 December 2010.

imperative for the African countries to implement strict provisions to ensure that they reap the appropriate rewards for the use of this vital and limited natural resource.

Given this requirement to protect these African countries' natural resources and, in turn, improving Africa's wealth and development, the relevant DTAs of the African countries read with their respective domestic tax legislations, should be seen as a key protection mechanism.

As the extraction of oil entails substantial resources and time (refer to paragraph 1.1.2), the non-resident taxpayer would have to set-up some form of operation within the African country. Accordingly, the non-resident taxpayer could be seen to be operating its business as if it were a resident taxpayer, *i.e.* creating a real and substantial economic nexus in the African country. This nexus is only considered to exist if the taxpayer is carrying on its business in the source country through a PE in the African country. The definition and interpretation of a PE must, therefore, be analysed.

The term "permanent establishment" is defined in terms of Article 5 of the OECD MTC. Broadly speaking, a PE refers to "*a fixed place of business through which the business of an enterprise is wholly or partly carried on*".<sup>3</sup> It specifically includes a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction of natural resources. Specifically excluded from the definition is, *inter alia*, the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any activity of a preparatory or auxiliary character.

The UN MTC is to a large extent consistent with the OECD MTC, but it is broader in its scope with regard to specific inclusions and also narrower in its exclusions.<sup>4</sup>

Despite the definition provided in these MTCs, there is no hard and fast interpretation of the article defining the term. Thus, there is scope for a taxpayer to apply a beneficial interpretation, possibly leading to the scenario in which the African country is left with nothing to show for its subsequently depleted natural resources. The interpretation of the term PE differs throughout the tax world, despite the efforts taken to try and create one interpretation (refer to chapter 3). The

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<sup>3</sup> Article 5(1), OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. p24 -25.

<sup>4</sup> United Nations - Department of Economic & Social Affairs (2001). *UN Model Double Taxation Convention between Developed and Developing Countries*. New York: United Nations. p3-40.

issues of the integration of the domestic tax legislations of the treaty countries and the DTAs concluded to provide relief where the latter does not deem the country to have the primary taxing rights, also exists.

### **1.1.2 Oil extraction activities**

The oil and gas industry includes the global processes of exploration, extraction, refining, transporting, and marketing oil and gas products. There are two major sectors within the oil and gas industry, upstream and downstream.<sup>5</sup> For the purposes of this dissertation the focus is on upstream, which is the process of extracting the oil and refining it, thus, more specifically the process of extracting the oil. Whereas downstream is the commercial side of the business, such as gas stations or the delivery of oil for heat. For the purposes of this dissertation an in-depth analysis of the oil extraction process is not necessary, however a high-level understanding of what the process involves is required.

Oil extraction activities involve oil drilling and services. Oil drilling and services are broken into two major areas: drilling and oilfield services.

- Drilling - Drilling companies physically drill and pump oil out of the ground. In the drilling industry, there are several different types of rigs, each with a specialized purpose. Some of these include:
  - Land Rigs - Drilling depths ranges from 5,000 to 30,000 feet.
  - Submersible Rigs - Used for ocean, lake and swamp drilling. The bottom part of these rigs are submerged to the sea's floor and the platform is on top of the water.
  - Jack-ups - this type of rig has three legs and a triangular platform which is jacked-up above the highest anticipated waves.
  - Drill Ships - These look like tankers/ships, but they travel the oceans in search of oil in extremely deep water.
- Oilfield Services - Oilfield service companies assist the drilling companies in setting up oil and gas wells. In general these companies manufacture, repair and maintain equipment used in oil extraction and transport. More specifically, these services can include:

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<sup>5</sup> Some see the industry as being divided into three major components: upstream, midstream and downstream, but the midstream operations are usually included in the downstream category.

- Seismic Testing - This involves mapping the geological structure beneath the surface.
- Transport Services - Both land and water rigs need to be moved around from time to time.

As the focus is on the drilling activities, which given the substantial skill, expertise and machinery involved, requires the use of substantial resources over a significant period of time.

### **1.1.3 African unions**

To assist in the development of the African community, certain groups of African countries, generally identified by geographical region, have formed unions to assist in developing and facilitating its incorporation into the international market. One form of assistance is the creation of tax agreements that facilitate trade between the African member states. For the purpose of this dissertation, the tax agreements from two of these African unions are applicable.

#### **1.1.3.1 Council of Arab Economic Unity**

The Arab Economic Union Council, more commonly referred to as the CAEU, was established by Egypt, Iraq, Jordan, Kuwait, Libya, Mauritania, Palestine, Somalia, Sudan, Tunisia, Syria, United Arab Emirates and Yemen on 3 June 1957. It became effective 30 May 1964, with the ultimate goal of achieving complete economic unity among its member states.<sup>6</sup>

For the purpose of this dissertation, the member countries to the CAEU have formed a regional DTA under which the taxing rights are allocated between the member states, and accordingly, this DTA will be reviewed in light of the purpose of this dissertation.

#### **1.1.3.2 Arab Maghreb Union**

The UMA was created under the Marrakech Treaty on 17 February 1989 by Algeria, Libya, Mauritania, Morocco and Tunisia. The UMA aims to encourage joint ventures and to create a regional single market. The strategic relevance of the region is based on the fact that, collectively, it boasts large phosphate, oil, and gas and it is a transit centre to southern Europe. The success of the Union would, therefore be economically important.

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<sup>6</sup> Refer to Annexure K for the objectives of the CAEU

The tax treaty was signed by the five countries of the UMA on 23 July 1995, and replaced the treaties between Algeria and each of the other member states, which were suspended. However, despite the intention behind the AMU, the evolution of the integration process within the UMA member states is in practice blocked by the international embargo imposed on Libya, the domestic crisis in Algeria and certain dissension between the member countries.<sup>7</sup> Despite this, for the purpose of this dissertation, what is to be assessed is whether the UMA DTA provides the selected 'oil rich' African countries which are member states to the UMA which the appropriate taxing rights with regard to oil extraction activities.

In addition it is noted that Libya, Mauritania and Tunisia are members of both the AMU and CAEU's tax treaties. Accordingly, for the purpose of this dissertation, as Libya is one of the selected 'oil rich' African countries, these tax treaties will also be compared to assess whether there is any possible interpretational conflict that could result with respect to the taxation of PE's created by oil extraction activities.

## **1.2 Research problem**

Given the problems identified, this dissertation serves to identify whether the definition of PE, as stated in the selected 'oil rich' African countries' DTAs currently entered into force with other countries, provides an appropriate right for the selected 'oil rich' African countries to tax the profits associated with the extraction of their natural resources, specifically oil, by the non-resident.

## **1.3 Scope of this dissertation**

Not all the African countries have oil reserves and, accordingly, this dissertation covers only the 'oil rich' countries of North and Central Africa (as determined by oil production). Based on the 2008 world's oil production statistics collated by the CIA, Africa produces approximately 11.5% of the World's oil (barrels per day), of which approximately 10.5% is produced in Central and North Africa in the following countries:<sup>8</sup>

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<sup>7</sup> IBFD. (2010). *Glossary*. Available: <http://k-online2.ibfd.org/kbase/>. Last accessed 20/12/2010.

<sup>8</sup> CIA. (2010). *Country Comparison: Oil - production*. Available: <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2173rank.html>. Last accessed 17 December 2010. In addition to the oil production, these selected

- Algeria<sup>9</sup>
- Angola<sup>10</sup>
- Egypt<sup>11</sup>
- Libya<sup>12</sup>
- Nigeria<sup>13</sup>
- Sudan<sup>14</sup>

It would appear that no research has been undertaken on the taxing rights for these oil rich African countries, thus, it would be key to the development of these countries that these rights are identified and, if required, corrected to ensure that they are not exploited for the benefit of the already developed countries in which these foreign multi-national taxpayers generally originate.

Thus, this dissertation serves to provide a review of the DTAs entered into by the selected 'oil rich' African countries (entered into force on or before 1 June 2010), primarily focussing on the PE definition Articles, with the objective to test these definitions against the definitions provided by the OECD and UN MTCs, generally seen as the guiding principles. In addition, this dissertation seeks to ascertain whether the taxing rights contained within the DTAs entered into provide for the selected 'oil rich' African countries to reap the rewards for the oil resources through primary taxing rights.

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'oil rich' African countries also have the six largest 'proved oil reserves', see CIA. (2010). *Country Comparison: Oil – proved reserves*. Available: <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2178rank.html>. Last accessed 20 December 2010.

<sup>9</sup> According to The Oil and Gas Journal (OGJ), Algeria held an estimated 12.2 billion barrels of proven oil reserves as of January 2010, the third largest in Africa (behind Libya and Nigeria). EIA. (2010). *Country Analysis Briefs - Algeria*. Available: <http://www.eia.doe.gov/emeu/cabs/Algeria/Oil.html>. Last accessed 20/12/2010.

<sup>10</sup> According to the Oil and Gas Journal (OGJ), as of January 2010 Angola has proven oil reserves of 9.5 billion barrels while statements made by the Angolan oil minister in December 2009 put total reserve numbers as high as 13.1 billion barrels. EIA. (2010). *Country Analysis Briefs - Angola*. Available: <http://www.eia.doe.gov/emeu/cabs/Angola/Oil.html>. Last accessed 20/12/2010.

<sup>11</sup> According to the Oil and Gas Journal's January 2010 estimate, Egypt's proven oil reserves stand at 3.7 billion barrels. EIA. (2010). *Country Analysis Briefs - Egypt*. Available: <http://www.eia.doe.gov/emeu/cabs/Egypt/Oil.html>. Last accessed 20/12/2010.

<sup>12</sup> Libya, a member of the Organization of Petroleum Exporting Countries (OPEC), holds the largest proven oil reserves in Africa, followed by Nigeria and Algeria. According to Oil and Gas Journal (OGJ), Libya had total proven oil reserves of 44 billion barrels as of January 2010, the largest reserves in Africa. EIA. (2010). *Country Analysis Briefs - Libya*. Available: <http://www.eia.doe.gov/emeu/cabs/Libya/Oil.html>. Last accessed 20/12/2010.

<sup>13</sup> According to the Oil and Gas Journal, Nigeria had an estimated 37.2 billion barrels of proven oil reserves as of January 2010. EIA. (2010). *Country Analysis Briefs - Nigeria*. Available: <http://www.eia.doe.gov/emeu/cabs/Nigeria/Oil.html>. Last accessed 20/12/2010.

<sup>14</sup> According to Oil and Gas Journal (OGJ), Sudan had five billion barrels of proved oil reserves in January 2010 up from an estimated 563 million barrels in 2006. EIA. (2010). *Country Analysis Briefs - Sudan*. Available: <http://www.eia.doe.gov/emeu/cabs/Sudan/Oil.html>. Last accessed 20/12/2010.

Such a comparative review should prove useful for renegotiation and future negotiation of DTAs, so as to bring about more effective taxation on business profits derived by non-resident taxpayers from a source within the selected 'oil rich' African countries.

## **1.4 Limitations of this dissertation**

### *Domestic tax laws of the selected 'oil rich' African countries*

The analysis is limited to the international interpretation of the definition of a PE. For this reason, analysis of the domestic tax laws of the selected 'oil rich' African countries is excluded from the scope of this dissertation. Where further analysis (outside the scope of this dissertation) would require analysis of such domestic tax laws, it is indicated.

### *DTAs with the United States*

As the treaties entered into with the United States are developed based on a model dissimilar in many respects from the UN and OECD MTC's, the treaties entered into with the US are noted, however, the review of the US treaties have been excluded from this dissertation. In addition, the States examined based their DTAs mainly on the UN and OECD Models.

### *Official translations of the DTAs*

It is noted that official translation of some of the DTAs entered into by the selected 'oil rich' African countries are currently only available in non-English text. As such, unofficial English translations of these DTAs have been used for the purposes of the comparative review.<sup>15</sup>

In addition, at the time of writing this dissertation, no English translation, official or unofficial, was available for a few of the DTAs entered into by the selected 'oil rich' African countries. Accordingly, these DTAs were excluded for the purpose of this dissertation.<sup>16</sup>

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<sup>15</sup> Refer to Annexure A

<sup>16</sup> *Ibid*

## 1.5 Research methodology

The dissertation will entail a review of African and international (beyond Africa) literature, DTAs, and explanatory memoranda regarding the taxing rights relating to the PE definition and the interpretation and the practical implications thereof.

The interpretation methodology to be implemented will be based on customary international law devising international interpretational rules (refer to chapter 2). This will be extrapolated to the interpretation of the relevant DTAs entered into by the selected 'oil rich' African countries, using the commentaries to the OECD and UN MTCs as a complementary addition to the interpretation base, so as to align with the VCLT, which is essentially the codification of customary international law (refer to paragraph 2.2).<sup>17</sup>

## 1.6 Structure

Each chapter in this dissertation answers questions relevant to the central theme as to whether the definition of PE, as stated in the selected 'oil rich' African countries' DTAs, provides an appropriate right for the selected 'oil rich' African countries to tax the profits associated with the extraction of their oil resources by the non-resident taxpayer.

Chapter 2 serves to devise the international interpretational rules, *i.e.* customary international law, to be implemented when reviewing the DTAs for the purpose of this dissertation. Implementing these interpretational rules, chapter 3 provides an analysis of the international interpretation of a PE, and then analyses the PE definitions provided in the DTAs of the selected 'oil rich' African countries.

Although the PE definitions provided in the reviewed DTAs may indicate that the non-resident taxpayer carrying on its business, *i.e.* oil extraction activities, in the selected 'oil rich' African countries, has a PE, chapters 4 and 5 analyse whether the DTAs appropriately allocate the taxing rights to the selected 'oil rich' African countries. Chapter 4 analyses the equivalent of Article 7 of the OECD and UN MTCs of the DTAs, which provides that the country, in which the PE is located, has the primary taxing right to profits earned from the business carried on

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<sup>17</sup> Olivier, L and Honiball, M (2008). *International Tax - A South African Overview*. 4th ed. South Africa: Siber Ink. p39.

through the PE. Chapter 5 then analyses whether the scoping provisions of the reviewed DTAs contain any deviations that would specifically exclude or include the taxation of profits from oil extraction activities, undertaken by a non-resident taxpayer in the selected 'oil rich' African countries, from the provisions of the reviewed DTAs.

As oil extraction activities are performed both on land and offshore, chapter 6 analyses whether the reviewed DTAs provide for such 'mobile' activities, and the extent of the selected 'oil rich' African countries' taxing rights.

Chapter 7 provides an analysis as to whether the use of a pipeline to transport the extracted oil would create a PE and thus provide the selected 'oil rich' African countries with taxing rights to the profits from such transportation.

Chapter 8 assesses whether the selected 'oil rich' African countries have concluded DTAs with the key countries exploiting the selected 'oil rich' African countries' oil reserves.

Chapter 9 provides the conclusions and recommendations derived from the dissertation.

## 2 International interpretation of DTAs

### 2.1 Introduction

Before a comparative analysis of the relevant DTAs entered into by the selected 'oil rich' African countries can be performed, a uniform interpretation base (from an international perspective) is required.

DTAs are treaties under international law, aiming to avoid double taxation by way of defining types of income, profit or capital and, through procedural rules, distributing them among Contracting States. Furthermore, it is their goal to create legal certainty for the benefit of Contracting States as well as for taxpayers and to assure the equal application of tax laws in the Contracting States.<sup>18</sup>

Skaar (1991:39) states that when discussing treaty-related aspects of international taxation, a position is to be taken as to whether there is a methodology of international law, specifically tax law. Skaar's view is that such a methodology exists and is based on customs and treaties and is supported by various international courts as well as other authors<sup>19</sup> on the topic.

In practice, however, the domestic interpretation of DTAs may differ between Contracting States. In some Contracting States priority is generally given to the ordinary meaning of the treaty terms (known as the 'literal' approach). In contrast, some Contracting States interpret these terms based on the intent and purpose of the DTA (known as the 'purposive' approach).

The differences arise as a result of the fact that the DTAs embody a large number of indefinite terms, rendering them open to interpretation, whereas domestic tax laws are usually very specific, with limited scope for interpretation. As bilateral treaties divide commonly understood

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<sup>18</sup> Vogel, K and Prokisch, R. (1993). *Interpretation of double taxation conventions; General report*. IFA Cahiers. 78 (A), p55.

<sup>19</sup> Jones, A et al., *The Interpretation of Tax Treaties with particular reference to Article 3(2) of the OECD Model*, Part I, British Tax Review 14n. 1 (1984); Vogel, K., *Double Tax Treaties and Their Interpretation*, 4 International Tax & Business Lawyer 4, 31 (1986); Jones/Oliver, How Others See Us, British Tax Review 437-440 (1988); see also Skaar, *Losing av skatteavtaletvister*, Skatterett 264, 284 (1989)

taxing rights between Contracting States, with potentially different systems of taxation,<sup>20</sup> the common meaning is crucial in identifying the meaning of the articles of a DTA.

DTAs are phrased in a manner not necessarily consistent with (and generally broader than) the domestic legislation. The broad language used in the DTA is necessary to ensure the life of the DTA beyond the date of signature and to incorporate a common understanding of the term.<sup>21</sup>

This approach expands the usual domestic application of the literal approach and the necessity to take a broader meaning into consideration. Such a form of interpretation may be found in the creation of 'transnational' legal terms, of which there is currently none, but, the MTCs created by the League of Nations, the OECD and the UN must be considered as steps in the development towards such an international language of specified terms. From an African perspective, this is supported by South African case law which referred to the use of an 'international fiscal language'.<sup>22</sup>

## 2.2 Vienna Convention on the Law of Treaties<sup>23</sup>

DTAs, as international agreements, are governed by the VCLT.<sup>24</sup> Although, there are only 35 states which are signatories to the VCLT, it is widely accepted that Articles 31-33 of the VCLT codifies already valid customary law<sup>25</sup> and hence, all international treaties would (as they are

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<sup>20</sup> Vogel (1997) states: “[f]or the effective interpretation of international treaties [...] it is necessary to reconcile the various national methods of interpretation”.

<sup>21</sup> West, C (2009). *The Taxation of International (non-resident) Sportspersons in South Africa*. PhD Thesis. University of Cape Town. p26.

<sup>22</sup> SIR v Downing 1975 37 SATC 249, supported by Vogel (1997: 37) as do Olivier and Honiball (2008: 40) referring to Amatucci, A. (2006). *The Scientific Autonomy of Tax Law: A Methodical Approach*. In: Amatucci, A. *International Tax Law*. Netherlands: Kluwer. p157.

<sup>23</sup> United Nations (2005). *Vienna Convention on the Law of Treaties - 1969*. Vienna: United Nations. p1-31.

<sup>24</sup> 23 May 1969, which came into effect when the 35th state joined on 27 January 1980

<sup>25</sup> The International Court of Justice and a number of foreign courts have essentially recognised that the VCLT represents a codification of customary international law. For an extensive analysis see Engelen (2004) (who does concede that “a distinction can be made between already existing rules of customary international law, rules of customary international law that became crystallised in the adoption of the Convention [VCLT], and rules set forth in the Convention that eventually may become a rule of customary international law”. Vogel (1997) and Ward et al (2005) support the general codification view with respect to the VCLT. See also Arnold BJ, ‘*The Interpretation of Tax Treaties: Myth and Reality*’, *Bulletin for International Taxation* (January 2010), who states that the provisions of the Vienna Convention, which apply to all treaties, are binding on all nations because they constitute a codification of the rules of customary international law. It should be noted that Arnold does conclude that the provisions of the Vienna Convention dealing with the interpretation of tax treaties are largely meaningless.

governed by customary law) be governed by the rules of interpretation of the VCLT in an unrestricted manner.<sup>26</sup>

Engelen, quoting Sir Ian Sinclair, provides that “*there is now strong judicial support for the view that the rules of treaty interpretation incorporated in the Convention [referring to the VCLT] are declaratory of customary law*” and further that “*the Hoge Raad also seemed to have accepted that the rules of treaty interpretation laid down in Articles 31 to 33 [of the] VCLT are a codification of existing customary international law*”.<sup>27</sup> Thus, it is submitted that Articles 31-33 of the VCLT do represent customary international law.<sup>28</sup>

Looking to the general intention of the VCLT, it provides that Contracting States entering into international agreements, such as a DTA, should take into account certain factors when entering into and applying/interpreting the international agreement, to align with the intention of the VCLT.<sup>29</sup>

### 2.2.1 VCLT interpretation guidelines

Articles 31 and 32 of the VCLT contain general rules of interpretation for international treaties. Article 31(1) states a basic rule of general validity, indicating that any interpretation of a DTA has to start with the ‘ordinary meaning’ of the terms of the treaty, *i.e.* an objective interpretation.<sup>30</sup> Article 31(2) defines the term ‘context’, indicating that the context in which the term is used must be analysed, as must the intention of the legislator or the respective parties to the DTA and the purpose of the provision.<sup>31</sup>

Looking to the DTAs entered into by the selected ‘oil rich’ African countries, the substantial activities involved in oil extraction allow for a fairly simple context in which to analyse such

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<sup>26</sup> Vogel and Prokisch. (1993). *Interpretation of double taxation conventions; General report*. IFA Cahiers. 78 (A), p55.

<sup>27</sup> Engelen, F (2004). *Interpretation of Tax Treaties under International Law*. Netherlands: IBFD Publications. p54-55.

<sup>28</sup> Also supported by West (2009:26)

<sup>29</sup> Refer to Annexure B1 for a listing of the factors.

<sup>30</sup> Vogel et al (1997:73) states that the “commentary on the final draft [of the VCLT] by the International Law Commission states that: ‘The article (Drafted initially in the VCLT as Article 27 but now is Article 31) [...] is based on the view that the text must be presumed to be the authentic expression of the intention of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties’”. Vogel repeats this assertion in his work, Klaus Vogel on Double Taxation Conventions. 2nd ed. Netherlands: Kluwer Law International, p37.

<sup>31</sup> This manner of interpretation was clearly followed in *SIR v Downing*, [1975] 37 SATC 249, in which the South African court assessed the wording of Article 5 (PE) of the relevant treaty and derived the meaning from that text.

interpretation. The intention of the Contracting States and the forces<sup>32</sup> driving their mutual agreement in concluding the DTA, provide the purpose of the DTA. As most of the DTAs entered into by the international community are primarily based on the OECD and UN MTCs, the first port of call for interpretation would be the internationally accepted interpretation policies (embodied in the VCLT, and discussed here) with regard to these MTCs.

In addition Article 32 of the VCLT provides for supplementary means of interpretation, indicating that the commentaries to the OECD and UN MTCs should also play a role in the interpretation of the relevant DTAs.<sup>33</sup> Whether the OECD Commentaries should be considered as customary international law and within the scope of Articles 31 and 32 of the VCLT has been debated at length internationally and is by no means settled.<sup>34</sup>

It is submitted that while the commentaries and other sources do not form part of the context of the DTAs, such sources may have bearing in determining a common intention between the states, noted above as a key determination of the “ordinary meaning” of the term in terms of the VCLT. However, such reliance is contingent on whether such source would be recognised in international courts. In the South African case (*SIR v Downing*), for example, reference was made to the lower courts usage of the OECD Commentary, however, the judge did not place any reliance on the commentary in the determination of the judgment.

Generally, the OECD and UN Commentaries are not considered as binding in international law.<sup>35</sup> While the OECD Commentaries have not been declared customary international law, should they fall within the ambit of Articles 31 or 32 of the VCLT, they would be considered an interpretational tool in terms of customary international law.<sup>36</sup> As regards the OECD

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<sup>32</sup> Being political or fiscal drivers, such as incentivising foreign investment.

<sup>33</sup> Pijl, H notes in his article, published in the November 2002 IBFD Bulletin *‘The Concept of Permanent Establishment and the Proposed Changes to the OECD Commentary with Special Reference to Dutch Case Law’*, that under Dutch case law, the Commentary is authoritative for the interpretation of existing tax treaties.

<sup>34</sup> Ward et al (2005) illustrates this point where the authors state: “As is the case with the Commentaries themselves, we have not arrived at unanimity in our views. What we express as our views [...] should be understood by the reader to be a wide, but not always full agreement of the authors”. *The Interpretation of Income Tax Treaties with Particular Reference of the Commentaries on the OECD Model*. Amsterdam: IBFD Publications. p5.

<sup>35</sup> The OECD Commentaries themselves indicate as much.

<sup>36</sup> Van Brunschot, F (2005) (Judge of Netherlands Supreme Court) states: “The maximum value of the Commentaries is that of an expert opinion of great weight. They have an uncontested significance for the interpretation of treaties to the extent that they existed at the time a particular treaty was concluded; the significance of the later versions of the Commentaries is less clear”. Van Brunschot (2005) also noted that in a number of Dutch cases, the Supreme Court stated that the OECD Model and its Commentaries in particular are “of great importance” for treaty interpretation (and not only as the lower court had put it, “may give some support”, BNB 1992/379). Further support is provided by Ward et al (2005), who state that: “the commentaries existing at the time the treaty is concluded, when the bilateral

Commentaries that existed at the time the DTA was concluded, most authors appear to be in agreement that the OECD Commentaries fall within Article 31 of the VCLT.<sup>37</sup>

Considering the above, it is submitted that the OECD and UN Commentaries have a definite place in determining the common intention of the negotiating states. However, it should be borne in mind that they are a supplementary means of interpretation, and they are not independent criteria of interpretation but are subordinate in terms of importance. They may confirm a result but not correct it, or they may help to explain a doubtful term under very specific circumstances.

The application of the VCLT by itself does not lead to a uniform interpretation by Contracting States. The rules of interpretation in the VCLT are formulated in a general way and, themselves, leave considerable room for interpretation. Nevertheless, the VCLT identifies the most important elements of interpretation and puts them in a relationship to each other, thus aiding the interpreter in assigning relative weights to the different elements.<sup>38</sup>

### **2.2.2 Multilingual DTAs**

The VCLT provides for multilingual treaties, where both copies are generally signed and the languages given equal authority. However, it is noted that for some of the DTAs entered into by the selected 'oil rich' African countries, the official translation of the DTAs entered into are currently only available in non-English text. For the purpose of this dissertation the unofficial English translations were used, accordingly, should possible further interpretation differences/issues arise due to multilingual treaties, the provisions of Article 33 to the VCLT should be considered.<sup>39</sup>

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treaty incorporates the wording of the [OECD] Model, although not legally binding, can be presumed to reflect generally the intentions of the treaty negotiators". In the supporting footnote they add: "This is reinforced when, which is sometimes the case, the government when presenting a bill to parliament to implement a tax treaty in domestic law, refers to the fact that the treaty was based on the OECD Model".

<sup>38</sup> Sinclair, J (1984). *The Vienna Convention on the Law of Treaties*. 2nd ed.: Manchester University Press. p 153.

<sup>39</sup> In some treaties the dispute resolution mechanism is identified in the treaty, and provides that disputes are to be settled using one of the versions of the DTA. However, where equal weight is given to both languages and the dispute resolution mechanism has not been identified, it is submitted that the courts should attempt to reconcile the two terms in the context of the objective of the DTA. This approach is consistent with Article 33 of the VCLT.

## 2.3 Ambulatory vs. static interpretation

Given Africa's recent increased role in the 'oil rich' community, the older DTAs entered into by the selected 'oil rich' African countries may be more beneficial to one of the Contracting States (generally the non-African country) than had the DTA been negotiated more recently, or vice versa, due to the shift in power as regards this natural resource.

Thus, in addition to the interpretation of the terms of a DTA, one also needs to assess the timing of the interpretation of the law. There are two forms of interpretation that can be followed:

- 1 Interpretation of the law at the time the DTA was signed, "static interpretation"; or
- 2 Interpretation of the law at the time the tax case arises, "ambulatory interpretation".

Without going into a detailed analysis of the history and developments of interpretation principles in this regard there are arguments and case law for both forms of interpretation.

Given the fact that the process of negotiating new treaties is both time consuming and expensive, ambulatory interpretation is preferred, if not critical, to the life of a DTA to take into account subsequent amendments, so as to ensure the purpose of the tax treaties does not become ineffective over time. To what extent that ambulatory approach should be extended to the OECD Commentaries and their use in interpretation of DTAs needs to be considered.<sup>40</sup> However, it should be noted that ambulatory interpretation should be adopted with some limitations.<sup>41</sup>

Just as the OECD Commentaries existing at the time the DTA was signed would have a persuasive effect in international courts where a DTA was based on the OECD Model, it is

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<sup>40</sup> West (2009:31). See also Pijl H (2002). *The Concept of Permanent Establishment and the Proposed Changes to the OECD Commentary with Special Reference to Dutch Case Law*. IBFD Bulletin - Tax Treaty Monitor. 5, p554. In his article, Pijl goes further to state that under Dutch case law the interpretation should be in line with the last version of the Commentary.

<sup>41</sup> Skaar, A (1991). *Permanent Establishment, Erosion of a Tax Treaty Principle*. India: Wolters Kluwer India Pvt Ltd. p 54. See also Avery Jones et al., *The Interpretation of Tax Treaties with particular reference to Article 3(2) of the OECD Model*, Part I, British Tax Review 36, 48 (1984).

submitted that certain of the later commentaries should be considered to also have a persuasive effect and others should not be taken into consideration by the courts.<sup>42</sup>

It is submitted that, given the uncertainty as to the status of the OECD Commentaries in international circles and the varied use by the foreign courts of the OECD Commentaries in the interpretation of DTAs and the possible reluctance of international courts to declare the OECD Commentary customary international law, at best the OECD Commentary should be an interpretational tool in terms of customary international law. Accordingly, the commentaries should have a persuasive effect where clarity is sought for a particular term used *i.e.* assisting in the interpretation of the context.<sup>43</sup>

Where the DTA Article deviates from the OECD or UN MTCs, the OECD and UN Commentaries may no longer be appropriate. However, the court may still refer to the OECD and UN Commentaries for clarification of a term if it is of the opinion that the relevant term is used in a similar context. Similar considerations will apply where the African negotiators have used other model treaties and the relevant commentaries. It is apparent that the majority of the DTAs analysed for the purposes of this dissertation are either based on the OECD or UN MTC, but then the deviation relates to a provision in the UN or OECD MTC. Thus, although individually possibly not able to provide influential guidance, the OECD and UN Commentaries read together would provide strong influential interpretative guidance.

## **2.4 Treaty interpretation under domestic tax laws**

This aspect of the topic is beyond the scope of this dissertation. An analysis of this aspect would involve a review of the approach to the interpretation of tax treaties in each of the selected 'oil rich' African countries, and even as this sample is limited to a handful of countries, it would be a sizeable undertaking. After this review of the individual countries' practices, it would be necessary to analyse these practices to determine the extent to which they are similar to or different from one another, and the extent to which they are similar to or different from the interpretive approach set out in Articles 31 and 32 of the VLCT.

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<sup>42</sup> Such as certain contradictory commentary that has the effect of changing the interpretation of the article in a way that could not have been contemplated by the negotiators.

<sup>43</sup> van Brunschot, F. *The Judiciary and the OECD Model Tax Convention and its Commentaries*. Bulletin for International Fiscal Documentation, Volume 59, 1st Issue, January 2005.

Although somewhat dated, the interpretation of tax treaties was one of the main subjects of the 1993 Florence Congress of the IFA, with the general report by Professors Vogel and Prokisch,<sup>44</sup> it provides some useful insights into the interpretation of tax treaties under domestic law that are still relevant.

A tax treaty is negotiated by a particular country with its domestic tax system in mind. As discussed, tax treaties limit domestic tax, and they do not impose tax themselves. Tax treaties are accessory to domestic tax systems and do not have any independent existence or meaning. This relationship between tax treaties and domestic law is illustrated by Article 3(2) of the OECD and UN MTCs, which provides that undefined terms in a treaty have the meaning that they have under domestic law unless the context of the treaty requires otherwise.

Given that tax treaties and domestic law form an integrated system, it would be surprising if the two parts of the system were to be interpreted differently. Nevertheless, the courts in many countries purport to apply different interpretive approaches to domestic tax laws and tax treaties, and many commentators have concluded that tax treaties should be interpreted more broadly than domestic tax laws.<sup>45</sup>

Although beyond the scope of this dissertation, it is vital to take note of this interdependence.

## 2.5 Conclusion

Given the recent rise of Africa to the international trade community, which has resulted in the negotiation and ratification of DTAs between African States and the international community, a uniform interpretation base is required. Although there is still a degree of uncertainty as to the interpretation of international agreements, for the purposes of this dissertation, it is submitted that the VCLT is to be seen as the key driver to the international interpretation base, which, coupled with the importance of the OECD and UN MTCs and their commentaries,<sup>46</sup> could result

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<sup>44</sup> Vogel, K and Prokisch, R. (1993). *Interpretation of double taxation conventions; General report*. IFA Cahiers. 78 (A), p55-85. See also Edwardes-Ker (1995 looseleaf). *Tax Treaty Interpretation*. Dublin: In-Depth Publishing. Chapter 3.

<sup>45</sup> "Generally speaking there seems to be a consensus among the National Reporters that double taxation conventions should be interpreted more broadly than domestic law". Vogel, K and Prokisch, R. (1993). *Interpretation of double taxation conventions; General report*. IFA Cahiers. 78 (A), p 60.

<sup>46</sup> It is noted that South Africa has entered an observation into the 2010 OECD MTC that it will apply the 2008 Commentary when interpreting Article 7, which provides support that South Africa (and other African states) will use the Commentaries to the OECD MTC to interpret DTA articles.

in a high degree of uniformity of interpretation of the DTAs entered into by the selected 'oil rich' African countries. In addition, the ambulatory and contextual interpretation of the DTAs entered into by the selected 'oil rich' African countries should be followed in analysing the PE definition provided by the DTAs.<sup>47</sup>

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<sup>47</sup> It is submitted that Article 2(4) of both the OECD and UN MTCs provides some support for the ambulatory approach in that the Article refers to the application of the MTC to '*any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws.*' i.e. the reference to future taxes in the DTA affirms the view that a DTA is agreed upon for a significant period of time, as such mechanisms are put in place to allow for and adapt to future developments.

### **3 International interpretation of a PE**

The importance of a PE is that a State would be entitled to tax profits associated with the business conducted through a PE of an enterprise in such State even though the enterprise may not be a resident of that State.<sup>48</sup> Although a simple concept, in practice it is the interpretation of a PE that creates significant economic consequences for taxpayers, tax authorities and in turn the governments of the Contracting States.

Generally DTAs define a PE, accordingly, the treaty definition is decisive.<sup>49</sup> However, the fact that the DTA defines a PE using other terms which are not defined,<sup>50</sup> creates difficulties for tax advisers and tax authorities when interpreting DTAs.<sup>51</sup> That there is no standard (universal) interpretation and application of the terms making up the definition of a PE, creates the greatest difficulty. The numerous articles and reports published on the interpretation of the PE definition focus on the extent of the issue and note the judicial and administrative guidance available to interpret the definition of a PE in DTAs. This focus accounts for the objective of seeking to formulate a universal interpretation of a PE, coupled with the international customary law based on the principles provided by the VCLT.

For the purpose of this dissertation, a uniform interpretation of the PE definition is required to allow for an independent comparative analysis of the DTAs entered into by the selected 'oil rich' African countries. In order to set this universal interpretation, an analysis of the OECD and UN MTCs and their commentaries is required.

#### **3.1 OECD and UN MTCs' definitions**

##### **3.1.1 Purpose of the OECD and UN MTCs**

Given the harmful effects of double taxation, it is necessary to stress the importance of removing the obstacles that such double taxation presents to the development of worldwide

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<sup>48</sup> Olivier, L and Honiball, M (2008). *International Tax - A South African Overview*. 4th ed. South Africa: Siber Ink. p95.

<sup>49</sup> Article 3 of the OECD and UN MTCs

<sup>50</sup> Skaar, A (1991). *Permanent Establishment, Erosion of a Tax Treaty Principle*. India: Wolters Kluwer India Pvt Ltd. p 40.

<sup>51</sup> Sasseville, J and Skaar, A. (2009). *Is there a permanent establishment?; General report*. IFA Cahiers. 94 (A), p55-85.

economic relations between countries,<sup>52</sup> particularly in promoting the development of the African economies.

Based on this simple purpose, the OECD and UN has recognised that it is desirable to clarify, standardise, and confirm the fiscal situation of taxpayers who are engaged in commercial, industrial, financial, or any other activities in other countries through the application by all countries of common solutions to identical cases of double taxation.<sup>53</sup> In turn, the purpose of the OECD and UN MTCs is to provide a means of settling on a uniform basis, which is the most common problem that arises in the field of international juridical double taxation.<sup>54</sup>

For the OECD member countries,<sup>55</sup> when concluding or revising bilateral conventions, they should conform to the OECD MTC as interpreted by the Commentaries thereon. When the text of the OECD MTC is reproduced in a bilateral treaty, their tax authorities should also follow these Commentaries when applying and interpreting the provisions of their bilateral tax conventions that are based on the OECD MTC.<sup>56</sup> The originating intention of the OECD was to assist developed countries in their international dealings with each other, but given the expansion of all economies into the international economy, the non-Member countries had to be recognised. Accordingly, the impact of the OECD MTC has extended far beyond the OECD member countries, and it has been used as a reference in negotiations between Member and non-Member countries and even between exclusively non-Member countries.

Given extensive use of the OECD MTCs as a reference for DTA negotiations, it was then used as the basis for the original drafting and the subsequent revision of the UN MTC between Developed and Developing Countries. The UN MTC thus reproduces a significant part of the provisions and Commentaries of the OECD MTC. In addition to the promotion of investment flows between developed and developing countries, the UN MTC also proposes that the tax

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<sup>52</sup> *Ibid*

<sup>53</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. P7.

<sup>54</sup> International juridical double taxation can be defined as the imposition of income taxes in two (or more) states on the same taxpayer in respect of the same income, where economic double taxation means the inclusion, by more than one state's tax administration, of the same income in the tax base when the income is in the hands of different taxpayers. OECD, Centre for Tax Policy and Administration. *Transfer Pricing*. Available: [http://www.eia.oecd.org/document/15/0,3746,en\\_2649\\_33753\\_36156239\\_1\\_1\\_1\\_1,00.html](http://www.eia.oecd.org/document/15/0,3746,en_2649_33753_36156239_1_1_1_1,00.html). Last accessed 30/01/2011.

<sup>55</sup> Refer to Annexure C for a listing of the OECD member countries

<sup>56</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing.

treaties should contribute to the furtherance of the development aims of the developing countries.<sup>57</sup>

This growing influence of the OECD MTC in non-member countries led to the agreement, in 1997, to add to the MTC the positions of a number of these countries on its provisions and Commentaries.<sup>58</sup> It is this worldwide recognition of the provisions of the OECD MTC and its incorporation into a majority of DTAs that has helped make the Commentaries on the provisions of the OECD MTC a widely-accepted guide to the interpretation and application of the provisions of existing DTAs, in turn, facilitating the interpretation and enforcement of these DTAs along common lines. With regard to the application of the UN MTC, it is understood that if the Contracting States decide to use wording suggested in the UN MTC in a DTA, it is to be presumed that they would also expect to derive assistance in the interpretation of that wording from the Commentary to the UN MTC.

Accordingly, both the Commentaries to the OECD and UN MTCs may be very useful in the implementation of a DTA concluded by the Contracting States and in the settlement of any dispute relating thereto.

As submitted earlier, it appears to be the majority view that, in terms of international customary law and the VLCT, the Commentaries to the OECD and UN MTCs are vital as supplementary interpretation guidance.

In addition it is also reiterated that where the specific DTA Article, as negotiated between the Contracting States, deviates from the OECD or UN MTCs, the OECD and UN Commentaries may no longer be appropriate. However, it is submitted that reference may still be made to the Commentaries for clarification of a term, especially as the majority of the DTAs analysed for the purposes of this dissertation are based on either the OECD or UN MTC, and the deviation generally relates to a provision in the other MTC (UN or OECD). Thus, the Commentaries to the OECD and UN MTCs read together should provide influential interpretative guidance.

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<sup>57</sup> United Nations - Department of Economic & Social Affairs (2001). *UN Model Double Taxation Convention between Developed and Developing Countries*. New York: United Nations. p vii.

<sup>58</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing.

### 3.1.2 PE definition – the “basic rule”

Paragraph 1 to Article 5 of the OECD and UN MTCs provides the general definition of a PE as “a fixed place of business through which the business of an enterprise is wholly or partly carried on”.<sup>59</sup>

Applying this ‘basic rule’ and the three essential characteristics of a PE<sup>60</sup> to oil extraction activities to be performed by the non-resident taxpayer, it is submitted that:

- 1 There is the existence of a “place of business”, *i.e.* a facility such as premises or, in certain instances, machinery or equipment, as oil extraction activities require premises to operate the substantial machinery and equipment involved in oil extraction activities.
- 2 The place of business will generally be “fixed”, *i.e.* it must be established at a distinct place with a certain degree of permanence. Oil extraction activities will have a definite degree of permanence, albeit not in one distinct place, but rather a geographically distinct area of operation.
- 3 The carrying on of the oil extraction business can only operate “through” this fixed place. As noted, the activities operate through the substantial machinery that will be located at this fixed place in the selected ‘oil rich’ African countries.

The above submissions have been arrived at applying the following commonly accepted interpretation tests to be applied for both the OECD and UN MTCs’ definition of a PE:

#### 3.1.2.1 “Place of business” test

The general understanding in this regard is that the place of business must be fixed in the sense that “it is a distinct place, which exhibits some degree of permanence”.<sup>61</sup> This general

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<sup>59</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing and United Nations - Department of Economic & Social Affairs (2001). *UN Model Double Taxation Convention between Developed and Developing Countries*. New York: United Nations.

<sup>60</sup> The Commentary on Article 5 concerning the definition of ‘Permanent Establishment’, July 2010, states that this general definition brings out these three essential characteristics. The Commentary to the UN MTC acknowledges and agrees with the Commentary to the OECD MTC.

<sup>61</sup> Holmes, K. (2007). Permanent establishments. *International Tax Policy and Double Tax Treaties - An Introduction to Principles and Application*. Netherlands: IBFD Publications BV. p151.

understanding is supported by a report prepared for the IFA<sup>62</sup> (“the report”) which noted that the accepted understanding of the phrase “place of business” is that “*it is the physical presence of the non-resident taxpayer in the source country*”.<sup>63</sup> To clarify the physical presence required, the report provides that the place of business is generally seen to be a tangible asset of a substantial nature, thus, securities and bank accounts, a website, a mailing address all in themselves do not meet the place of business test.

The analysis requires a further breakdown of the phrase. A ‘place’ qualifying for a “place of business” is generally interpreted broadly, and any ‘place’ in the ordinary sense of the word may be a “place of business”.<sup>64</sup> Specifically noted in the report is that the place where a drilling ship or a rig is located may also be a “place of business”, as well as substantial machinery and equipment,<sup>65</sup> and thus may qualify for a PE if other conditions for a PE are met. In addition, the report notes that there is no reason to preclude a place of business being situated underground, such as mines, quarries and underground pipelines, as these objects are clearly situated ‘in’ a country.

It should be noted that it is not as easily applied as one would think, as in some countries it is controversial whether the place where the activity is conducted can be a place of business if it is also the object of the business activity of the taxpayer.<sup>66</sup> Conceptually, these countries distinguish between the object of the business and the “place of business”.<sup>67</sup> This describes what could also be seen as a functionality requirement, in that the purpose of the “place” is “*to serve the business activity, not to be the subject to the business activity*”.<sup>68</sup>

In addition, it is not sufficient for these countries’ taxing authorities that the enterprise has the objective of business activities, yet the ‘place’ must be at the taxpayer’s disposal in a certain qualified way. This by no means requires a formal legal right, but merely a right of disposal. The counter to this requirement is that mere presence also does not necessarily mean that the location is at the disposal of the enterprise.

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<sup>62</sup> Sasseville, J and Skaar, A. (2009). *Is there a permanent establishment?; General report*. IFA Cahiers. 94 (A), p23-43.

<sup>63</sup> *Ibid*

<sup>64</sup> *Ibid*

<sup>65</sup> *Ibid*

<sup>66</sup> *Ibid*

<sup>67</sup> *Ibid*

<sup>68</sup> Skaar, A (1991). *Permanent Establishment, Erosion of a Tax Treaty Principle*. India: Wolters Kluwer India Pvt Ltd. p112.

Applying this definition to the oil extraction activities of the non-resident taxpayer, as it involves substantial machinery and takes lengthy time periods to extract,<sup>69</sup> it would be difficult to argue that the operations set up in the selected ‘oil rich’ African countries do not constitute a “place of business”. The machinery used is tangible and has a physical presence and is at the non-resident taxpayer’s disposal. In addition, the machinery is generally manned by employees or contractors of the non-resident taxpayer. The machinery is not the non-resident taxpayer’s objective, the extraction of the oil is the objective, thus, it is submitted that the machinery used fulfils the requirement of the place of business test.

### 3.1.2.2 “Location test”

#### *Geographical nexus to the source state*

Sasseville and Skaar’s report (2009) provides that the place of business should be located at a specific geographical nexus to constitute a “fixed place of business” for PE purposes. However, as already noted, it does not have to be visible from the surface of the earth (underground pipelines, railroads, mines, etc.) to meet the requirements under the location test for a PE. In addition, it is noted that the place of business does not have to be construction of any kind, thus there is no requirement of a mechanical connection to the earth, and thus, a tent or a shanty could be sufficiently connected for the location test’s purposes.<sup>70</sup>

It is submitted that the machinery required to extract oil would create a sufficient geographical nexus to the area, at least for a sufficiently significant period of time, to meet this requirement of the location test. Accordingly, there should not be any noteworthy disagreement that oil extraction activities should constitute a “fixed place of business”.

#### *Business activities that constitute a geographical and commercial coherent whole*

Oil extraction activities are operated both on and offshore. Accordingly, there is an understanding that offshore oil extraction, would not always take place at one fixed place, at least not for an indefinite period. Thus, even if the non-resident taxpayer is moving around

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<sup>69</sup> This is in line with the broad interpretation of a “place of business” discussed in Sasseville, J and Skaar, A. (2009). *Is there a permanent establishment?; General report.* IFA Cahiers. 94 (A), p23-43.

<sup>70</sup> Sasseville, J and Skaar, A. (2009). *Is there a permanent establishment?; General report.* IFA Cahiers. 94 (A), p23-43.

within a geographically coherent area, as long as that taxpayer is performing a commercially coherent business activity, that area may well still constitute one 'place' under the location test. However, it should be noted that, in terms of the commentary to the OECD MTC, places that are only connected commercially, but not connected geographically, do not constitute one 'place'. Accordingly, one should always consider that activities which are carried on as part of a single project constituting a coherent commercial whole may lack the necessary geographical coherence in one geographical location to be considered as one single 'place' (of business).

With regard to oil extraction, although the equipment and machinery are not always permanently fixed to the earth, it is submitted that as long as the equipment and machinery have some form of temporary nexus to the ground in the selected 'oil rich' African countries, the oil extraction area should meet the location test for a PE.

So as not to dispel any chance of the contrary argument, oil extraction does generally form part of a larger group of activities that are carried on as part of a single project, *i.e.* the refinement and sale oil, constituting the coherent commercial whole. Thus, it may lack the necessary geographical coherence to be considered as one single place. Despite this, it is submitted that the strong counter argument would be that oil extraction is part of a bigger project to sell refined goods, and that the extraction in itself is a substantial activity with the commercial intention of extracting the raw material for sale in its raw form, albeit to the probable head office.

### 3.1.2.3 “Duration test”

*The relationship between the duration test and the right of use test*

A business activity is not a PE unless it is performed *through* a place of business, which is vital to the answer to the question posed by Sasseville and Skaar’s report (2009):

*“Should the duration test be related to the place of business, to the business activity or to anything else?”<sup>71</sup>*

The answer is based on nothing more than logic in that if a legal right of use to the place of business is required for a PE to be constituted, it has to relate it to the duration test. The follow

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<sup>71</sup> *Ibid*

up question posed, most relevant to oil extraction activities, is “*What constitutes ‘permanent’ in the interpretation of the duration test?*”<sup>72</sup>

Various reports and commentators confirm that there is no universal view that ‘permanent’ requires perpetuity, but what is vital is a form of permanence, which in itself should be open to differing views of interpretation, and ultimately is a question of degree.

The period fixed in the construction clause to the PE definition of the OECD MTC does not assist taxpayers involved in non-construction activities. However, it could provide for a base guideline as to what the Contracting States have agreed to as a marker for permanency.<sup>73</sup> As with any form of interpretation, subject to the circumstances in each case, it would appear that practice has shown that the duration test is met where the right of use to the place of business was maintained for a period of at least six months.<sup>74</sup> However, the application of the duration test has often been denied for shorter periods,<sup>75</sup> but as noted, such interpretation is subject to the question of degree, and should be looked to in conjunction with the other requirements of a PE, particularly when assessing oil extraction activities.

The vital element as to the degree of permanency lies in the activity undertaken and the permanency of that activity. Although little guidance is provided on a universal interpretation, the significant activities involved in oil extraction would provide for a strong argument for a sufficient degree of permanency to allow for this requirement of the PE definition to be met generally. Although not an indefinite activity, the permanency of the activity is defined by the oil resources available, and once depleted, there is no more activity in which to be involved, and accordingly, the activity is as permanent as it can be.

#### *Intention vs. factual duration and temporary suspensions*

There is the view that a right of use for an indefinite period of time is sufficient to meet the duration test, but that it is not necessary.<sup>76</sup> In addition, the duration test is to be applied

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<sup>72</sup> *Ibid*

<sup>73</sup> This aligns with published reports which generally agree on a six-month minimum duration found in practice, which is also reported in the Commentary to the OECD MTC.

<sup>74</sup> Sasseville, J and Skaar, A. (2009). *Is there a permanent establishment?; General report*. IFA Cahiers. 94 (A), p23-43.

<sup>75</sup> *Ibid*

<sup>76</sup> *Ibid*

retrospectively, *i.e.* a business which is intended to last for a short period of time, but lasts in practice for a longer period, may still be considered to meet the duration test. Thus, in this respect, the intentions of the taxpayer are less important than the factual duration of the right of use. However, if the intention of the taxpayer was that the right of use to the place of business should last for a long or an indefinite period of time, but was in fact terminated after a short period of time, a PE could nevertheless be constituted. Thus, in these situations the intentions of the taxpayer are more important than the factual duration of the right of use.

Assessing the intention and factual duration of oil extraction activities, the non-resident taxpayer entering into the selected 'oil rich' African country would clearly have an intention to operate in that country for a significant period of time, as such a time period is generally required for oil extraction activities. As for factual duration, this would generally match the intention of the non-resident taxpayer, as the oil extraction phase is based on exploration that has indicated the likelihood of oil to be extracted. Even if no oil is actually extracted and the operations cease earlier than intended, the shortened factual duration should not impact the intended duration to extract oil.

Despite the actual period of time spent in the selected 'oil rich' African country, it is submitted that, generally, the duration test would be met with regard to oil extraction activities.

#### *“One-off projects”*

For activities of a special nature, in which a once-off project is undertaken, given the lack of universal interpretation and consensus on the required period for the duration test to be met, the intention of the non-resident taxpayer entering the selected 'oil rich' African country with the required equipment and machinery to extract oil would be a key factor. Accordingly, there may be an argument for the non-resident taxpayer having a form of permanence in the African country, this once off duration thus meeting the non-resident taxpayer's intention.

#### **3.1.2.4 “Right of use” test**

The question that this test considers is the issue as to whether or not there is a requirement that the enterprise has some form of legal right to use a particular place in order for that place to be considered as a place *“through which the business of an enterprise is wholly or partly carried*

on”<sup>77</sup>. Second, is whether or not it a fundamental requirement under this “right of use” test that the taxpayer’s use of the facilities cannot be denied, withdrawn or removed without the consent of the taxpayer.<sup>78</sup> To do this, the following analyses are required.

*Is a legal right required or does an “implied” legal right of use suffice?*

There is a general consensus that no formal legal right to use the place is required, and that factual use is enough.<sup>79</sup> Essentially, under any circumstances, it is recognised that the taxpayer’s ‘control’ (factual or legal) over the place of business, which cannot be altered unilaterally by a third party, is a key factor when determining whether a PE exists.<sup>80</sup> Further, it is evident that the ‘mere presence’ at a place of business cannot constitute a PE,<sup>81</sup> because there is the requirement that a business activity is performed at that place.

In applying these tests to oil extraction activities, the true test is whether the activities are creating the nexus between the non-resident taxpayer extracting oil and the selected ‘oil rich’ African countries.

As the equipment and machinery the non-resident taxpayer is using to achieve the objective of oil extraction is of significant proportions, presumably the non-resident taxpayer has entered into a purchase or lease agreement to use the equipment and machinery. In addition, the non-resident taxpayer would also have to have entered into an agreement with the owner of the land/area in which the taxpayer plans to extract the oil. Accordingly, it is submitted that it would be clear that the right of use test would be met generally.

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<sup>77</sup> Article 5(1) of the OECD and UN MTCs

<sup>78</sup> *Ibid*

<sup>79</sup> *Ibid*. See also Holmes, K. (2007). Permanent establishments. *International Tax Policy and Double Tax Treaties - An Introduction to Principles and Application*. Netherlands: IBFD Publications BV. p151.

<sup>80</sup> Sasseville, J and Skaar, A. (2009). *Is there a permanent establishment?; General report*. IFA Cahiers. 94 (A), p23-43.

<sup>81</sup> Holmes, K. (2007). Permanent establishments. *International Tax Policy and Double Tax Treaties - An Introduction to Principles and Application*. Netherlands: IBFD Publications BV. p151. In addition, the Commentary to Article 5 of the OECD MTC refers to the situation in which illegal use of the place of business causes confusion from a conceptual point of view, as it states that a PE could exist where an enterprise illegally occupied a certain location where it carried on its business, however, there is the fact that the illegal use could be altered unilaterally by a third party, i.e. the legal owner/occupant.

### 3.1.2.5 “Business activity” test

Up to now the requirements have dealt with creating a “place of business” through which the business can be operated. The next requirement is that this “place of business” must serve the non-resident taxpayer’s business activity, with mere presence in a country being insufficient. It should be noted, that there is no requirement that a PE should be autonomous or independent of the head office.<sup>82</sup> The local business activity may be fully integrated into the activity of the head office, but the local business activity needs to be an activity under

- (a) the laws of the country which applies the treaty; and
- (b) under the treaty itself.<sup>83</sup>

*What is a business activity and is the business activity the taxpayer’s business?*

In order to qualify as a “business activity”, one needs to decide whether a business activity is conducted ‘in’ a country or not. In order to do this, one needs to assess the nature of the activity, and the location of this activity, and both are to be interpreted autonomously.

Once established that there is a business activity, the corresponding question is whose business activity is being conducted. The answer to this can generally be found by establishing whose personnel are operating through the place of business.

*“Core business” versus “preparatory or auxiliary” activities (the negative list)*

In terms of the OECD MTC, only ‘core’ business activities may constitute a PE. Auxiliary activities are of a different nature as compared to preparatory activities in the sense that the auxiliary activities accompany the core business activity while the preparatory activities precede the core activity.

The general argument that is made is that the terms ‘preparatory’ or ‘auxiliary’ activities should be interpreted broadly. An activity is a core business activity if it constitutes a material and authoritative (“essential”) part of the enterprise’s entire activity, regardless of whether it is

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<sup>82</sup> Sasseville, J and Skaar, A. (2009). *Is there a permanent establishment?; General report*. IFA Cahiers. 94 (A), p23-43.

<sup>83</sup> *Ibid*

conducted by employees, a body of the company such as the managing director, the owner of the enterprise, or automatic equipment.<sup>84</sup>

Key to the analysis with regard to auxiliary services is that the nature of the activity is understood. For example, where collecting of information is an essential and material part of the business in relation to third parties, this has been interpreted as a core business. However, it is vital that a distinction should be made between extraction of natural resources (oil, natural gas, etc.) for somebody else's business purposes on the one side, and exploration activities for the taxpayer's own business purposes on the other side.<sup>85</sup> Exploration for the taxpayer's own business purposes should be considered a preparatory or auxiliary activity with the consequence that no PE exists. However, exploration carried out for third parties qualifies as a core business activity, thus could create a PE (this would be seen as an oilfield service, refer to paragraph 1.1.2).<sup>86</sup>

Applying the "business test" to oil extraction activities, it would appear that the business activity is the extraction of the oil, and the vital criteria to be determined are whether the oil extraction from the African country is the non-resident taxpayer's core business and the split between the exploration and the extraction phases (discussed in paragraph 3.2.2.1).

### **3.1.2.6 "Business connection" test**

The place of business which is at the taxpayer's disposal must serve (be "connected to") the business activity of the taxpayer, *i.e.* the business activity must be performed 'through' the place of business. The word 'through' has led to a discussion whether it means the same as 'in' and 'at', and the general consensus seems that these terms are interchangeable in this respect (refer to 3.2.1.1).<sup>87</sup>

As oil extraction is reliant on the substantial machinery, it would be difficult to prove that the oil extraction activities, provided they are the core business of the non-resident taxpayer, are not carried on through the place of business, located where the taxpayer has set up its machinery and operations in the African country.

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<sup>84</sup> *Ibid*

<sup>85</sup> *Ibid*

<sup>86</sup> *Ibid*

<sup>87</sup> *Ibid*

### 3.1.3 Specific inclusions – the “positive list”

Paragraph 2 to Article 5 of both the OECD and UN MTCs provide for the certain places/activities to be specifically identified as PEs, the so-called “positive list”.<sup>88</sup> It should be noted that despite such places/activities being specifically included, it does not automatically indicate that, should a non-resident operate such activities or through such a place, they have created a PE. The other requirements of Article 5(1) still have to be met. In particular the taxpayer still has to have a right of use to the specifically identified places of business, and there has to be the performance of a business activity through it.<sup>89</sup> This is supported by the Commentary to the OECD MTC, which states that when a place of business is found, a PE does not exist until the other conditions of the ‘basic rule’ are met.<sup>90</sup>

This indicates a primacy to the ‘basic rule’, which is further demonstrated by the circumstances that the “positive list” may be overruled by the exemptions listed in the “negative list”, contained in Article 5(4) to the OECD and UN MTCs.

For the purpose of this dissertation, the key inclusion is Article 5(2)(f), “*a mine, an oil or gas well, a quarry or any other place of extraction of natural resources*”.

#### 3.1.3.1 *Natural resources*

Although self explanatory, the Commentaries to the OECD and UN MTCs provide that in connection with Article 5(2)(f), which provides that the term “permanent establishment” includes ‘mines, oil or gas wells, quarries or any other place of extraction of natural resources’, the OECD Commentary states that “*the term ‘any other place of extraction of natural resources’ should be interpreted broadly*” to include, for example, all places of extraction of hydrocarbons whether on or off-shore.<sup>91</sup>

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<sup>88</sup> Cf. Storck, *Ausländische Betriebsstätten im Ertrag- und Vermögensteuerrecht*, 147 (1980)

<sup>89</sup> Skaar, A (1991). *Permanent Establishment, Erosion of a Tax Treaty Principle*. India: Wolters Kluwer India Pvt Ltd. p113.

<sup>90</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. p98.

<sup>91</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. p98-99.

Applying the international tax glossary's definition of a natural resource,<sup>92</sup> it is evident that oil is a natural resource as referred to in Article 5(2)(f).

It is noted that Article 5(2)(f) of the OECD and UN MTCs does not mention exploration for natural resources, whether on or off-shore, thus, Article 5(1) will govern whether exploration activities are carried on through a PE (refer to paragraph 3.2.2.1). The OECD Commentary states:<sup>93</sup>

*“Since, however, it has not been possible to arrive at a common view on the basic questions of the attribution of taxation rights and of the qualification of the income from exploration activities, the Contracting States may agree upon the insertion of specific provisions. They may agree, for instance, that an enterprise of a Contracting State, as regards its activities of exploration of natural resources in a place or area in the other Contracting State:*

- a) shall be deemed not to have a permanent establishment in that other State; or*
- b) shall be deemed to carry on such activities through a permanent establishment in that other State; or*
- c) shall be deemed to carry on such activities through a permanent establishment in that other State if such activities last longer than a specified period of time.*

*The Contracting States may moreover agree to submit the income from such activities to any other rule.”*

It is submitted that should a non-resident operate oil extraction activities, it could well create a PE, however, as already noted, despite being specifically included, the other requirements of the ‘basic rule’ still have to be met.

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<sup>92</sup> IBFD. (2010). *Glossary*. Available: <http://k-online2.ibfd.org/kbase/>. Last accessed 28/12/2010. A natural resource is defined as ‘Economically valuable resources, such as minerals including oil and gas deposits, virgin forests and grasslands, which occur naturally and are capable of exploitation for the national benefit.’

<sup>93</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. p99.

### **3.1.4 The “negative list”**

Although Article 5(2)(f) specifically includes the oil extraction activities, it may be overruled by the exemptions listed in Article 5(4) to the OECD and UN MTCs. The prime example of such an overruling is in the fact that storage or preparatory/auxiliary activities do not provide PE status, even if performed through a fixed place of business. This further supports the view that exploration activities are similar to preparatory activities, thus, only the reference to extraction of natural resources in Article 5(2)(f).

Despite the above, it is submitted that oil extraction activities would not fall within the exemptions provided by Article 5(4), accordingly, it would only be oil exploration activities which do not create a PE.

### **3.1.5 Application to oil extraction activities**

Given an ambulatory and purposive interpretation of the OECD and UN MTCs’ definition of a PE, and applying it to the operations involved in oil extraction, as already discussed above, it is submitted that the “basic rule” of Article 5(1) should encompass oil extraction operations.

To summarise the discussions above, this submission is based on the essential characteristics provided by the Commentaries to both the OECD and UN MTCs are generally met in that in order to operate oil extraction activities, there is clearly an existence of a “place of business”, *i.e.* the oil well and the machinery or equipment required. Once the location of the oil is identified, this creates a place of business that is ‘fixed’ and would be established at a distinct place with a certain degree of permanence. Finally, there is no doubt in that the oil will be extracted ‘through’ this fixed place of business.

To reinforce this submission, the fact that there is the specific inclusion of “*a mine, an oil or gas well, a quarry or any other place of extraction of natural resources*” provided in Article 5(2) of the MTCs, provides for the conclusion that oil extraction activities do create a PE.

## **3.2 Analysis of the PE definition provided in the reviewed DTAs<sup>94</sup>**

### **3.2.1 ‘Basic rule’ – Article 5(1) of the OECD and UN MTCs**

Based on the analysis of the international interpretation of a PE above, it is submitted that should the relevant DTA entered into by the selected ‘oil rich’ African countries contain the ‘basic rule’, as provided by the OECD and UN MTCs, the oil extraction activities of the non-resident taxpayers performing such activities in the selected ‘oil rich’ African countries would meet this definition, accordingly, creating a PE.

Applying this interpretation to the DTAs entered into by the selected ‘oil rich’ African countries, it is submitted that the basic rule provided in these DTAs do not differ sufficiently to allow for an alternative, and possible detrimental, interpretation of the ‘basic rule’. In turn, the selected ‘oil rich’ African countries should be provided with the taxing rights to the profits from such activities through the relevant equivalent of Article 7 to the OECD and UN MTCs (see the discussion provided in chapter 4) in the relevant DTA entered into.

#### **3.2.1.1 *Fixed place of business “through which” vs. “in which” the business of an enterprise is wholly or partly carried on***

Across the DTAs entered into by the selected ‘oil rich’ African countries, the most prevalent difference between the definitions of the ‘basic rule’ lies in the use of the wording “through which” and “in which”.<sup>95</sup>

There is currently no guidance as to whether this should create any implications for the taxing rights of the selected ‘oil rich’ African countries. However, the 1963 OECD MTC and 1980 UN MTC made use of the wording ‘in which’. The Commentary to the 1963 OECD MTC made no mention of the significance of the use of ‘in which’, and nor did the Commentary to the 1977 OECD MTC, where the definition was changed to ‘through which’. With regard to the UN MTC, there was no change in use of the wording ‘in which’ until the implementation of the 2001 UN MTC. However, it should be noted that the Commentary to the 1980 UN MTC referred to the Commentary to the 1977 OECD MTC which used the wording ‘through which’.

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<sup>94</sup> Refer to Annexure E – Analysis of the PE definition per DTA

<sup>95</sup> *Ibid*

It is submitted that based on the Commentary to the 2010 OECD MTC, the use of 'in which' could have been seen to be restrictive. The Commentary to the 2010 OECD MTC provides for a wide interpretation of the wording 'through which'.<sup>96</sup> This is supported by Ludicke (2004)<sup>97</sup> in his analysis of the changes in the Commentary to the PE definition, when the 2008 OECD MTC became effective. Ludicke (2004) notes that such a broad interpretation was new at that stage, and the implication was that the business did not have to be restricted to the physical fixed place of business, but rather that it '*comes down to the geographical area where the entrepreneur of his employees perform their work*'.<sup>98</sup>

The question that comes to mind at this stage is why 'in which' is only applied to some DTA's and not others entered into by the selected 'oil rich' African countries. The first criteria analysed was the date that the relevant DTAs were entered into force. The majority of the DTAs identified<sup>99</sup> as using 'in which' were all entered into force on or before the introduction and use of 'through which' in the 1977 OECD MTC. Accordingly, the DTAs were based on the MTC available at the time of negotiation of these DTAs.

The balance of the DTAs identified as using 'in which' were entered into force after the introduction of 'through which' in the 1977 OECD MTC. For the majority of these DTAs<sup>100</sup> they were entered into force shortly after the introduction of the 1977 OECD MTC. There is no definitive reason provided for the use of 'in which' post the introduction of 'through which', however it is submitted that, given the lengthy negotiation process in developing and concluding a DTA as well as the use of 'in which' by the UN MTC up to 2001, these DTAs probably did not intend to create a different interpretation to the PE definition by using 'in which', and that the use was based on negotiations entered into prior to the introduction of 'through which'.

Accordingly, for the purposes of this dissertation, with specific reference to the application of the ambulatory approach, it is submitted that despite some of the DTAs referring to 'in which' as the Commentaries to both the UN and OECD MTCs refer to 'through which' and given the

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<sup>96</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing, p94.

<sup>97</sup> Ludicke, J. (2004). *Recent commentary changes concerning the definition of Permanent Establishment*. IBFD Bulletin - Tax Treaty Monitor. May (1), p190-194.

<sup>98</sup> *Ibid*

<sup>99</sup> Egypt-Austria DTA; Egypt-Finland DTA; Egypt-India DTA; Egypt-Iraq DTA; Egypt-Japan DTA; Egypt-Norway DTA; Egypt-Sudan DTA; Libya-Malta DTA; Sudan-United Kingdom DTA. Refer to Annexure E.

<sup>100</sup> Egypt-Italy DTA; Egypt-Romania DTA; Egypt-United Kingdom DTA; Libya-India DTA. Refer to Annexure E.

use of a wider interpretation, there should be no impact on the selected ‘oil rich’ African countries’ taxing rights, provided the other criteria to the PE definition are met. This aligns with Sasseville and Skaar’s assertion that the terms are interchangeable when assessing the ‘business connection’ test (refer to paragraph 3.1.2.6).<sup>101</sup>

### 3.2.1.2 *Other deviations noted*

No other deviations to the ‘basic rule’ were noted across the DTAs entered into by Nigeria and Sudan. However, for Algeria, Egypt and Libya, there are a few deviations in the wording used in defining the ‘basic rule’ of a PE for the DTAs they have entered into.

The deviations noted below provide enough uncertainty to warrant further investigation into which Contracting State has actually been afforded the taxing rights in past dealings between the Contracting States, specific to oil extraction. This analysis would also require an analysis of the domestic tax legislations of the Contracting States, which is beyond the scope of this dissertation, to ascertain what interpretation principles are applied domestically to such international agreements.

#### *Algeria*

##### Algeria – Egypt DTA

Based on the unofficial translation of the DTA entered into between Algeria and Egypt, a PE is defined as ‘*a fixed place where the project is wholly or partly carried on*’. Accordingly, the deviation from ‘the business of an enterprise’ could possibly have an impact on the agreed upon interpretation of this PE definition, and accordingly, Algeria’s taxing rights, specifically limiting Algeria’s taxing rights. However, Article 3 (the general definitions) to the Algeria – Egypt DTA provides:

*“The terms ‘project (company) in a Contracting State’ and ‘project (out) of the other Contracting State’ mean a project (company) operated by a resident of a state contractor and a project (business ) operated by a resident of the other Contracting State.”*

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<sup>101</sup> Sasseville, J and Skaar, A. (2009). *Is there a permanent establishment?; General report*. IFA Cahiers. 94 (A), p23-43.

It is submitted that although this definition does not define a project, it does provide that a project is akin to a business/company operated by the taxpayer. Looking to Article 3 of the OECD MTC and the Commentary, specifically the definition of enterprise, both provide that that no exhaustive definition of the term been attempted as it has always been interpreted according to the provisions of the domestic laws of the Contracting States. However, it is provided that the term enterprise applies to the carrying on of any business.<sup>102</sup> The UN MTC does not provide for the definition of an enterprise, as it relies on the fact that it is defined in terms of the domestic laws of the Contracting States. Despite this lack of certainty regarding the use of the term 'enterprise', it is submitted that as the Business Profits Article refers to such *business* profits, the use of project in the Algeria – Egypt DTA should not impact on Algeria's taxing rights, as the term appears to be provided interchangeably with business.

It is also submitted that the term 'business' is expressly defined in the OECD MTC to include the performance of professional services and of other activities of an independent character, this clarifies that the performance of professional services or other activities of an independent character must be considered to constitute an enterprise, regardless of the meaning of that term under domestic law.<sup>103</sup>

For the purposes of this dissertation, it is submitted that there is no apparent impact on the taxing rights for Algeria. It is interesting that the two Contracting States are both a part of the sample of the 'oil rich' African countries reviewed for the purposes of this dissertation. Although no apparent impact on Algeria or Egypt's taxing, there is enough uncertainty to warrant further investigation as discussed above.

*Egypt*

#### Egypt-Algeria DTA

Based on the unofficial translation of the DTA entered into between Algeria and Egypt, a PE is defined as '*a fixed place where the project is wholly or partly carried on*'. As submitted above, the use of 'project' should not impact on Egypt or Algeria's taxing rights, but there is enough

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<sup>102</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. p23, 78 and 81.

<sup>103</sup> *Ibid*

uncertainty to warrant further research (beyond the scope of this dissertation) into the domestic legislations of the Contracting States.

#### Egypt-Hungary DTA

The Egypt–Hungary DTA defines a PE as ‘...*a fixed place of business, including among others commercial and industrial activities, through which...*’. It is submitted that this definition does not limit Egypt’s taxing rights, particularly relating to oil extraction activities. It appears that the addition of the words, ‘*including among others commercial and industrial activities*’, serves to clarify these activities. It is submitted that such a deviation would not favour either the source or the residence state, as it is merely clarifying the inclusion of these activities, and it also ensures that the inclusion does not exclude other activities. However, the deviation does raise some pertinent questions which may require further analysis as discussed above.

#### Kuwait / Libya / Palestinian Autonomous Areas / Syria / United Arab Emirates

Based on the unofficial translation of the DTAs entered into between Egypt and the noted Contracting States, a PE is defined as ‘*a fixed place, which carries out all the project activities or part of it*’. The deviation relates to the use of ‘project activities’ instead of the business of an enterprise. In contrast to the Egypt-Algeria DTA, none of the DTAs entered into by Egypt with the noted Contracting States has a definition for ‘project activities’.

In such cases, Article 3(2) of both the OECD and UN MTCs should be looked to for a remedy. Article 3(2) provides for any term not defined in the DTA, and notes that, unless the context otherwise requires, the term shall have the meaning that it has at that time under the law of that State, *i.e.* Egypt, for the purposes of the taxes to which the DTA applies. Accordingly, it would appear that Egypt could either be at risk of limiting its taxing rights or have extended taxing rights, should the domestic definition provide as such. No further analysis is provide in this regard, as the domestic legislation of the selected ‘oil rich’ African countries are beyond the scope of this dissertation, but there is sufficient uncertainty to warrant further analysis as discussed above.

### Egypt-Tunisia DTA

The Egypt–Tunisia DTA defines a PE as *‘a fixed place where the enterprise is wholly or partly carried on’*. The deviation is such that the fixed place of business is not required to be carried *‘through which’* or *‘in which’* (as discussed at 3.2.1.1). It would appear that Egypt could have limited its taxing rights in that the business of the enterprise is to be carried on at the location of the fixed place and not *‘through’* it.

Interpretation of such wording is once again vital, as on plain reading it may appear to have no real impact. However, when applying the formulated tests to interpret a PE, in terms of the *‘location test’* (at 3.1.2.2), offshore business activities, such as oil extraction, do not always take place in one fixed place, at least not for an indefinite period. Even if the non-resident taxpayer is moving around, it would appear that there is possibility for an interpretation that limits the principle created by the location test. The possible limitation is that although the taxpayer is moving around within a geographically coherent area, and is performing a commercially coherent business activity within that area, the use of the wording *‘where the fixed place is’* may well not provide for it constituting one *‘place’* under the location test.

In this instance it is thus submitted that applying the *‘location test’* to the Egypt–Tunisia DTA, it appears to be more stringent, in turn limiting Egypt’s taxing rights. However, there is sufficient uncertainty to warrant further analysis as discussed above.

### *Libya*

#### Libya-Egypt DTA

As discussed above, based on the unofficial translation of the DTA entered into between Libya and Egypt, a PE is defined as *‘a fixed place, which carries out all the project activities or part of it’*. In addition it was noted that the DTA does not provide for a definition of *‘project activities’*, and looking to Article 3(2) the term shall have the meaning that it has at that time under the law of Libya. As already submitted, it would appear that Libya could either be at risk of limiting its taxing rights or have extended taxing rights, should the domestic definition provide as such. However, no further analysis is provide in this regard, as the domestic

legislation of the selected 'oil rich' African countries are beyond the scope of this dissertation, but it does ask pertinent questions for further study.

It is noted that Libya is a member of both the AMU and CAEU's tax treaties. The question which arises is whether there any possible interpretational conflict that could result with respect to the taxation of PE's created by oil extraction activities.

Based on the review of the wording of the two DTA's, it would appear that the only interpretational differences could lie in the use of 'in which' and the reference to 'Industrial and commercial profits', per the CAEU DTA, versus 'through which' and the reference to 'Business Profits', per the AMU DTA. However, as noted in paragraphs 3.2.1.1 and 4.2.1, these differences should not having any significant impact on Libya's taxing rights should a non-resident taxpayer perform oil extraction activities in Libya.

### **3.2.2 'The positive list' – Article 5(2) of the OECD and UN MTCs**

As discussed (refer 3.1.3), both the OECD and UN MTCs provide for the certain places/activities to be specifically identified as PEs. For the purpose of this dissertation, the key inclusion is Article 5(2)(f), '*a mine, an oil or gas well, a quarry or any other place of extraction of natural resources*'. This inclusion strengthens the submission that oil extraction activities do create a PE, even in terms of the 'basic rule'. What should be reiterated is the fact that although there is a presumption that if an activity falls within the 'positive list' the requirements of the 'basic rule' also need to be met, which, as submitted above, should be for oil extraction activities.

Applying this interpretation to the DTAs entered into by the selected 'oil rich' African countries, it is submitted that the 'positive list' in conjunction with the 'basic rule', subject to the deviations identified above, provided in the DTAs reviewed provide for the non-resident taxpayer, undertaking oil extraction activities, entering into the selected 'oil rich' African countries to have created a PE in the selected 'oil rich' African countries.

### 3.2.2.1 *Extraction, exploitation and exploration*

Across the DTAs entered into by the selected 'oil rich' African countries, the main variations relate to the inclusion of exploitation and exploration, in addition to the extraction (see paragraph 1.1.2 for an overview of oil extraction activities), of natural resources in a few of the DTAs entered into.<sup>104</sup> The distinction of these terms provide for varying implications as to the selected 'oil rich' African countries' taxing rights provided by the relevant DTAs.

As the terms extraction, exploitation and exploration are not defined in the DTAs reviewed, nor the OECD nor UN MTCs and their Commentaries, the interpretation principles provided by the VCLT (refer to paragraph 2.2.1) should be followed. It is also noted that none of these terms are defined in the international tax glossary<sup>105</sup> either. Accordingly, Articles 31(1) and 31(2) provide the guidelines of the basic rule of general validity and 'context'.

#### *Exploration*

Exploration is defined by the Oxford Online Dictionary as "*the action of exploring an unfamiliar area*" or "*the action of searching an area for natural resources*".<sup>106</sup> It is clear that exploration is the first phase to the business of profiting from natural resources. Although significant activities are undertaken specifically for oil exploration, it is submitted that such activities generally do not reap any economic benefit without the extraction and/or exploitation of the oil. Although oil exploration activities may create a PE in the African countries, the taxing rights generally will not provide for taxing revenues.

It should be noted that for the purposes of this paper, it is reiterated that the focus is on the activities pertaining to the oil business and not the exploration business. Exploration can be performed by an independent third party, and as this is its business it could make profits from such business activities.

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<sup>104</sup> Refer to Annexure E which indicates which DTAs have included either or both exploration and exploitation to the 'positive list' to the PE definition Article to the DTA.

<sup>105</sup> IBFD. (2010). *Glossary*. Available: <http://k-online2.ibfd.org/kbase/>. Last accessed 28/12/2010.

<sup>106</sup> "exploration". Oxford Dictionaries. April 2010. Oxford University Press. Available: [http://oxforddictionaries.com/view/entry/m\\_en\\_gb0281510](http://oxforddictionaries.com/view/entry/m_en_gb0281510). Last accessed 23 October 2010.

### *Extraction*

Extraction is defined by the Oxford Online Dictionary as “*the action of extracting something, especially using effort or force*”.<sup>107</sup> Applying such a definition to the context of oil, it is submitted that extraction is the physical removal of the oil from the land or seabed of the African country (see paragraph 1.1.2). Accordingly, extraction is the second phase to the business of profiting from natural resources, and the initiation of the profits for the taxpayer. It is submitted that this will be the first phase to which the African countries would require taxing rights.

### *Exploitation*

Exploitation is defined by the Oxford Online Dictionary as “*the action of making use of and benefiting from resources*”.<sup>108</sup> It is submitted that in the context of oil activities, although similar activities could be performed to those involved in oil extraction, as the DTAs refer to both “*extraction and exploitation of natural resource*”, this gives rise to an interpretation that is broader than just oil extraction activities. Such activities, known as downstream activities in the oil industry, could include oil refinery and even the production of oil by-products. Accordingly, it is submitted that exploitation activities will create a PE that extends beyond oil extraction, and provides for another phase of profits.

### *To include or not to include*

The question that arises is whether the DTAs, the selected ‘oil rich’ African countries have entered into, provide for less taxing rights should the DTA only refer to the “*extraction of natural resources*”. Neither of the Commentaries to the UN or OECD MTCs deal with the use nor the interpretation of these words. Some of the member countries<sup>109</sup> to the OECD MTC have reserved the right to specifically include either both, or just one, of exploration and exploitation of natural resources to the activities covered by Article 5.

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<sup>107</sup> "extraction". Oxford Dictionaries. April 2010. Oxford University Press. Available: [http://oxforddictionaries.com/view/entry/m\\_en\\_gb0282470](http://oxforddictionaries.com/view/entry/m_en_gb0282470). Last accessed 23 October 2010.

<sup>108</sup> "exploitation". Oxford Dictionaries. April 2010. Oxford University Press. Available: [http://oxforddictionaries.com/view/entry/m\\_en\\_gb0281490](http://oxforddictionaries.com/view/entry/m_en_gb0281490). Last accessed 23 October 2010.

<sup>109</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. p126. Commentary to Article 5, the countries are Canada and Chile.

Despite the little guidance provided by the Commentaries, applying the guidelines of the basic rule of general validity and 'context', it is submitted that there is the possibility that the African countries' taxing rights could be unintentionally limited.

As an example, should only the extraction activities create a PE, the non-resident taxpayer could operate at small margins on the extraction phase. Then move the unrefined oil to another non-PE position (for the purposes of this example) in the same country for 'exploitation'. Once 'exploited', the non-resident sells the refined oil at larger margins. In such a case the African country will be allocated its taxing right to the business profits on the oil extraction phase, as this is the PE. But, as the non-resident has shifted the profits to the exploitation phase, which is not a PE, the African country could be at a loss of tax revenues on the more significant profits. Such an example does also need to consider the transfer pricing implications of such actions by the non-resident taxpayer. These implications are dealt with in Article 7 to the OECD and UN MTCs, regarding the allocation of profits to the PE.

Discussed in more detail below (see chapter 4.1), Article 7 operates in conjunction with Article 5, in that once the PE is created in terms of Article 5, the attributable profits of the PE are subject to tax in the source State. In addition, the attributable profits are subject the transfer pricing principles of Article 9, which should counter the issue identified in this example.

### **3.2.3 Conclusion**

It is submitted that the reference to 'in which' as opposed to 'through which' in the 'basic rule' of a few of the DTAs reviewed generally should have no impact on the selected 'oil rich' African countries' taxing rights, provided the other criteria to the PE definition are met.

The other deviations noted to the 'basic rule' and the deviations noted to the 'positive list' do create uncertainty for those specific DTAs in which the deviations occur. It is submitted that the taxing rights of the selected 'oil rich' African countries are generally protected with regard to oil extraction activities, at least for those with no deviations.

This uncertainty created by deviations to the MTCs raises the following pertinent questions:

- 1 Why was such a deviation necessary? Is there background to the relationship between these Contracting States, economic, political etc., that lead to the inclusion?
- 2 Why would the selected 'oil rich' African countries only deviate when negotiating with these countries? The background between the Contracting States would also be relevant to this question.
- 3 Have these deviations been introduced to favour the source state or residence state?
- 4 Most importantly, does it reflect a general practice that should be extended to the other DTAs the selected 'oil rich' African countries have and will enter into?

It was noted by van Brunschot (2005) that in negotiating double taxation treaties, the Treasuries of the Contracting States have to protect the interests of their resident taxpayers, on the one hand, and the interests of the Treasury, on the other. Given that these interests are not necessarily matched, the result of the negotiations is going to be less than optimal for at least one of the parties involved. Van Brunschot (2005) referred to his article where he demonstrated the effect of this 'Janus (two) face' position by comparing the wording of the then recently concluded Netherlands–United Kingdom and Netherlands–Canada treaties with the OECD Model. He concluded that the deviations were almost always to the benefit of the Treasury and that no explanation was provided for the deviations.<sup>110</sup>

Accordingly, the answer to these questions, such as does the one Contracting State have more influential bargaining power to claim the taxing right or is there a mutual agreement, may be answered through a more technical analysis of the relationship between these Contracting States, not only in the tax field but also economic and political. Such analysis is beyond the scope of this dissertation.

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<sup>110</sup> Van Brunschot, F. (2005). *The Judiciary and the OECD Model Tax Convention and its Commentaries*. IBFD Bulletin - Tax Treaty Monitor. January (1), p5-11.

## 4 Allocation of taxing rights

### 4.1 Article 7 of the OECD and UN MTCs

Article 7(1) of the OECD and UN MTCs essentially stipulates that the profits of a taxpayer shall be taxable only in its country of residence unless the taxpayer carries on business in the other Contracting State, *i.e.* the selected 'oil rich' African countries, through a PE situated therein. Thus, when the non-resident taxpayer carries on its business, *i.e.* oil extraction activities (refer to chapter 1.1.2), in the selected 'oil rich' African countries, the tax authorities of these 'oil rich' African countries would have to ask themselves two questions before they can levy tax on the profits of the non-resident taxpayer:

- 1 The first question is whether the enterprise has a PE in their countries.
- 2 If the answer is in the affirmative, then the second question is what, if any, are the profits on which that PE should pay tax.

Article 5 of the OECD and UN MTCs determines whether the non-resident taxpayer has a PE and if so then Article 7 of the OECD and UN MTCs provides that the country, in which the PE is located, has the primary taxing right to profits earned from the business carried on through the PE. However, what should be noted is that not all of the profits of the enterprise can be taxed in the source country, but only the profits attributable to the PE, and this requires a determination of the amount of the profits arising from the activities of the PE.<sup>111</sup>

It is submitted that, based on the analysis of the OECD and UN MTCs and applying the interpretation guidelines provided to the DTAs entered into by the selected 'oil-rich' Africa countries, oil extraction activities should create a PE in the selected 'oil rich' African countries. Accordingly, once the PE has been identified, Article 7 provides the selected 'oil rich' African countries the taxing right. However, the next difficulty lies in the attribution of which profits are subject to the selected 'oil rich' African countries' taxing rights. There are basically two methods that are advocated internationally for attributing profits to PEs:

- 1 the 'indirect method'; and

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<sup>111</sup> Oguttu, AW. (2010). *The challenges of taxing profits attributed to Permanent Establishments: A South African Perspective*. IBFD Bulletin - Tax Treaty Monitor. March (1), p165.

## 2 the 'direct method'.<sup>112</sup>

Under the 'indirect method' the total profits of the enterprise are allocated to the PE under an apportionment formula.<sup>113</sup> According to the direct method, also referred to as the 'separate-entity method',<sup>114</sup> a PE is treated as a separate legal entity and the transfer pricing rules (the arm's length principle<sup>115</sup> laid out in Article 9 of the OECD and UN MTCs), which apply with regard to separate legal entities, are applied to the PE. Needless to say, this will pose conflicts in the application of the domestic tax laws of some countries, as, in most jurisdictions, a PE is not treated as a separate legal entity. The OECD recommends the use of the direct method.<sup>116</sup> The commentary to the UN MTC states that there is a general acceptance of the arm's length rule embodied in the OECD MTC.

It should be reiterated that, even though a tax treaty may contain provisions that relate to the attribution of profits to PEs, it is a generally accepted principle of international tax law that a tax treaty cannot impose tax, nor can it create taxing rights.<sup>117</sup> Rather, tax treaties provide boundaries within which domestic tax provisions are enforceable. Tax treaties "*create an independent voice to avoid double taxation through restriction of Contracting States' tax claims where there could be an overlapping of these claims*".<sup>118</sup> Although a tax treaty can provide guidance as to which country has the right to tax income, the tax so imposed must still be levied

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<sup>112</sup> *Ibid*, citing Rohatgi, R. *Basic International Taxation* (The Hague: Kluwer Law International, 2002), p. 530 and G. Kraft, "Profit and Loss Attribution Between Head Office and Permanent Establishment in Different Jurisdictions: The German Tax Administration's Point of View Critically Analysed", *European Taxation* 3 (2001), p. 84.

<sup>113</sup> *Ibid*

<sup>114</sup> Oguttu, AW. (2010). *The challenges of taxing profits attributed to Permanent Establishments: A South African Perspective*. IBFD Bulletin - Tax Treaty Monitor. March (1), p166.

<sup>115</sup> Guidance is provided by the OECD Transfer Pricing Guidelines. OECD (2010). *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. OECD Publishing.

<sup>116</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. p26, Article 7(2) of the OECD MTC. For the purposes of this Article and Article [23 A] [23B], the profits that are attributable in each Contracting State to the permanent establishment referred to in paragraph 1 are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise.

<sup>117</sup> Oguttu, AW. (2010). *The challenges of taxing profits attributed to Permanent Establishments: A South African Perspective*. IBFD Bulletin - Tax Treaty Monitor. March (1), p166, citing Russo, R. "Tax Treatment of 'Dealings' Between Different Parts of the Same Enterprise Under Article 7 of the OECD Model: Almost a Century of Uncertainty", *Bulletin for International Fiscal Documentation* 10 (2004), p. 485 and Olivier, L and Honiball, M. *International Tax: A South African Perspective* (5th ed.) (Cape Town: Siber Ink, 2009), p. 11.

<sup>118</sup> Oguttu, AW. (2010). *The challenges of taxing profits attributed to Permanent Establishments: A South African Perspective*. IBFD Bulletin - Tax Treaty Monitor. March (1), p166, citing Uckmar, V. "Double Taxation Conventions", in Amatucci, A (ed.), *International Tax Law* (Alphen aan den Rijn: Kluwer Law International, 2006), p. 153.

in accordance with domestic law, *i.e.* a tax treaty does not generally create a tax liability where there is no liability in terms of domestic law.<sup>119</sup>

Accordingly, Article 7 provides the Contracting State, in which the PE is created, the taxing right. However, the issue upon which consensus is to be confirmed, is the quantification of the amount subject to tax in the selected 'oil rich African countries. Once consensus is reached, the practical question that most countries have to confront is whether the domestic law levies tax on the profits attributed to the PE. A detailed analysis of Article 7 in relation to the domestic laws of the selected 'oil rich' African countries is beyond the scope of this dissertation, but, the considerable variation as to the correct interpretation of Article 7, specifically as to which profits are subject to the taxing rights attributed to the source country and the taxation of PEs should be noted. In particular the business community has also pointed out that the lack of a common interpretation of Article 7 can lead to double taxation, and may also lead to double non-taxation.<sup>120</sup>

## **4.2 Application in DTAs entered into by the selected 'oil rich' African countries<sup>121</sup>**

Based on a review of the DTAs entered into by the selected 'oil rich' African countries, it is submitted that they provide that the selected 'oil rich' African countries have the right to tax the profits of the non-resident but only to the extent they are attributable to the PE created by the oil extraction activities.

The relevant Articles in the DTAs do also provide for the two methods that are advocated internationally for attributing profits to PEs. It is submitted that the 'direct method' is generally provided as the preferred allocation method, with the 'indirect method' being the alternative if it is customary in the selected 'oil rich' African countries to determine the profits attributable to a PE on the basis of an apportionment of total profits of an enterprise to its various parts, provided that the result is consistent with the principles contained in the Article.

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<sup>119</sup> *Ibid*

<sup>120</sup> Oguttu, AW. (2010). *The challenges of taxing profits attributed to Permanent Establishments: A South African Perspective*. IBFD Bulletin - Tax Treaty Monitor. March (1), p166.

<sup>121</sup> Refer to Annexure F

For the purposes of this dissertation, it is submitted these issues do not impact on the allocation of the taxing right to the African country, but more to the quantum of the profits on the oil extraction activities which the African country may tax, should its domestic legislation provide for the use of the taxing rights provided by the DTAs.

#### 4.2.1 Deviations

*Egypt*

##### Egypt-CAEU DTA

The DTA refers to '*industrial or commercial activity in the other Contracting State through a permanent establishment situated therein*', and not '*business in the other Contracting State through a permanent establishment situated therein*' as provided in the OECD and UN MTCs. The substitution for industrial or commercial activity does not appear to tie back to the PE definition provided in the Egypt-CAEU DTA, which refers to the business of the enterprise. Further, the Egypt-CAEU DTA does not provide definitions for an industrial or commercial activity.

However, the Commentary to the OECD MTC, in referring to the development of Article 7 to the OECD MTC, notes that before 2000 (the Egypt-CAEU DTA was entered into force in 13 July 1975) income from professional services and other activities of an independent character was dealt with under a separate Article, *i.e.* Article 14. The provisions of that Article were similar to those applicable to business profits but Article 14 used the concept of fixed base rather than that of PE, since it had originally been thought that the PE concept should be reserved to commercial and industrial activities.<sup>122</sup> The Commentary goes on to discuss the reasons for deleting Article 14 in 2000, namely that consensus was that in fact there were no intended differences between the concepts of PE, as used in Article 7, and fixed base, as used in Article 14, or between how profits were computed and tax was calculated.

Although, using the Commentary as interpretational guidance does not clarify the inconsistency between the PE Article and the Business Profits Article to the Egypt-CAEU DTA, it is submitted that given the nature of oil extraction activities, they would fall within the

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<sup>122</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. p151.

commercial and industrial activities, *i.e.* the Business Profits Article would apply should the oil extraction activities meet the PE definition.

#### Egypt-Austria/Sudan DTAs

The DTAs Egypt has entered into with Austria and Sudan, refer to *'the enterprise carries on a trade or business in that other State through a permanent establishment situated therein'*, which aligns with the OECD and UN MTCs, however the DTAs refer to *'the industrial or commercial profits of the enterprise'* being subject to tax in the other State, and not *'the business profits'* as provided in the OECD and UN MTCs. Industrial or commercial profits are not defined in any of these DTAs, but it would appear that the reason for the deviation is a result of these DTAs being entered into force in 1963 and 1975 respectively. Accordingly, the above discussion regarding the development of Article 7 is of particular relevance.

At the time these DTAs were negotiated commercial and industrial activities were viewed separately from professional services and other activities of an independent character, therefore, the taxing rights were allocated in terms of Article 7 and 14 of the then OECD and UN MTCs. As submitted above, there is no relevance of this deviation for the purpose of this dissertation as given the nature of oil extraction activities, they would fall within the commercial and industrial activities, as such *'the industrial or commercial profits of the enterprise'*, in turn allowing for the equivalent of Article 7 to the OECD and UN MTCs to apply should the oil extraction activities meet the PE definition.

Aligning with the above submission, the addition of the industrial profits to business profits is superfluous, as the interpretation (for the purpose of this dissertation) of business profits includes all profits relating to the enterprise (inclusive of a PE), whether it is industrial, commercial or other. Thus, it is submitted that Egypt, Austria or Sudan's taxing rights should not be affected.

*Libya*

### Libya-Malta DTA

The Business Profits Article to the Libya-Malta DTA provides that *'The profits of enterprise of a Contracting State shall be taxable in the State where the enterprise is situated and also in the State where it has a permanent establishment, in which latter case, the tax so charged shall be limited to the profits attributable to the permanent establishment and shall not exceed 15 per cent of the said profits'*. There is no commentary to this DTA, and such a deviation is not provided for in the Commentaries to either the OECD or UN MTCs. Despite this, it is difficult to see any interpretational issues, where a PE exists, in the reading of the above.

It is submitted that the DTA is allocating the taxing rights to both Libya and Malta, and the non-resident taxpayer will be subject to tax in both Malta (its country of residence) and Libya. However, despite being afforded the taxing rights, Libya's right is limited to 15% of the non-resident taxpayer's profits from its oil extraction activities.

Based on the review of the DTAs Malta has entered into with the selected 'oil rich' African countries, it is only in the Libya-Malta DTA that such a limitation has been implemented. The question that arises in this regard is why? There is no apparent reason for such a deviation, and the answer could be that the one Contracting State had more influential bargaining power to claim the taxing right or there is a mutual agreement between Libya and Malta. There appears to be no tax related reason and the solution may only be clearer through a more technical analysis of the relationship between Libya and Malta, specifically in the economic and political fields. Such an analysis is beyond the scope of this dissertation.

*Sudan*

#### Sudan-CAEU DTA

As the CAEU DTA is a regional treaty, as with the Egypt-CAEU DTA, the submission is unchanged from that provided with regard to the Egypt-CAEU DTA. Given the nature of oil extraction activities, they would fall within the commercial and industrial activities, *i.e.* the Business Profits Article would apply should the oil extraction activities meet the PE definition.

#### Sudan-Egypt DTA

As discussed above, the deviation in the Sudan-Egypt DTA is superfluous, as such, it is submitted that neither Egypt nor Sudan's taxing rights are affected through this deviation.

### **4.2.2 Conclusion**

It is submitted that except for the deviation identified in the Libya-Malta DTA, where Libya is afforded limited taxing rights, the other deviations identified should not affect or create uncertainty as to the selected 'oil rich' African countries' taxing rights with regard to the oil extraction activities creating a PE.

## 5 Scope provisions of the DTAs

The main focus of this dissertation is the PE definition as provided in the respective DTAs entered into by the selected 'oil rich' African countries.<sup>123</sup> However, to ensure that there are no specific scope adjustments, mutually agreed on by the Contracting States, which could affect the findings of this dissertation, a review of the scope Article to the respective DTAs is necessary.

Articles 1 and 2 of both the OECD and UN MTCs refer to the persons and the taxes covered respectively.

### 5.1 Persons covered

With regard to the persons covered, the DTAs generally apply to persons who are residents of one or both of the Contracting States, and the term 'resident' is defined in Article 4. For the purposes of this dissertation, although some of the DTAs refer to nationals (which are defined in the relevant DTAs) and not residents, this is of no significance as it is assumed that the non-resident taxpayer entering into the selected 'oil rich' African countries to undertake oil extraction activities is a resident/national of the other Contracting State to the particular DTAs reviewed.

### 5.2 Taxes covered

Referring to the taxes covered, unless any taxes are specifically excluded, then generally all the taxes on income and capital of the two Contracting States are covered. Article 2(3) of the OECD and UN MTCs refers to the existing taxes to which the MTCs shall apply, and this will vary dependent on the specific DTA.

Although there is very little research done on Article 2, Lang (2005) notes that although the treaty negotiators must mention the taxes levied in their country at the time the treaty is signed, Article 2(3) uses the phrase 'in particular' and thus makes it clear that the list is not complete.<sup>124</sup> In addition, the Commentary to the OECD MTC adopts the view: "*The list is not exhaustive. It*

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<sup>123</sup> See Annexure G for the listing of the DTAs entered into force by the selected 'oil rich' African countries.

<sup>124</sup> Lang, M. (2005). *Taxes Covered* – What is a "Tax" according to Article 2 of the OECD Model?. IBFD Bulletin - Tax Treaty Monitor. June (1), p220.

*serves to illustrate the preceding paragraphs of the Article. In principle, however, it will be a complete list of taxes imposed in each State at the time of signature and covered by the Convention”.*<sup>125</sup>

Article 2(4) provides that the DTA is also to apply to all identical or substantially similar taxes that are imposed in a Contracting State after the date of signature of the DTA in addition to, or in place of, the existing taxes in that State. In addition, Article 2(4) also provides that each State undertakes to notify the other of any significant changes made to its taxation laws by communicating to it, for example, details of new or substituted taxes. Member countries are encouraged to communicate other significant developments as well, such as new regulations or judicial decisions. This also supports the view that DTAs are generally entered into with a long-term life, thus the principle of ambulatory interpretation should be the accepted approach.

### **5.3 Application to the DTAs entered into by the selected ‘oil rich’ African countries**

Based on the review of all the DTAs entered into by the selected ‘oil rich’ African countries, there appear to be no material deviations from the wording of the OECD and UN MTCs. In addition, there are no specific scope adjustments that would impact on the African countries’ taxing rights regarding oil extraction activities, as provided by the Articles in the DTAs covering the PE definition and the taxation of the profits from a PE (Articles 5 and 7 of the OECD and UN MTCs).

The following deviations from the standard were noted, but it is submitted that none of the deviations should impact the findings of this dissertation with respect to the scope of the DTAs entered into by the selected ‘oil rich’ African countries.

#### **5.3.1 Algeria**

##### Algeria-Germany DTA

In the case of the Algeria-Germany DTA, there is specific mention to the *‘fees, taxes on income and additional taxes on income related to exploration, research, exploitation and pipeline*

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<sup>125</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. p76.

*transportation of oil*' which relates to the domestic fees, taxes on income and additional taxes provided by the Algerian taxing authorities. This would suggest that either in addition to or substitute to the normal taxation on the income from oil extraction activities, there are specific taxes provided for in Algeria's domestic law. Despite this specific scope inclusion, it does not detract from, nor impact on, the findings of this dissertation in looking to the taxing rights provided by the DTAs on the income from oil extraction activities.

#### Algeria-Indonesia DTA

In the case of the Algeria-Indonesia DTA, the taxes to which the DTA applies are, in the case of Indonesia the income tax imposed under the Undang-Undang Pajak Penghasilan 1984 (Law No. 7 of 1983), except for income tax paid under production sharing contracts, contracts of work and other similar contracts, in the oil and gas sector, and the other mining sector. Such a specific exclusion should not have an impact on the findings of this dissertation, as should Algeria be granted primary taxing rights over the income from oil extraction activities, they would still be granted such rights, it is the Indonesian taxpayer and the Indonesian taxing authority who will be at a loss, given such an exclusion from the scope of the DTA.

However, the question is raised as to whether enterprises from separate tax jurisdictions may generate a joint PE, even if individually the enterprises would not create a PE. Joint ventures seem to be a significant exception in respect of profit-sharing agreements. Skaar (2005) notes that current practice requires that a foreign venturer perform its business activity in the source state in order to have a PE there.<sup>126</sup> Even if a joint venturer has a joint venture partner in another country, and has agreed with such partner to share the net profits of the joint venture, he cannot be attributed the domestic venturer's place of business unless he has performed a business activity there himself.<sup>127</sup> Despite these findings by the courts of Greece and Belgium, there is no decisive international view.

Based on the requirement of the 'basic rule', should all the enterprises from the separate jurisdictions perform their relevant functions of the joint venture in the source state, it is submitted that they would have created a PE (provided all the criteria have been met). However,

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<sup>126</sup> Skaar, A (2005). *OECD - Analysis Art. 5 OECD Model Convention - 2. The Basic-Rule PE*. IBFD Tax Research Platform. Available: <http://k-online2.ibfd.org/kbase/>. Last accessed 23/12/2010.

<sup>127</sup> *Ibid*, citing the Belgian Supreme Court decision in Bulletin der Belastingen 1885 (1975); see for international litigation, IRS in Ltr. Rul. 82-41-032; cf. the Dutch lower court's decision of 5 December 1974 (No. 161/72 M1).

whether the taxing rights allocated to the source state on the joint ventures profits or the individual entities profits, it would appear that based on current practice and limited interpretational guidance, a look-through approach would be applied to the joint venture *i.e.* through to the individual entities operating their business through a fixed place in the source state.

### **5.3.2 Nigeria**

For all the DTAs entered into by Nigeria, there is specific mention of the petroleum profits tax in Nigeria. This would suggest that either in addition to or substitute to the normal taxation on the income from petroleum profits, there are specific taxes provided for in Nigeria's domestic tax law. Despite this specific scope inclusion, it does not detract from, nor impact on, the findings of this dissertation in looking to the taxing rights provided by the DTAs on the income from oil extraction activities.

### **5.3.3 Egypt, Libya and Sudan**

It is submitted that there are no deviations in the reviewed DTAs that would specifically exclude or include the taxation of profits from oil extraction activities by a non-resident taxpayer in Egypt, Libya or Sudan.

## 6 Offshore oil extraction

As discussed, oil extraction will generally be seen to create a PE in the African country, however as some forms and locations of oil extraction occur offshore, the question arises as to what offshore extraction falls within the African countries' tax jurisdiction. It is noted that the difficulty does not lie in the permanent installations for the extraction of the oil,<sup>128</sup> it relates to what defines the tax jurisdiction of the African country when it comes to offshore oil extraction.

### 6.1 Mobile oil extraction vessels and the 'basic rule'<sup>129</sup>

Before analysing the key issue as to the tax jurisdiction, Skaar (1991)<sup>130</sup> did indicate that there was uncertainty in the practice of coastal states with significant mineral resources and whether offshore activities constituted a PE. It is noted that the initial practice, driven by the 'US drilling-rig clause' and the UK,<sup>131</sup> whereby all petroleum-related business activities, specifically the offshore extraction, are taxable by the 'shelf state'. However, this initial approach was only really followed by a few countries, mainly due to the then recent development and economic benefit of offshore mineral exploration and extraction. The rapid rate of development, due to constant growth in the demand for oil resource, created a now well established view that offshore extraction activities fall within the scope of the 'positive list' along with the 'basic rule'.<sup>132</sup> This further supports the submission that even if one argues that the oil extraction through an oil rig is essentially a 'mobile activity'<sup>133</sup>, and thus the permanence required to meet the 'basic rule' for a PE is lacking, should the oil rig remain within the African country's

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<sup>128</sup> Skaar, A (1991). *Permanent Establishment, Erosion of a Tax Treaty Principle*. India: Wolters Kluwer India Pvt Ltd. p419. It has not been disputed that permanent installations on the seabed within the territory of a tax treaty constitute a PE.

<sup>129</sup> Refer to 3.1.2

<sup>130</sup> Skaar, A (1991). *Permanent Establishment, Erosion of a Tax Treaty Principle*. India: Wolters Kluwer India Pvt Ltd. p421.

<sup>131</sup> DTAs entered in between the UK and Norway and the UK and Ireland.

<sup>132</sup> Skaar (1991) referred to a Japanese Court decision in which a drilling rig was considered a PE, as further support for this view.

<sup>133</sup> Paragraph 20 of the OECD Commentary to Article 5, provides further support for 'mobile activities' having permanence, albeit with reference to construction contracts. The Commentary notes that the contractor's activity has to be relocated continuously or at least from time to time, as the project progresses (in the case for instance where roads or canals were being constructed, waterways dredged, or pipe-lines laid), and in such cases, the fact that the work force is not present for twelve months in one particular location is immaterial. The activities performed at each particular spot are part of a single project, and that project must be regarded as a permanent establishment if, as a whole, it lasts more than twelve months. OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. p101.

jurisdiction, there is still an established and distinct place with a certain degree of permanence through which the activity is performed.

The concepts of mobility and permanence were also discussed by Larking (1998), who noted that although these concepts seem incompatible at first sight,<sup>134</sup> there is support for the 'spatial delimitation approach'<sup>135</sup> and what Larking terms the 'relativity of permanence'.<sup>136</sup> Larking's 'relativity of permanence' principle simply means that physical permanence has a variable meaning which is relative to the nature of the business.<sup>137</sup> Both these approaches support the submission that 'mobile' oil extraction activities could create an established and distinct place with a certain degree of permanence through which the activity is performed. This aligns the fact that there would be the necessary geographical coherence in one geographical location to be considered as one single 'place' (of business).

## 6.2 Offshore taxing rights

Given the then lack of profitability of offshore extraction of minerals, Skaar (1991:423) indicates that the legal questions concerning such jurisdiction over the extent of the coastal state's taxing rights have remained uncertain, that is until the 1958 Convention<sup>138</sup> was introduced. Despite its introduction, the 1958 Convention only really took to clarifying the situation a few years after its introduction. The reason for this delayed effect was mainly a result of the fact that the UN member countries did not have domestic legislation covering the continental shelf, which was due to the lack of necessity of such legislation. However, given the developments and identified economic benefits of offshore mineral exploration and extraction, the necessity arose. The 1958 Convention has been superseded by, most recently, the third UNCLOS ("UNCLOS III").<sup>139</sup> UNCLOS III was strongly supported by African coastal states as the 1958 Convention was considered to lack sufficient flexibility and comprehensiveness to

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<sup>134</sup> Larking, B. (1998). *The Importance of Being Permanent*. IBFD Bulletin - Tax Treaty Monitor. p267.

<sup>135</sup> A trend reported by Skaar (1991:134), whereby fixed temporary locations within a delimited area may constitute a PE.

<sup>136</sup> Larking, B. (1998). *The Importance of Being Permanent*. IBFD Bulletin - Tax Treaty Monitor. P268-269.

<sup>137</sup> *Ibid*

<sup>138</sup> United Nations (1958). *Convention on the Continental Shelf*. Geneva: United Nations.

<sup>139</sup> Third United Nations Conference on the Law of the Sea was convened in New York, 1973.

adapt to the evolving economic, political, security and technological concerns of the international community.<sup>140</sup>

This is where the understanding and agreed upon jurisdiction between the Contracting States needs to be assessed, in conjunction with UNCLOS III. This assessment is more important given the fact that neither the OECD nor the UN MTCs provide any assistance in this regard.

Ultimately the negotiating powers of the Contracting States as well as their standing jurisdictional (sovereign) rights will prevail when it comes to assessing the extent to which the seabed and the superjacent waters fall within the African countries' territories. For the purposes of this dissertation, an understanding of these rights is vital, as all of the selected 'oil rich' African countries are coastal states.

### **6.2.1 The selected 'oil rich' African countries' offshore taxing rights**

No definition is provided regarding the jurisdictional rights of the selected 'oil rich' African countries over offshore activities. Although already discussed in detail, the VCLT indicates, that when interpreting international agreements, the provisions of Articles 31 and 32 of the VCLT should be followed. However, in this regard Article 32 will be of no assistance in that neither the OECD nor the UN MTCs provide any guidance when it comes to the jurisdictional rights of the Contracting States when it comes to offshore activities, specifically oil extraction.

Applying the principles of Article 31 of the VCLT, the 'ordinary meaning' of the words of the DTAs are to be followed. Following this initial step, should there be a variety of possible meanings, the context in which the term is used must be analysed, as must the intention of the respective parties to the DTA and the purpose of the provision.

The majority of the DTAs entered into by the selected 'oil rich' African countries do contain a definition of the geographical area included when reference is made to the Contracting States to the DTA. These definitions are contained in the 'General Definitions' Articles to the DTAs.<sup>141</sup> The OECD and UN MTCs do not provide for explicit definitions of the Contracting States to be

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<sup>140</sup> Akintoba, TO (1996). *African States and Contemporary International Law: "A case study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone"*. Netherlands: Kluwer Law International.

<sup>141</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. p23. United Nations - Department of Economic & Social Affairs (2001). *UN Model Double Taxation Convention between Developed and Developing Countries*. New York: United Nations. p8.

provided in DTAs. There is little guidance with regard to an all encompassing definition of a Contracting State ('general definition'), specifically when used in a geographical sense. Based on a review of the DTAs entered into by the selected 'oil rich' African countries, the following general definition is submitted to encompass the scope of the specific definitions reviewed:

*'the territory of the named Contracting State, including the territorial sea and, beyond it, the zones in which, in accordance with international law and the national legislation, the named Contracting State exercises its jurisdiction or its sovereign rights for the purpose of exploration and exploitation of natural resources of the sea-bed, the sub-soil and superjacent water.'*

There are naturally deviations from this derived comprehensive general definition. However, it is submitted that it captures the critical aspects of definitions provided in the DTAs analysed.

What needs to be answered is how such a definition would assist in defining the selected 'oil rich' African countries' taxing rights with regard to offshore oil extraction activities. Given the lack of support provided by the OECD and UN MTCs in this regard, the 'ordinary meaning', and given any possible variety of meanings, the context and intention of the definition and the DTA are to be assessed.

#### **6.2.1.1 UNCLOS III and tax treaties**

Susanti (2008) notes,<sup>142</sup> that a state that has signed UNCLOS is granted sovereign rights not only over its EEZ, but also its continental shelf for the purpose of exploring and exploiting its natural resources.<sup>143</sup> As all of the selected 'oil rich' African countries have signed UNCLOS,<sup>144</sup> the provisions and rights provided therein should be applicable.

Article 76(1) of UNCLOS provides the legal definition of the continental shelf of a continental shelf state and refers to the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to 200 nautical miles from the baselines from which the breadth of the

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<sup>142</sup> Susanti, N. (2008). *An Analysis of the Special Treaty Provisions Relating to Continental Shelf Activities*. European Taxation Journal. April (1), p186.

<sup>143</sup> United Nations. (1958). *United Nations convention on the law of the sea*. Articles 77.1 and 77.2. Available: [www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm). Last accessed 28/12/2010.

<sup>144</sup> See Annexure H

territorial sea is measured where the outer edge of the continental margin does not extend to this distance.

Accordingly, in acquiring sovereign rights by virtue of UNCLOS, the selected 'oil rich' African countries could have taxation rights over the continental shelf, should the relevant DTAs provide for such sovereign rights.

Susanti (2008:176) also notes that due to the complexity and the specialisation required in performing activities relating to oil and gas exploitation, such activities are generally carried on by foreign companies. When referring to 'foreign companies' Susanti (2008) was analysing the offshore provisions inserted by Denmark, Ireland, Latvia, Lithuania and the United Kingdom into their DTAs. Although a different region, this does not detract from the statement's applicability to this dissertation, as the foreign companies referred to could be the non-resident taxpayer entering into the selected 'oil rich' African countries. As discussed, when dealing with taxing rights and the power of the selected 'oil rich' African countries to tax these non-resident taxpayers, it is only effective if a PE exists in the territory of the selected 'oil rich' African countries.

Susanti (2008:176) acknowledges that offshore activities are usually carried on for some days or months and not through a fixed place of business, as such it is difficult to qualify such activities as a PE by reference to Article 5 of the OECD MTC and the DTAs. For the countries Susanti (2008) analysed, each have inserted specific provisions, referred to as 'offshore provisions', that provide rules in respect of such offshore activities. However, the selected 'oil rich' African countries' DTAs analysed do not have such a provision. It is submitted that the UNCLOS should be used as an interpretation guideline, to identify the sovereign rights of the selected 'oil rich' African countries regarding such offshore oil extraction activities.

### 6.2.1.2 *Territorial seas*

Based on Articles 2 and 3 to UNCLOS,<sup>145</sup> all coastal states, have sovereign rights over its territorial seas, which extends to 12 nautical miles from its coastline. However, the ‘general definition’ submitted as being applicable to DTAs refers to zones beyond the territorial seas.

### 6.2.1.3 *Zones beyond the territorial seas*

Article 33<sup>146</sup> and Parts V and VI of UNCLOS deal with the zones beyond the territorial seas, as referred to in the general definition. With regard to the rights required for the ‘purpose of exploration and exploitation of natural resources of the sea-bed, the sub-soil and superjacent water’, the relevant zones, as defined, are the EEZ<sup>147</sup> and the continental shelf.<sup>148</sup>

#### *EEZ*

With specific application to this dissertation, EEZ is defined as a zone beyond and adjacent to the territorial sea in which a coastal state has:

*‘sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone. The outer limit of the exclusive economic zone shall not exceed 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.’<sup>149</sup>*

#### *Continental shelf*

Article 76 of UNCLOS defines the continental shelf of a coastal state as comprising the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural

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<sup>145</sup> Refer to Annexure H for the relevant extracts from UNCLOS

<sup>146</sup> *Ibid*

<sup>147</sup> United Nations. (1958). *United Nations convention on the law of the sea*. Part V. Available: [www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm). Last accessed 28/12/2010.

<sup>148</sup> United Nations. (1958). *United Nations convention on the law of the sea*. Part VI. Available: [www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm). Last accessed 28/12/2010.

<sup>149</sup> United Nations. (1958). *United Nations convention on the law of the sea*. Part V. Available: [www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm). Last accessed 28/12/2010.

prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. It further defines the continental margin as comprising the submerged prolongation of the landmass of the coastal state, and consists of the seabed and subsoil of the shelf, the slope and the rise. Wherever the continental margin extends beyond 200 nautical miles from the baseline, coastal states may extend their claim to a distance not to exceed 350 nautical miles from the baseline or 100 nautical miles from the 2500 meter isobath.

It should be noted that the continental shelf does not include the deep ocean floor with its oceanic ridges or the subsoil thereof. Accordingly, it would appear that deep ocean oil extraction activities fall beyond the jurisdiction of the selected 'oil rich' African countries. For the purposes of this dissertation this is to be noted as a possible loss of taxing rights to the selected 'oil rich' African countries, and an area of possible further research.

#### **6.2.1.4 Maritime claims**

The general definition with regard to offshore taxing rights provides that these rights are provided '*where the Contracting State exercises its jurisdiction or its sovereign rights*'. For the reviewed DTAs that are aligned with the general definition, it is vital to ascertain the zones in which the selected 'oil rich' African countries may exercise its jurisdiction or its sovereign rights.

In terms of international maritime law, each coastal state in the world has a maritime claim. Thus, to assess whether the PE created by the offshore oil extraction activities falls within the jurisdiction of the selected 'oil rich' African countries, their maritime claims are as follows:<sup>150</sup>

- Algeria - Territorial sea.
- Angola - Territorial sea, contiguous zone and EEZ up to 200 nautical miles.
- Egypt - Territorial sea, contiguous zone, EEZ up to 200 nautical miles and the continental shelf up to 200m depth.

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<sup>150</sup> CIA. *The World Factbook - Maritime Claims*. Available: [https://www.cia.gov/library/publications/the-world-factbook/fields/print\\_2106.html](https://www.cia.gov/library/publications/the-world-factbook/fields/print_2106.html). Last accessed 28/12/2010.

- Libya - Territorial sea, also limited by Gulf of Sidra's closing line at 32 degrees, 30 minutes north.
- Nigeria - Territorial sea, EEZ up to 200 nautical miles and the continental shelf up to 200m depth.
- Sudan - Territorial sea, contiguous zone and the continental shelf up to 200m depth.

Thus, for the purpose of this dissertation, it would appear that without specific inclusions in their relevant DTAs, Algeria and Libya have very limited maritime claims, which could equate to limiting their taxing jurisdiction over offshore oil extraction activities. In addition, Angola could find itself in a situation whereby it has limited tax jurisdiction without specific inclusions in its DTAs.<sup>151</sup>

The implication is that the non-resident taxpayer may actually need to assess whether it falls within the tax jurisdiction of another neighbouring country, through its maritime rights. Thus the taxpayer would need to ascertain whether it has a DTA to prevent double taxation with that Contracting State. This has not been analysed any further and represents an opportunity for future research.

#### **6.2.1.5 *UNCLOS III or maritime claims, which prevails***

It is not clear which prevail, the provisions of UNCLOS, which provides that the selected 'oil rich' African countries could have taxation rights over the continental shelf, or the standard maritime claims (provided above). Akintoba (1996:35)<sup>152</sup> in his chapter regarding sources of international law and the attitudes of African States, notes that all African states recognise and respect universal customs, codified by state practice, that are embodied in the UN Charter and other multilateral agreements that meet their needs and protect their interest. This supports the view that, in terms of the principles of Article 32 to the VCLT in cases regarding jurisdictional limits of offshore activities, the prevalent international law is international maritime law, more specifically the provisions of UNCLOS III. This is supported by Akintoba (1996:36), in noting that the key to the African States ensuring that their needs are met and their interests are protected, that there is a tendency for African states to still scrutinise customary international

<sup>151</sup> See discussion regarding Angola at Chapter 8, it has not entered into any DTAs.

<sup>152</sup> Akintoba, TO (1996). *African States and Contemporary International Law: "A case study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone"*. Netherlands: Kluwer Law International.

law that evolved before their emergence as independent states. It is this scrutiny that lead to the strong drive by the African states to support the implementation of UNCLOS III in 1982. It was the lack of flexibility and comprehensiveness of the 1958 Geneva Conventions which created concerns for the African states.<sup>153</sup>

Accordingly, for the purpose of this dissertation, it is submitted that UNCLOS III extends the selected 'oil rich' African countries' jurisdiction beyond the standard maritime claims, to the continental shelf.

#### **6.2.1.6 *Specific deviations or omissions from the 'general definition'***

Based on the review of the DTAs entered into by the selected 'oil rich' African countries, it would appear that there are no specific deviations from the derived 'general definition' of a Contracting State (as regards the inclusion of offshore jurisdictional rights). Accordingly, the selected 'oil rich' African countries' are limited in terms of their sovereign rights (as the offshore area over which the selected 'oil rich' African countries exercise jurisdictional taxing rights).

However, what should be noted is that there are a few DTAs, entered into by the selected 'oil rich' African countries, which do not provide for a definition of the Contracting States, specifying a geographical jurisdiction.<sup>154</sup> It is not apparent what the impact of such will be on the jurisdictional limitation to the taxing rights relating to the PE created by the offshore oil extraction activities, but it does expose these countries to the risk of not being allocated the appropriate taxing rights in this regard.

### **6.2.2 Conclusion**

Oil extraction activities, as specifically included in the 'positive list' and meeting the provisions of the 'basic rule', create a PE for offshore oil extraction activities. However, the extent to which the taxing rights are limited when assessing offshore oil extraction activities may be excluded from the scope of the DTA as assessed in this chapter.

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<sup>153</sup> Akintoba, TO (1996). *African States and Contemporary International Law: "A case study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone"*. Netherlands: Kluwer Law International. p45.

<sup>154</sup> Refer to Annexure I

The OECD and UN MTCs do not provide any assistance in this regard, however, as offshore oil extraction activities fall within the realm of international maritime law, and using the principles of customary international law, provided by the VCLT, the jurisdictional limits should be assessed against the maritime claims of each of the selected 'oil rich' African countries. However, it is submitted that these claims (in some cases, very limited claims) are extended by UNCLOS III to the continental shelf.

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## 7 Oil pipelines

The use of a pipeline to transport the extracted oil would not normally form part of the oil extraction activities, and the taxation of such pipelines is very complicated. One single pipeline might cross many jurisdictions, continental shelves, or even be laid outside any jurisdictions. The pipeline might even be operated automatically. These factors make pipelines unique, and the questions concerning the taxation of pipelines are uncertain, unsolved and unpredictable. No comprehensive work on this topic has been found, and as such there is no common international approach.<sup>155</sup>

Olsen (2006) in his presentation titled "Cross border pipelines - onshore, offshore or foreign taxation"<sup>156</sup> noted that there are various ways which a pipeline should be considered according to Articles 5 or 6 to the OECD's MTC, as a pipeline might be treated as:

- a) a PE according to the 'basic rule'; or
- b) a building site, or construction, or installation project, when the pipeline is built (Article 5(3)); or
- c) passive income, if the pipeline is leased to third parties without any significant maintenance, Commentaries Article 5(1); or
- d) a transport facility (Article 5(4)(a)) (use of facilities for the sole purpose of...delivery of goods); or
- e) a preparatory or auxiliary character (Article 5(4)(e)); or
- f) a combination of a transport facility and of preparatory or auxiliary character (Article 5(4)(f)), or
- g) an immovable property, Article 6.

Olsen (2006) then noted that alternatives a) and b) will constitute a PE and income from the pipelines will be allocated to the source State according to Article 7. Alternatives c), d), e) and f) will not constitute a PE and the pipeline will be taxable in the taxpayer's home state. In alternative g) the pipeline will be taxable in the source State according to Article 6.

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<sup>155</sup> This was underlined at the IFA Oslo Congress in 2002.

<sup>156</sup> Short reports of the discussions from the meeting of research students 2006, Thursday 6 July 2006, Chair: Prof. Huub Bierlaagh/Joanna Wheeler/Prof. Wim Wijnen. Available: [http://www.ibfd.org/portal/synopsis\\_olsen\\_report.html](http://www.ibfd.org/portal/synopsis_olsen_report.html)

Accordingly, Olsen was challenging the Commentaries to the OECD MTC<sup>157</sup> in concluding that a pipeline could be considered a PE according to the 'basic rule'. Olsen went on to note that this conclusion should then be used as the common international approach. In providing such a conclusion, Olsen presented the principles laid down in The German Pipeline case<sup>158</sup> in 1996, where The Supreme Tax Court stated that a pipeline in Germany was a PE. It would appear that Olsen's arguments have been considered by the OECD in its discussion draft on 'Tax treaty issues related to common telecommunication transactions',<sup>159</sup> however, it appears that the OECD would not agree with the pipeline creating a PE. The comments provided in this draft discussion document have also been included in the 2010 Commentary to the OECD MTC, and read:

*'An additional question is whether the cable or pipeline could also constitute a permanent establishment for the customer of the operator of the cable or pipeline, i.e. the enterprise whose data, power or property is transmitted or transported from one place to another. In such a case, the enterprise is merely obtaining transmission or transportation services provided by the operator of the cable or pipeline and does not have the cable or pipeline at its disposal. As a consequence, the cable or pipeline cannot be considered to be a permanent establishment of that enterprise'.<sup>160</sup>*

Thus, it is submitted that there is still some uncertainty as to whether a pipeline creates a PE, but should the non-resident taxpayer own and operate the pipeline, the income derived by the taxpayer from the operation of the pipeline is covered by Article 6 where such pipeline constitutes immovable property under Article 6 to the MTC.

It is submitted that, given the lack of comprehensive work on this topic and as this dissertation is looking to a universal interpretation, the guidelines to such are the use of the Commentaries to the OECD and UN MTCs. Therefore, the use of a pipeline will generally not create a PE in the source State. Although, the German Pipeline case does provide some judiciary guidance, each case still needs to be assessed on its own facts. However, it is reiterated that the equivalent of

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<sup>157</sup> Especially paragraph 26.1 to Article 5(4)

<sup>158</sup> German Tax Court: Decision of October 30, 1996, II R 12/92

<sup>159</sup> 25 November 2009 to 31 January 2010

<sup>160</sup> OECD (2010). *Model Tax Convention on Income and Capital - Condensed Version*: OECD Publishing. p103.

Article 6 of the OECD or UN MTC to the relevant DTA would still provide taxing rights to the source State (if the pipeline may be classified as immovable property).

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## **8 Analysis of the companies and countries exploiting the selected 'oil rich' African countries' oil reserves**

Up to this point the focus of the dissertation has been whether the DTAs entered into by the selected 'oil rich' African countries provide sufficient taxing rights to the African countries from the profits derived by a non-resident undertaking oil extraction activities in the African country. In the majority of the DTAs reviewed it is apparent that the PE definition as defined does allow for the taxing rights to be appropriately allocated to the selected 'oil rich' African countries. However, this analysis is incomplete without ensuring that the selected 'oil rich' African countries have negotiated DTAs with the appropriate Contracting States in which the non-resident taxpayer, who is exploiting the oil reserves, resides.

### **8.1 Largest oil companies**

The most recent statistics available indicate that of the largest oil companies, 86% of the world's oil reserves are handled by companies originating from countries which are members of the Organisation of the Petroleum Exporting Countries.<sup>161</sup> Of the remaining 14%, 13.3% of the world's oil reserves are handled primarily by companies originating from the developed nations of the world, all of which are non-African countries.<sup>162</sup>

Should one of the largest oil companies decide to undertake oil extraction activities in one of the selected 'oil rich' African countries, a review of the DTAs in relation to the countries of origin of these oil companies would indicate whether there is any current or future exposure, should the selected 'oil rich' African countries not have a DTA with the relevant country(ies). Should there be no DTA negotiated to clarify the appropriate taxing rights, the analysis already provided in this dissertation indicates that the African countries are at risk. In addition, should the domestic legislation of the African countries not provide for the appropriate tax benefits from the extraction and exploitation of the African countries' oil reserves, with or without a DTA, the African countries are left at risk of not recouping any benefit from its now depleted natural resource.

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<sup>161</sup> OGJ 200/100. *Oil & Gas Journal*. September 2010. Based on 2009 worldwide oil equivalent reserves as reported in "OGJ 200/100". Refer to Annexure J

<sup>162</sup> *Ibid*

The review of the DTAs in force indicates that the selected 'oil rich' African countries are open to significant risk in this regard. Essentially out of the top 25 countries from which the largest oil companies originate, Egypt has negotiated DTAs with 14 of these countries, Algeria and Sudan 7, Libya and Nigeria 4 and Angola has not negotiated any DTAs. This risk could be mitigated through the domestic tax laws of the African countries. The scope of this dissertation does not include analysis of the domestic legislation of these African states. The risk to the African states is therefore highlighted.

## **8.2 Largest importers of oil from the selected 'oil rich' African countries**

A more detailed analysis of which countries are currently the largest importers of oil from the selected 'oil rich' African countries also provides that the selected 'oil rich' African countries have not negotiated DTAs with the appropriate countries, specifically from a protection of its taxing rights with regard to oil extraction activities is concerned.

### **8.2.1 Who are the larger oil importers?**

#### *Algeria*

Algeria is an important oil exporter, with estimated net oil exports reaching 1.33 Mmbbl<sup>163</sup>/day of crude oil.<sup>164</sup> The EIA estimates that the United States imported an average of 488 bbl/day from Algeria in 2009 and was the largest single importer of Algerian oil at about 27 percent of Algeria's total oil exports that year.<sup>165</sup> In addition an average of 1.18 Mmbbl/day (62 percent of total exports) was imported by member countries of the OECD in 2009, of which about 482,000 bbl/day were imported by the OECD European countries, of which France, Germany, Italy, the U.K. were the major importers.<sup>166</sup> Another 149,000 bbl/d went to Canada, while about 61,000 went to other OECD countries, including Japan and the Republic of Korea.<sup>167</sup>

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<sup>163</sup> Million barrels per day

<sup>164</sup> EIA. (2010). *Country Analysis Briefs - Algeria*. Available: <http://www.eia.doe.gov/emeu/cabs/Algeria/Oil.html>. Last accessed 20/12/2010.

<sup>165</sup> *Ibid*

<sup>166</sup> *Ibid*

<sup>167</sup> *Ibid*

### *Angola*

In the first half of 2009, Angola exported over 1.7 million bbl/day of crude oil, (more than 90% of total production) primarily to China and the United States (the United States imported 535,000 bbl/day making Angola one of the top sources for U.S. oil imports).<sup>168</sup> Angola also exported approximately 500,000 bbl/day to China and was the third largest source of Chinese imports.<sup>169</sup>

### *Egypt*

In 2009, Egypt's total oil production averaged 685,000 bbl/day, of which approximately 440,000 bbl/day was crude oil.<sup>170</sup> Despite discoveries and enhanced oil recovery techniques at mature fields, crude oil production is declining. In addition, domestic oil consumption is slightly higher than production and, according to a review of Oil Market Trends,<sup>171</sup> Egypt does register a small volume of net oil imports. These imports are, in part, the result of Egypt's refining capacity being larger than oil production levels. Oil imports are expected to continue with some refined product exports in the short-term, but are still contingent on domestic demand growth.<sup>172</sup>

### *Libya*

Libya had estimated net exports of 1.5 million bbl/day in 2009.<sup>173</sup> According to 2009 official trade data as reported to the Global Trade Atlas,<sup>174</sup> the vast majority of Libyan oil exports are sold to European countries namely Italy, Germany, France, and Spain. With the lifting of sanctions against Libya in 2004, the United States has also increased its imports of Libyan oil.

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<sup>168</sup> EIA. (2010). *Country Analysis Briefs - Angola*. Available: <http://www.eia.doe.gov/emeu/cabs/Angola/Oil.html>. Last accessed 20/12/2010.

<sup>169</sup> *Ibid*, citing FACTS Global Energy study.

<sup>170</sup> EIA. (2010). *Country Analysis Briefs - Egypt*. Available: <http://www.eia.doe.gov/emeu/cabs/Egypt/Oil.html>. Last accessed 20/12/2010.

<sup>171</sup> *Ibid*, citing APS Review.

<sup>172</sup> EIA. (2010). *Country Analysis Briefs - Egypt*. Available: <http://www.eia.doe.gov/emeu/cabs/Egypt/Oil.html>. Last accessed 20/12/2010.

<sup>173</sup> EIA. (2010). *Country Analysis Briefs - Libya*. Available: <http://www.eia.doe.gov/emeu/cabs/Libya/Oil.html>. Last accessed 20/12/2010.

<sup>174</sup> *Ibid*, citing Global Trade Atlas.

### *Nigeria*

In 2009, Nigeria exported most of its 2.2 million bbl/day of total oil production, of this close to 800,000 bbl/day (40%) was exported to the United States, making Nigeria the 5th largest foreign oil supplier to the United States for the year. Additional importers of Nigerian crude oil include Europe (24%), Asia (20%), Brazil (10%), and South Africa (4%).<sup>175</sup>

### *Sudan*

In 2009, Sudan produced close to 485,000 bbl/day and consumed around 90,000 bbl/d, with the remaining crude was exported almost exclusively to Asian markets.<sup>176</sup> According to international trade data,<sup>177</sup> in 2009 China imported close to 250,000 bbl/d (65% of total Sudanese exports and 6% of Chinese imports) followed by Indonesia (60,000 bbl/d) and Japan (50,000 bbl/d). Additional importers of Sudanese crude include India, Malaysia, the Netherlands and Thailand.<sup>178</sup>

## **8.2.2 Have the selected 'oil rich' African countries entered into DTAs with these countries?**

### *Algeria*

Of the larger importers noted above, Algeria has not negotiated DTAs with the United States, United Kingdom, Japan and the Republic of Korea. In addition, it does not appear that there is a prospective DTA currently under negotiation for entry into force in the near future.

### *Angola*

Angola has not negotiated any DTAs with any other country.

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<sup>175</sup> EIA. (2010). *Country Analysis Briefs - Nigeria*. Available: <http://www.eia.doe.gov/emeu/cabs/Nigeria/Oil.html>. Last accessed 20/12/2010.

<sup>176</sup> EIA. (2010). *Country Analysis Briefs - Sudan*. Available: <http://www.eia.doe.gov/emeu/cabs/Sudan/Oil.html>. Last accessed 20/12/2010.

<sup>177</sup> *Ibid*, citing International Trade Data

<sup>178</sup> EIA. (2010). *Country Analysis Briefs - Sudan*. Available: <http://www.eia.doe.gov/emeu/cabs/Sudan/Oil.html>. Last accessed 20/12/2010.

### *Egypt*

Accordingly, for the purpose of this dissertation and based on the economic data, Egypt does not appear to be at any real risk.

### *Libya*

Of the larger importers noted above, Libya has only negotiated a DTA with France. In addition, it appears that there is only a prospective DTA with Italy currently under negotiation for entry into force in the near future.

### *Nigeria*

Of the larger importers noted above, Nigeria has not negotiated DTAs with the United States, a few of the larger oil importing European nations, and Brazil. In addition, it does not appear that there is a prospective DTA currently under negotiation for entry into force in the near future.

### *Sudan*

Of the larger importers noted above, Sudan has not negotiated DTAs with Japan, the Netherlands and Thailand. In addition, it does not appear that there is a prospective DTA currently under negotiation for entry into force in the near future.

## **8.2.3 Are the selected 'oil rich' African countries' taxing rights at risk?**

Based on the DTAs each of the selected 'oil rich' African countries (except for Egypt, see discussion above) have entered into, despite the fact that these DTAs appear to provide the selected 'oil rich' African countries with the appropriate taxing rights regarding oil extraction activities, the selected 'oil rich' African countries taxing rights are at risk as they are not protected by an appropriately negotiated DTA with the identified larger oil importers. In addition, should the selected 'oil rich' African countries' domestic legislations not provide for the appropriate tax benefits from the extraction and exploitation of the selected 'oil rich' African countries' oil reserves, without a DTA, the selected 'oil rich' African countries are at risk of not recouping any benefit from its now depleted natural resource.

## **9 Conclusions and recommendations**

### **9.1 Are the selected 'oil rich' African countries provided with sufficient taxing rights to reap the appropriate benefit from the extraction and exploitation, by a non-resident, of their natural resource, oil?**

This dissertation undertook the review of the following Articles of the DTAs entered into by the selected 'oil rich' African countries to identify whether the definition of PE, as stated in the respective DTAs, provides an appropriate right for these African states to tax the extraction or use of their natural resources by the non-resident. The three Articles reviewed were the:

- Relevant scope Article(s) to the DTAs;
- PE definition Article of the DTAs; and
- Business Profits Article of the DTAs.

The findings below are based on a review of the DTAs from an international tax perspective. A review of the domestic tax laws of the selected 'oil rich' African countries was beyond the scope of the dissertation. Accordingly, should the reviewed DTAs provide the selected 'oil rich' African countries with the appropriate taxing rights on the profits from oil extraction activities undertaken by a non-resident taxpayer, this dissertation does not conclude as to whether the non-resident taxpayer is ultimately subject to tax in terms of the domestic tax laws of the selected 'oil rich' African countries.

#### **9.1.1 Do the DTAs currently in place provide sufficient taxing rights?**

Based on the international interpretation base, with the VCLT seen as the key driver coupled with the importance of the OECD and UN MTCs and their commentaries and an ambulatory and contextual interpretation of the DTAs entered into by the selected 'oil rich' African countries, it would appear that in terms of the content of the DTAs entered into by the selected 'oil rich' African countries, the majority of the DTAs currently in place do provide the appropriate taxing rights. The deviations identified appear to be DTA specific, and it is submitted that they may have an impact on the selected 'oil rich' African countries' taxing rights as discussed below.

### **9.1.1.1 PE definition Article**

Deviations were identified in the PE definition Article of the reviewed DTAs relating to both the ‘basic rule’ and ‘the positive list’. It is submitted that the deviations identified create uncertainty regarding the interpretation of the deviation and thus the selected ‘oil rich’ African countries taxing rights, and raises the following pertinent questions:

1. Why was such a deviation necessary? Is there background to the relationship between these Contracting States, economic, political etc., that lead to the inclusion?
2. Why would the selected ‘oil rich’ African countries only deviate when negotiating with these countries? The background between the Contracting States would also be relevant to this question.
3. Have these deviations been introduced to favour the source state or residence state?

Accordingly, it is submitted that the identified deviations (refer to paragraphs 3.2.1 and 3.2.2) warrant further investigation into which Contracting State has actually been afforded the taxing rights in past dealings between the Contracting States, specific to oil extraction activities. Such analysis would require a review of the domestic tax legislations of the Contracting States, specifically the selected ‘oil rich’ African country, which is beyond the scope of this dissertation. In addition to the domestic tax laws, the political and economic environment would have to be analysed.

### **9.1.1.2 Business Profits Article**

The deviations identified in the Business Profits Article do not appear to limit the selected ‘oil rich’ African countries taxing rights with regard to oil extraction activities. The most common deviation appears to be a result of the development of Articles 7 and 14 to the OECD MTC, and the reference to ‘*the industrial or commercial profits of the enterprise*’ being subject to tax in the other State, and not ‘*the business profits*’ as provided in the current OECD and UN MTCs. Applying an ambulatory approach to interpreting the DTAs, it is submitted that the use of industrial or commercial profits is of no relevance for the purpose of this dissertation, as given the nature of oil extraction activities, they would fall within the commercial and industrial activities.

The only limiting deviation relates to the Libya-Malta DTA (refer to paragraph 4.2.1) in which there is a specific limitation of the portion of the profits from the oil extraction activities which Libya may tax. There appears to be no tax related reason, yet a more technical analysis of the relationship between Libya and Malta, specifically in the economic and political fields may provide a solution, however, such an analysis is beyond the scope of this dissertation. In addition this exception appears to be an isolated case with no bearing on the other DTAs Libya has entered into, but should be noted for DTAs Libya is currently negotiating or future DTAs to be negotiated.

### **9.1.1.3 *Scope Articles***

Regarding the persons covered by the reviewed DTAs, as long as the non-resident undertaking oil extraction activities is a resident/national of one or both of the Contracting States, the allocation of the taxing rights would fall within the scoped of the reviewed DTAs.

With regard to the taxes covered, the key principle applied is that the taxes listed in the DTA are not exhaustive and that similar taxes would also apply. Applying this principle, it is submitted that should the domestic tax laws of the selected 'oil rich' African countries provide for tax on the profits from the oil extraction activities and as the taxing rights appear to be appropriately allocated in terms of the DTAs, the selected 'oil rich' African countries should reap the appropriate benefit in exchange for the extraction and use of its natural resource. In addition, although deviations were identified, it is submitted that none of the deviations should impact the findings of this dissertation with respect to the scope of the DTAs entered into by the selected 'oil rich' African countries.

### **9.1.1.4 *Other relevant Articles or definitions provided in the DTAs***

#### *Exploration, extraction and exploitation*

Despite the identified possible limitations to the selected 'oil rich' African countries' taxing rights with regard to oil extraction activities, some of the reviewed DTAs refer to exploration and exploitation activities in addition to "*the extraction of natural resources*". It is submitted that such inclusions should provide the 'oil rich' African countries with extended taxing rights.

However, such additions were only noted in very few of the DTAs reviewed (refer to paragraph 3.2.2.1).

#### *Offshore oil activities*

Although the OECD and UN MTCs and Commentaries do not provide assistance in this regard, offshore oil extraction activities fall within the realm of international maritime law. Applying the principles of customary international law, provided by the VCLT, the jurisdictional limits in this regard are thus assessed against the maritime claims of each of the selected 'oil rich' African countries as well as the provisions of UNCLOS III, as these provide the sovereign rights to the offshore exploitation of natural resources of such coastal states.

Although there is no 'general definition' of a Contracting State's sovereign rights with regard to offshore oil activities, it is submitted that based on the review of the DTAs, there were no specific deviations identified in the DTAs that would appear to extend or limit the selected 'oil rich' African countries' sovereign rights. Accordingly, it is submitted that the selected 'oil rich' African countries' taxing rights are provided by their respective maritime claims, which are extended by UNCLOS III to the continental shelf (refer to paragraph 6.2.1).

#### *Oil pipelines*

There is still uncertainty amongst international tax experts as to whether an oil pipeline creates a PE in the country through which it runs. Accordingly, for the purpose of this dissertation, it is submitted that given the lack of comprehensive work on this topic and as this dissertation is looking to a universal interpretation of international tax law, the guidelines to such are the use of the Commentaries to the OECD and UN MTCs, the use of a pipeline will generally not create a PE in the source State through which it runs (according to the 'basic rule'). Although, the German Pipeline case does provide some judiciary guidance, each case still needs to be assessed on its own facts, and as the taxation of such pipelines is very complicated, a detailed analysis of the pipelines currently running through and to be run through the selected 'oil rich' African countries should be performed to assess whether the activities involved will create a PE, specifically in terms of the 'basic rule'.

### **9.1.2 Do the selected 'oil rich' African countries have sufficient DTA network coverage?**

Despite the relatively positive findings regarding the content of the DTAs reviewed, it is submitted that based on a review of the DTAs currently in place, there is insufficient coverage of the DTAs the selected 'oil rich' African countries have entered into. The selected 'oil rich' African countries are in a position where the appropriate taxing rights, with no DTA to clarify the allocation of the taxing rights, for the extraction of its limited natural resource, oil, are probably insufficient.

Based on economic data it appears that the selected 'oil rich' African countries have not entered into DTAs with all the appropriate Contracting States. The economic data provides that there are 25 countries from which the largest oil companies originate, and based on the review of the DTAs entered into force, Egypt has negotiated DTAs with 14 of these countries, Algeria and Sudan 7, Libya and Nigeria 4 and Angola has not negotiated any DTAs (refer to paragraph 8.1).

In addition, country specific economic data indicates the key exporting countries of oil from each of the selected 'oil rich' African countries, and based on the DTAs reviewed, the selected 'oil rich' African countries taxing rights are at risk as they are not protected by an appropriately negotiated DTA with the identified larger oil importers (refer to paragraph 8.2).

To possibly further exasperate the DTA network coverage risk, should the selected 'oil rich' African countries' domestic legislations not provide for the appropriate tax benefits from the extraction and exploitation of the selected 'oil rich' African countries' oil reserves, without a DTA, the selected 'oil rich' African countries are at risk of not recouping any benefit from its now depleted natural resource.

## **9.2 Recommendations**

Based on the above findings, the following recommendations are proposed:

1. All the selected 'oil rich' African countries should negotiate DTAs with the identified key Contracting States with respect to oil extraction activities. In negotiating these DTAs, in reality, economic or political factors between these Contracting States may influence the terms of the DTA. However, as the primary objective of a DTA is to ensure the fair

allocation of taxing rights between the Contracting States, sight should not be lost of this objective, and accordingly these economic or political factors should ultimately not play a vital role in the DTA negotiation process.

2. Following from the above recommendation, it is recommended that the selected 'oil rich' African countries follow one of either the OECD or UN MTCs when negotiating DTAs, as the OECD and UN MTCs were developed and are continuously monitored to ensure the primary objective of a DTA is met.
3. For the DTAs currently entered into force, it is recommended that where the identified deviations create uncertainty as to whether the selected 'oil rich' African countries' taxing rights are appropriately allocated with regard to oil extraction activities, clarification in this regard is accounted for in the re-negotiation process and appropriately documented by the Contracting States.
4. Although the creation and development of tax treaties has spanned many years<sup>179</sup> and the development of a model tax convention requires expert resources, it is recommended that a sub-committee(s) to either or both the OECD or UN fiscal committees is created with specific focus on the protection of the taxing rights for all African countries. This is a result of increased international trade between Africa and the rest of the world, with particular focus on the protection of the taxing rights associated with the profits from the exploitation of the untouched natural resources (embedded with significant profits) that Africa possesses.

### **9.3 Areas of further research**

The two main areas of further research to assist with the protection of the taxing rights associated with the profits from the exploitation of the untouched natural resources (embedded with significant profits) that Africa possesses, would be:

1. Assuming a DTA has been entered into force and provides the selected 'oil rich' African countries with appropriate taxing rights, a review of the domestic tax laws of the selected 'oil rich' African countries, and whether the domestic tax laws provide for the selected 'oil rich' African country to benefit from the extraction of its oil reserves by a non-resident. This review would also look to the status of a DTA with regard to those domestic tax laws.

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<sup>179</sup> It can be maintained that tax treaties are a German invention. The first tax treaty was concluded in 1899 between Prussia and the Austro-Hungarian double monarchy. Kusters, B. (2004). *The United Nations Model Tax Convention and Its Recent Developments*. Asia-Pacific Tax Bulletin. January/February (1), p4.

2. Outside the field of tax law, a review of the economic and political relationships the selected 'oil rich' African countries have with the identified key Contracting States with respect to oil extraction activities. This review would also look to the role the DTA plays in the development of the economic and political relationships.

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## A Annexure A: Multi-lingual DTAs reviewed

### A.1 Algeria

Number	Country	English an official language of DTA text	Unofficial English translation
1	Arab Maghreb Union	No	Yes
2	Austria	No	Yes
3	Belgium	No	Yes
4	Bulgaria	Yes	N/A
5	Canada	Yes	N/A
6	China (People's Republic)	Yes	N/A
7	Egypt	No	Yes
8	France	No	Yes
9	Germany	No	Yes
10	Indonesia	No	Yes
11	Italy	No	Yes
12	Jordan	No	Yes
13	Korea (Republic)	Yes	N/A
14	Lebanon	No	Yes
15	Portugal	No	Yes
16	Romania	No	Yes
17	Russia	No	Yes
18	South Africa	Yes	N/A
19	Spain	Yes	N/A
20	Switzerland	No	Yes
21	Syria	No	Yes
22	Turkey	No	Yes
23	Ukraine	No	Yes
24	United Arab Emirates	No	Yes

Source: IBFD Treaty Database (last accessed 1 June 2010)

## A.2 Egypt

Number	Country	English an official language of DTA text	Unofficial English translation
1	Albania	Yes	N/A
2	Algeria	No	Yes
3	Arab Economic Union Council	No	Yes
4	Austria	Yes	N/A
5	Bahrain	No translation	No translation
6	Belarus	Yes	N/A
7	Belgium	Yes	N/A
8	Bulgaria	No	Yes
9	Canada	Yes	N/A
10	China (People's Republic)	Yes	N/A
11	Cyprus	Yes	N/A
12	Czech Republic	Yes	N/A
13	Denmark	Yes	N/A
14	Finland	Yes	N/A
15	France	No	Yes
16	France (Protocol)	No	Yes
17	Germany	Yes	N/A
18	Greece	Yes	N/A
19	Hungary	Yes	N/A
20	India	Yes	N/A
21	Indonesia	Yes	N/A
22	Iraq	No	Yes
23	Italy	Yes	N/A
24	Japan	Yes	N/A
25	Jordan	No translation	No translation
26	Korea (Republic)	Yes	N/A
27	Kuwait	No	Yes

28	Lebanon	No translation	No translation
29	Libya	No	Yes
30	Malaysia	Yes	N/A
31	Malta	Yes	N/A
32	Morocco	No translation	No translation
33	Netherlands	Yes	N/A
34	Norway	Yes	N/A
35	Pakistan	Yes	N/A
36	Palestinian Autonomous Areas	No	Yes
37	Poland	Yes	N/A
38	Romania	Yes	N/A
39	Russia	Yes	N/A
40	Serbia and Montenegro	Yes	N/A
41	Singapore	Yes	N/A
42	South Africa	Yes	N/A
43	Spain	Yes	N/A
44	Sudan	No	Yes
45	Sweden	Yes	N/A
46	Switzerland	Yes	N/A
47	Syria	No	Yes
48	Tunisia	No	Yes
49	Turkey	Yes	N/A
50	Ukraine	Yes	N/A
51	United Arab Emirates	No	Yes
52	United Kingdom	Yes	N/A
53	United States	Yes	N/A
54	Yemen	No translation	No translation

Source: IBFD Treaty Database (last accessed 1 June 2010)

### A.3 Libya

Number	Country	English an official language of DTA text	Unofficial English translation
1	Arab Maghreb Union	No	Yes
2	Egypt	No	Yes
3	France	No	Yes
4	India	Yes	N/A
5	Malta	Yes	N/A
6	Malta (Protocol)	Yes	N/A
7	Ukraine	Yes	N/A
8	United Kingdom	Yes	N/A

Source: IBFD Treaty Database (last accessed 1 June 2010)

### A.4 Nigeria

Number	Country	English an official language of DTA text	Unofficial English translation
1	Belgium	Yes	N/A
2	Canada	Yes	N/A
3	China (People's Republic)	Yes	N/A
4	Czech Republic	Yes	N/A
5	France	Yes	N/A
6	Netherlands	Yes	N/A
7	Pakistan	Yes	N/A
8	Romania	Yes	N/A
9	Slovak Republic	Yes	N/A
10	South Africa	Yes	N/A
11	United Kingdom	Yes	N/A

Source: IBFD Treaty Database (last accessed 1 June 2010)

## A.5 Sudan

Number	Country	English an official language of DTA text	Unofficial English translation
1	Arab Economic Union Council	No	Yes
2	China (People's Republic)	Yes	N/A
3	Egypt	No	Yes
4	India	Yes	N/A
5	Indonesia	Yes	N/A
6	Malaysia	Yes	N/A
7	Romania	No	Yes
8	Turkey	Yes	N/A
9	United Kingdom	Yes	N/A

Source: IBFD Treaty Database (last accessed 1 June 2010).

## **B Annexure B: Extracts from the VCLT**

### **B.1 Factors to be taken into account when entering into and applying/interpreting the international agreement, to align with the intention of the VCLT.<sup>180</sup>**

- Considering the fundamental role of treaties in the history of international relations,
- Recognising the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems,
- Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,
- Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,
- Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,
- Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,
- Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations,
- Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.

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<sup>180</sup> VCLT 1969

## **B.2 Article 31**

- 1 A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
- 2 The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
- 3 There shall be taken into account, together with the context:
  - a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - c) any relevant rules of international law applicable in the relations between the parties.
- 4 A special meaning shall be given to a term if it is established that the parties so intended.

## **B.3 Article 32**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a) leaves the meaning ambiguous or obscure; or
- b) leads to a result which is manifestly absurd or unreasonable.<sup>181</sup>

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<sup>181</sup> Article 32 – Supplementary means of interpretation, VCLT 1969

## **B.4 Article 33**

- 1 When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
- 2 A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
- 3 The terms of the treaty are presumed to have the same meaning in each authentic text.
- 4 Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.<sup>182</sup>

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<sup>182</sup> Article 33 – Interpretation of treaties authenticated in two or more languages, VCLT 1969

## C Annexure C: OECD member countries as at 1 July 2010

Twenty countries originally signed the Convention on the OECD on 14 December 1960. Since then thirteen countries have become members of the Organisation.<sup>183</sup>

Country	Date	Country	Date
Australia	07 June 1971	Korea (Republic)	12 December 1996
Austria	29 September 1961	Luxembourg	07 December 1961
Belgium	13 September 1961	Mexico	18 May 1994
Canada	10 April 1961	Netherlands	13 November 1961
Chile	07 May 2010	New Zealand	29 May 1973
Czech Republic	21 December 1995	Norway	04 July 1961
Denmark	30 May 1961	Poland	22 November 1996
Finland	28 January 1969	Portugal	04 August 1961
France	07 August 1961	Slovak Republic	14 December 2000
Germany	27 September 1961	Slovenia	21 July 2010
Greece	27 September 1961	Spain	03 August 1961
Hungary	07 May 1996	Sweden	28 September 1961
Iceland	05 June 1961	Switzerland	28 September 1961
Ireland	17 August 1961	Turkey	02 August 1961
Israel	07 September 2010	United Kingdom	02 May 1961
Italy	29 March 1962	United States	12 April 1961
Japan	28 April 1964		

<sup>183</sup> [http://www.oecd.org/document/58/0,3343,en\\_2649\\_201185\\_1889402\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,3343,en_2649_201185_1889402_1_1_1_1,00.html)

## **D Annexure D: Extracts from the OECD and UN MTCs**

### **D.1 Article 1**

Persons Covered:

This Convention shall apply to persons who are residents of one or both of the Contracting States.

### **D.2 Article 2**

Taxes Covered:

- 1 This Convention shall apply to taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.
- 2 There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.
- 3 The existing taxes to which the Convention shall apply are in particular:
  - a) (in State A): .....
  - b) (in State B): .....
- 4 The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws.

### **D.3 Article 5(2)**

The term “permanent establishment” includes especially:

- a) A place of management;
- b) A branch;
- c) An office;
- d) A factory;
- e) A workshop;
- f) A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.<sup>184</sup>

### **D.4 Article 5(4)**

Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:

- a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
- b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
- c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
- e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
- f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

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<sup>184</sup> Article 5(2) of the OECD MTC and Article 5(2) of the UN MTC

## E Annexure E: Analysis of PE definition per DTA reviewed

### E.1 Algeria

Number	Country	Paragraph 1		Paragraph 2		Paragraph 3
		'in which' or 'through which'	Other deviation	'oil field or other place of extraction of natural resources' specifically included	Exploitation and/or exploration included	oil extraction specifically excluded
1	Arab Maghreb Union	'through which'	None	Yes	Neither	None
2	Austria	'through which'	None	Yes	Neither	None
3	Belgium	'through which'	None	Yes	Neither	None
4	Bulgaria	'through which'	None	Yes	Neither	None
5	Canada	'through which'	None	Yes	Neither	None
6	China (People's Republic)	'through which'	None	Yes	Neither	None
7	Egypt	Deviation	'...a fixed place where the project is wholly or partly carried on.'	Yes	Neither	None
8	France	'through which'	None	Yes	Neither	None
9	Germany	'through which'	None	Yes	Neither	None
10	Indonesia	'through which'	None	Yes	Neither	None

11	Italy	'in which'	None	Yes	Neither	None
12	Jordan	'through which'	None	Yes	Neither	None
13	Korea (Republic)	'through which'	None	Yes	Neither	None
14	Lebanon	'through which'	None	Yes	Neither	None
15	Portugal	'through which'	None	Yes	Neither	None
16	Romania	'through which'	None	Yes	Neither	None
17	Russia	'through which'	None	Yes	Neither	None
18	South Africa	'through which'	None	Yes	Exploitation	None
19	Spain	'through which'	None	Yes	Neither	None
20	Switzerland	'in which'	None	Yes	Exploitation	None
21	Syria	'through which'	None	Yes	Neither	None
22	Turkey	'through which'	None	Yes	Neither	None
23	Ukraine	'through which'	None	Yes	Neither	None
24	United Arab Emirates	'through which'	None	Yes	Exploration	None

Source: IBFD Treaty Database (last accessed 1 June 2010)

## E.2 Egypt

Number	Country	Paragraph 1		Paragraph 2		Paragraph 3
		'in which' or 'through which'	Other deviation	'oil field or other place of extraction of natural resources' specifically included	Exploitation and/or exploration included	oil extraction specifically excluded
1	Albania	'through which'	None	Yes	Neither	None
2	Algeria	Deviation	'...a fixed place where the project is wholly or partly carried on.'	Yes	Neither	None
3	Arab Economic Union Council	'in which'	None	Yes	Neither	None
4	Austria	'in which'	None	Yes	Neither	None
5	Bahrain	No translation	No translation			
6	Belarus	'through which'	None	Yes	Neither	None
7	Belgium	'through which'	None	Yes	Neither	None
8	Bulgaria	'through which'	None	Yes	Neither	None
9	Canada	'through which'	None	Yes	Neither	None
10	China (People's Republic)	'through which'	None	Yes	Neither	None
11	Cyprus	'through which'	None	Yes	Neither	None
12	Czech Republic	'through which'	None	Yes	Neither	None
13	Denmark	'through which'	None	Yes	Exploration	None

14	Finland	'in which'	None	Yes	Neither	None
15	France	'through which'	None	Yes	Neither	None
16	France (Protocol)	No change	No change	Yes	Neither	None
17	Germany	'through which'	None	Yes	Neither	None
18	Greece	'through which'	None	Yes	Neither	None
19	Hungary	'through which'	'...a fixed place of business, <b>including among others commercial and industrial activities</b> , through which...'	Yes	Neither	None
20	India	'in which'	None	Yes	Neither	None
21	Indonesia	'through which'	None	Yes	Exploration and Exploitation	None
22	Iraq	'in which'	None	Yes	Neither	None
23	Italy	'in which'	None	Yes	Neither	None

24	Japan	'in which'	None	Yes	Neither	None
25	Jordan	No translation	No translation			
26	Korea (Republic)	'through which'	None	Yes	Neither	None
27	Kuwait	Deviation	'...a fixed place, which carries out all the project activities or part of it.'	Yes	Exploration and Exploitation	None
28	Lebanon	No translation	No translation			
29	Libya	Deviation	'...a fixed place, which carries out all the project activities or part of it.'	Yes	Neither	None
30	Malaysia	'through which'	None	Yes	Neither	None
31	Malta	'through which'	None	Yes	Neither	None
32	Morocco	No translation	No translation			
33	Netherlands	'through which'	None	Yes	Neither	None
34	Norway	'in which'	None	Yes	Neither	None

35	Pakistan	'through which'	None	Yes	Neither	None
36	Palestinian Autonomous Areas	Deviation	'...a fixed place, which carries out all the project activities or part of it.'	Yes	Neither	None
37	Poland	'through which'	None	Yes	Neither	None
38	Romania	'in which'	None	Yes	Neither	None
39	Russia	'through which'	None	Yes	Neither	None
40	Serbia and Montenegro	'through which'	None	Yes	Neither	None
41	Singapore	'through which'	None	Yes	Neither	None
42	South Africa	'through which'	None	Yes	Neither	None
43	Spain	'through which'	None	Yes	Neither	None
44	Sudan	'in which'	None	Yes	Neither	None
45	Sweden	'through which'	None	Yes	Neither	None
46	Switzerland	'through which'	None	Yes	Neither	None

47	Syria	Deviation	'...a fixed place, which carries out all the project activities or part of it.'	Yes	Neither	None
48	Tunisia	Deviation	'...a fixed place where the enterprise is wholly or partly carried on.'	Yes	Neither	None
49	Turkey	'through which'	None	Yes	Neither	None
50	Ukraine	'through which'	None	Yes	Neither	None
51	United Arab Emirates	Deviation	'...a fixed place, which carries out all the project activities or part of it.'	Yes	Neither	None
52	United Kingdom	'in which'	None	Yes	Neither	None
53	United States	'through which'	None	Yes	Neither	None
54	Yemen	No translation	No translation			

Source: IBFD Treaty Database (last accessed 1 June 2010)

### E.3 Libya

Number	Country	Paragraph 1		Paragraph 2		Paragraph 3
		'in which' or 'through which'	Other deviation	'oil field or other place of extraction of natural resources' specifically included	Exploitation and/or exploration included	oil extraction specifically excluded
1	Arab Maghreb Union	'through which'	None	Yes	Neither	None
2	Egypt	Deviation	'...a fixed place, which carries out all the project activities or part of it.'	Yes	Neither	None
3	France	'through which'	None	Yes	Neither	None
4	India	'in which'	None	Yes	Neither	None
5	Malta	'in which'	None	Yes	Neither	None
6	Malta (Protocol)	No change	No change	Yes	Neither	None
7	Ukraine	'through which'	None	Yes	Neither	None
8	United Kingdom	'through which'	None	Yes	Neither	None

Source: IBFD Treaty Database (last accessed 1 June 2010)

## E.4 Nigeria

Number	Country	Paragraph 1		Paragraph 2		Paragraph 3
		'in which' or 'through which'	Other deviation	'oil field or other place of extraction of natural resources' specifically included	Exploitation and/or exploration included	oil extraction specifically excluded
1	Belgium	'through which'	None	Yes	Neither	None
2	Canada	'through which'	None	Yes	Neither	None
3	China (People's Republic)	'through which'	None	Yes	Neither	None
4	Czech Republic	'through which'	None	Yes	Neither	None
5	France	'through which'	None	Yes	Neither	None
6	Netherlands	'through which'	None	Yes	Neither	None
7	Pakistan	'through which'	None	Yes	Neither	None
8	Romania	'through which'	None	Yes	Neither	None
9	Slovak Republic	'through which'	None	Yes	Neither	None
10	South Africa	'through which'	None	Yes	Exploitation	None
11	United Kingdom	'through which'	None	Yes	Neither	None

Source: IBFD Treaty Database (last accessed 1 June 2010)

## E.5 Sudan

Number	Country	Paragraph 1		Paragraph 2		Paragraph 3
		'in which' or 'through which'	Other deviation	'oil field or other place of extraction of natural resources' specifically included	Exploitation and/or exploration included	oil extraction specifically excluded
1	Arab Economic Union Council	'in which'	None	Yes	Neither	None
2	China (People's Republic)	'through which'	None	Yes	Neither	None
3	Egypt	'in which'	None	Yes	Neither	None
4	India	'through which'	None	Yes	Neither	None
5	Indonesia	'through which'	None	Yes	Exploration and Exploitation	None
6	Malaysia	'through which'	None	Yes	Neither	None
7	Romania	'through which'	None	Yes	Neither	None
8	Turkey	'through which'	None	Yes	Neither	None
9	United Kingdom	'in which'	None	Yes	Neither	None

Source: IBFD Treaty Database (last accessed 1 June 2010)

## F Annexure F: Analysis of the Business Profits Article per the DTAs reviewed

### F.1 Algeria

Number	Country	Paragraph 1	Other Paragraphs
		Deviation	Deviation that may limit the selected 'oil rich' African countries' taxing rights with respect to PEs
1	Arab Maghreb Union	None	None
2	Austria	None	None
3	Belgium	None	None
4	Bulgaria	None	None
5	Canada	None	None
6	China (People's Republic)	None	None
7	Egypt	None	None
8	France	None	None
9	Germany	None	None
10	Indonesia	None	None
11	Italy	None	None
12	Jordan	None	None
13	Korea (Republic)	None	None

14	Lebanon	None	None
15	Portugal	None	None
16	Romania	None	None
17	Russia	None	None
18	South Africa	None	None
19	Spain	None	None
20	Switzerland	None	None
21	Syria	None	None
22	Turkey	None	None
23	Ukraine	None	None
24	United Arab Emirates	None	None

Source: IBFD Treaty Database (last accessed **1 June 2010**)

## F.2 Egypt

Number	Country	Paragraph 1	Other Paragraphs
		Deviation	Deviation that may limit the selected 'oil rich' African countries' taxing rights with respect to PEs
1	Albania	None	None
2	Algeria	None	None
3	Arab Economic Union Council	'enterprise of a Contracting State carries on an industrial or commercial activity in another Contracting State through a permanent establishment situated therein'	None
4	Austria	'industrial or commercial profits of an enterprise of one of the Contracting States shall not be subject to tax in the other Contracting State unless the enterprise carries on a trade or business in that other State through a permanent establishment situated therein'	None
5	Bahrain	None	None
6	Belarus	None	None
7	Belgium	None	None
8	Bulgaria	None	None
9	Canada	None	None

10	China (People's Republic)	None	None
11	Cyprus	None	None
12	Czech Republic	None	None
13	Denmark	None	None
14	Finland	None	None
15	France	None	None
16	France (Protocol)	None	None
17	Germany	None	None
18	Greece	None	None
19	Hungary	None	None
20	India	None	None
21	Indonesia	None	None
22	Iraq	None	None
23	Italy	None	None
24	Japan	None	None
25	Jordan	None	None
26	Korea (Republic)	None	None
27	Kuwait	None	None
28	Lebanon	None	None
29	Libya	None	None

30	Malaysia	None	None
31	Malta	None	None
32	Morocco	None	None
33	Netherlands	None	None
34	Norway	None	None
35	Pakistan	None	None
36	Palestinian Autonomous Areas	None	None
37	Poland	None	None
38	Romania	None	None
39	Russia	None	None
40	Serbia and Montenegro	None	None
41	Singapore	None	None
42	South Africa	None	None
43	Spain	None	None
44	Sudan	'business or industrial profits of an enterprise of one of the Contracting States shall not be subject to tax in the other Contracting State unless the enterprise carries on a trade or business in that other State through a permanent establishment situated therein'	None
45	Sweden	None	None

46	Switzerland	None	None
47	Syria	None	None
48	Tunisia	None	None
49	Turkey	None	None
50	Ukraine	None	None
51	United Arab Emirates	None	None
52	United Kingdom	None	None
53	United States	'industrial or commercial profits of an enterprise of one of the Contracting States shall not be subject to tax in the other Contracting State unless the enterprise carries on a trade or business in that other State through a permanent establishment situated therein'	None
54	Yemen	None	None

Source: IBFD Treaty Database (last accessed **1 June 2010**)

### F.3 Libya

Number	Country	Paragraph 1	Other Paragraphs
		Deviation	Deviation that may limit the selected 'oil rich' African countries' taxing rights with respect to PEs
1	Arab Maghreb Union	None	None
2	Egypt	None	None
3	France	None	None
4	India	None	None
5	Malta	'The profits of enterprise of a Contracting State shall be taxable in the State where the enterprise is situated and also in the State where it has a permanent establishment, in which latter case, the tax so charged shall be limited to the profits attributable to the permanent establishment and shall not exceed 15 per cent of the said profits'	None
6	Malta (Protocol)	None	None
7	Ukraine	None	None
8	United Kingdom	None	None

Source: IBFD Treaty Database (last accessed 1 June 2010)

#### F.4 Nigeria

Number	Country	Paragraph 1	Other Paragraphs
		Deviation	Deviation that may limit the selected 'oil rich' African countries' taxing rights with respect to PEs
1	Belgium	None	None
2	Canada	None	None
3	China (People's Republic)	None	None
4	Czech Republic	None	None
5	France	None	None
6	Netherlands	None	None
7	Pakistan	None	None
8	Romania	None	None
9	Slovak Republic	None	None
10	South Africa	None	None
11	United Kingdom	None	None

Source: IBFD Treaty Database (last accessed 1 June 2010)

## F.5 Sudan

Number	Country	Paragraph 1	Other Paragraphs
		Deviation	Deviation that may limit the selected 'oil rich' African countries' taxing rights with respect to PEs
1	Arab Economic Union Council	'enterprise of a Contracting State carries on an industrial or commercial activity in another Contracting State through a permanent establishment situated therein'	None
2	China (People's Republic)	None	None
3	Egypt	'business or industrial profits of an enterprise of one of the Contracting States shall not be subject to tax in the other Contracting State unless the enterprise carries on a trade or business in that other State through a permanent establishment situated therein'	None
4	India	None	None
5	Indonesia	None	None
6	Malaysia	None	None
7	Romania	None	None
8	Turkey	None	None
9	United Kingdom	None	None

Source: IBFD Treaty Database (last accessed 1 June 2010)

## G Annexure G: Treaties entered into force as at 1 June 2010

### G.1 Algeria

Number	Country	Date convention concluded	Date of entry into force	Effective date
1	Arab Maghreb Union	23 July 1990	14 July 1993	01 January 1994
2	Austria	17 June 2003	01 December 2006	01 December 2006 (withholding taxes) 01 January 2006 (other taxes)
3	Belgium	15 December 1991	10 January 2003	01 January 2004
4	Bulgaria	25 October 1998	11 April 2005	01 January 2006
5	Canada	28 February 1999	26 December 2000	01 January 2000
6	China (People's Republic)	06 November 2006	27 July 2007	01 January 2008
7	Egypt	17 February 2001	17 May 2003	01 January 2004
8	France	17 October 1999	01 December 2002	01 January 2002
9	Germany	12 November 2007	23 December 2008	01 January 2009
10	Indonesia	28 April 1995	08 December 2000	01 January 2001
11	Italy	03 February 1991	30 June 1995	01 January 1996
12	Jordan	16 September 1997	Exact date unknown, 2001	01 January 2002
13	Korea (Republic)	24 November 2001	31 August 2006	01 January 2007

14	Lebanon	26 March 2002	19 July 2006	01 January 2007
15	Portugal	02 December 2003	01 May 2006	01 January 2007
16	Romania	28 June 1994	11 July 1996	01 January 1997
17	Russia	10 March 2006	18 December 2008	01 January 2009
18	South Africa	28 April 1998	12 June 2000	01 January 2001
19	Spain	07 October 2002	06 July 2005	01 January 2006
20	Switzerland	03 June 2006	09 February 2009	01 January 2010
21	Syria	14 September 1997	22 June 2001	01 January 2002
22	Turkey	02 August 1994	30 December 1996	01 January 1997
23	Ukraine	14 December 2002	01 July 2004	01 January 2005
24	United Arab Emirates	24 April 2001	25 June 2004	31 December 2004

Source: IBFD Treaty Database (last accessed **1 June 2010**)

## G.2 Egypt

Number	Country	Date convention concluded	Date of entry into force	Effective date
1	Albania	23 February 2005	14 December 2005	01 January 2006
2	Algeria	17 February 2001	17 May 2003	01 January 2004
3	Arab Economic Union Council	03 December 1973	13 July 1975	
4	Austria	16 October 1962	28 October 1963	01 January 1961
5	Bahrain	17 September 1997	13 February 1999	01 January 2000
6	Belarus	16 June 1998	27 May 1999	01 January 2000
7	Belgium	03 January 1991	03 March 1997	01 January 1998
8	Bulgaria	05 June 2003	11 May 2004	01 January 2005
9	Canada	30 May 1983	02 October 1983	01 January 1985
10	China (People's Republic)	13 August 1997	24 March 1999	01 January 2000
11	Cyprus	19 December 1993	14 March 1995	01 January 1996
12	Czech Republic	19 January 1995	04 October 1995	01 January 1996
13	Denmark	09 February 1989	12 April 1990	01 January 1991
14	Finland	01 April 1965	03 April 1966	01 January 1966
15	France	19 June 1980	01 October 1982	01 January 1982
16	France (Protocol)	01 May 1999	01 June 2004	01 January 2005
17	Germany	08 December 1987	22 September 1991	01 January 1992
18	Greece	27 November 2004	23 August 2006	01 January 2007

19	Hungary	05 November 1991	22 May 1994	01 January 1995 (withholding taxes) 01 January 1994 (other taxes)
20	India	20 February 1969	30 September 1969	30 September 1969 (Egypt) 01 January 1969 (India)
21	Indonesia	13 May 1998	26 February 2002	01 January 2003
22	Iraq	31 March 1968	02 December 1968	01 January 1968 (Egypt) 01 January 1969 (Iraq)
23	Italy	07 April 1979	28 April 1982	01 January 1983
24	Japan	03 September 1968	06 August 1969	06 August 1969 (Egypt) 01 January 1969 (Japan)
25	Jordan	08 May 1996	23 October 1997	01 January 1998
26	Korea (Republic)	09 December 1992	15 January 1994	01 January 1992
27	Kuwait	16 February 2004	02 May 2006	01 January 2007
28	Lebanon	17 March 1996	22 March 1998	01 January 1999
29	Libya	03 December 1990	04 July 1991	01 January 1992

30	Malaysia	14 April 1997	09 July 2002	01 January 2003 (Egypt) 01 January 2004 (Malaysia)
31	Malta	20 February 1999	07 April 2001	01 January 2002
32	Morocco	22 March 1989	28 May 1993	01 January 1993
33	Netherlands	21 April 1999	20 May 2000	01 January 2001
34	Norway	20 October 1964	29 July 1965	01 January 1965
35	Pakistan	16 December 1995	01 September 1998	01 January 1998 (Egypt) 01 July 1998 (Pakistan)
36	Palestinian Autonomous Areas	28 April 1998	28 December 1999	01 January 2000
37	Poland	24 June 1996	16 July 2001	01 January 2002
38	Romania	13 July 1979	05 January 1981	01 January 1982
39	Russia	23 September 1997	06 December 2000	01 January 2001
40	Serbia and Montenegro	31 July 2005	05 April 2006	01 January 2007
41	Singapore	22 May 1996	27 January 2004	01 January 2005
42	South Africa	26 August 1997	16 December 1998	01 February 1999
43	Spain	10 June 2005	28 May 2006	01 January 2007

44	Sudan	09 December 1970	13 July 1975	01 January 1975 (Egypt) 13 July 1975 (Sudan)
45	Sweden	26 December 1994	16 March 1996	01 January 1997
46	Switzerland	20 May 1987	14 July 1988	01 January 1989
47	Syria	19 July 1991	01 December 1991	01 January 1992
48	Tunisia	08 December 1989	02 January 1991	01 January 1992
49	Turkey	25 December 1993	31 December 1996	01 January 1997
50	Ukraine	29 March 1997	27 February 2002	01 January 2003
51	United Arab Emirates	12 April 1994	16 July 1995	01 January 1996
52	United Kingdom	25 April 1977	22 August 1980	01 January 1977 (Egypt) 06 April 1977 (United Kingdom)
53	United States	24 August 1980	31 December 1981	01 January 1982
54	Yemen	12 December 1997	02 August 2000	01 January 2001

Source: IBFD Treaty Database (last accessed 1 June 2010)

### G.3 Libya

Number	Country	Date convention concluded	Date of entry into force	Effective date
1	Arab Maghreb Union	23 July 1990	14 July 1993	01 January 1994
2	Egypt	03 December 1990	04 July 1991	01 January 1992
3	France	22 December 2005	01 July 2008	01 January 2009
4	India	02 March 1981	01 July 1982	01 January 1983 (Libya) 01 April 1983 (India)
5	Malta	05 October 1972	07 December 1972	01 January 1973
6	Malta (Protocol)	28 April 1995	01 July 1996	01 January 1994
7	Ukraine	04 November 2008	18 November 2009	01 January 2011
8	United Kingdom	17 November 2008	08 March 2010	01 January 2011

Source: IBFD Treaty Database (last accessed 1 June 2010)

## G.4 Nigeria

Number	Country	Date convention concluded	Date of entry into force	Effective date
1	Belgium	20 November 1989	27 October 1994	01 January 1995
2	Canada	04 August 1992	16 November 1999	01 January 2000
3	China (People's Republic)	15 April 2002	21 March 2009	01 January 2010
4	Czech Republic	31 August 1989	02 December 1990	01 January 1991
5	France	27 February 1990	02 May 1991	01 January 1992
6	Netherlands	11 December 1991	09 December 1992	01 January 1993
7	Pakistan	10 October 1989	08 March 1990	08 March 1990 (withholding taxes) 01 January 1991 (other taxes)
8	Romania	21 July 1992	01 January 1994	01 January 1995
9	Slovak Republic	31 August 1989	02 December 1990	01 January 1991
10	South Africa	29 April 2000	05 July 2008	01 January 2009
11	United Kingdom	09 June 1987	27 December 1987	01 January 1988 (Nigeria) 06 April 1988 (United Kingdom)

Source: IBFD Treaty Database (last accessed 1 June 2010)

## G.5 Sudan

Number	Country	Date convention concluded	Date of entry into force	Effective date
1	Arab Economic Union Council	03 December 1973	13 July 1975	
2	China (People's Republic)	30 May 1997	09 February 1999	01 January 2000
3	Egypt	09 December 1970	13 July 1975	13 July 1975 (Sudan) 01 January 1975 (Egypt)
4	India	22 October 2003	15 April 2004	01 January 2005 (Sudan) 01 April 2005 (India)
5	Indonesia	10 February 1998	Unknown, but in force	Unknown
6	Malaysia	07 October 1993	18 December 2002	01 January 2008 (withholding taxes) 01 January 2003 (other taxes)
7	Romania	31 May 2007	14 November 2009	01 January 2010
8	Turkey	26 August 2001	14 October 2003	01 January 2004
9	United Kingdom	08 March 1975	07 October 1977	01 January 1975 (Sudan) 06 April 1975 (United Kingdom)

Source: IBFD Treaty Database (last accessed 1 June 2010)

## **H Annexure H: Extracts from UNCLOS**

### **H.1 Article 2 - Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil**

- 1 The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
- 2 This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
- 3 The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

### **H.2 Article 3 - Breadth of the territorial sea**

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

### **H.3 Article 33 – Contiguous zone**

- 1 In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
  - a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
  - b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
- 2 The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

#### H.4 Status of UNCLOS signatories<sup>185</sup>

<b>The United Nations Convention on the Law of the Sea of 10 December 1982</b>		
Entry into force	16 November 1994, in accordance with article 308(1)	
Registration	16 November 1994, No. 31363	
<b>Participant</b>	<b>Signature</b>	<b>Ratification</b>
Algeria	10 December 1982	11 June 1996
Angola	10 December 1982	05 December 1990
Egypt	10 December 1982	26 August 1983
Libya	03 December 1984	
Nigeria	10 December 1982	14 August 1986
Sudan	10 December 1982	23 January 1985

<sup>185</sup> Extract of the status as at 30 October 2010;

[http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#EndDec)

# I Annexure I: Analysis of offshore rights per the DTAs reviewed

## I.1 Algeria

Number	Country	Definition of Algeria	Offshore rights per DTA
1	Arab Maghreb Union	No	
2	Austria	Yes	'...in a geographical sense, means the territory of the Republic of Algeria including the territorial sea and beyond it, the areas over which in accordance with international law and national legislation, the Republic of Algeria exercises jurisdiction or sovereign rights for exploration and exploitation of living natural resources and non-living seabed, their sub-soil and superjacent waters'
3	Belgium	Yes	As per Algeria - Austria DTA
4	Bulgaria	Yes	'...in a geographical sense, it means the territory of the Democratic People's Republic of Algeria, including the territorial sea and, beyond it, the zones in which, in accordance with international law and the national legislation, the Democratic People's Republic of Algeria exercises its jurisdiction or its sovereign rights for the purpose of exploration and exploitation of natural resources of the sea-bed, the sub-soil and superjacent water'
5	Canada	Yes	'..in a geographical sense, the term means the territory of the People's Democratic Republic of Algeria including the territorial sea and any area beyond the territorial sea, the areas over which the People's Democratic Republic of Algeria, in accordance with international law and the laws of Algeria, exercises its jurisdiction or sovereign rights with respect to the exploration and exploitation of natural resources of the seabed and subsoil and the overlying water'

6	China (People's Republic)	Yes	'...in a geographical sense, means the territory of the People's Democratic Republic of Algeria, including the territorial sea and, beyond it, the zones in which, in accordance with international law and national legislation, the People's Democratic Republic of Algeria exercises its jurisdiction or its sovereign rights for the purposes of exploration and exploitation of natural resources, biological and non biological, of the sea-bed, the subsoil and superjacent water'
7	Egypt	Yes	'...in a geographical sense means the territory of the Republic of Algeria including the territorial sea and, beyond it, the areas over which the Republic Algeria has jurisdiction and sovereign rights for exploration and exploitation of natural resources seabed subsoil and the superjacent waters, in accordance with international law and national legislation'
8	France	Yes	'used in a geographical sense, means the territory of the People's Democratic Republic including the territorial sea, and beyond the latter areas on which, in accordance with international law, the Algerian People's Democratic Republic has jurisdiction or sovereign rights for exploration and exploitation of natural resources in the seabed and subsoil and the superjacent waters'
9	Germany	Yes	'...in a geographical sense, means the land territory, territorial sea and, beyond it, the various areas of maritime space which the Republic Algeria exercises, under its national legislation and international law, sovereign rights and jurisdiction for the purpose of exploring and exploiting, conserving and managing natural resources of the seabed, its sub-soil and superjacent to the seabed'

10	Indonesia	Yes	'...in its geographical sense it means the territory of Algeria including : (a) any region located on the territorial waters of Algeria which in conformity with international law and by virtue of the law of Algeria is the region within which Algeria may have rights on the seabed and the subsoil of the sea and their natural resources, and (b) the seas and airspace over the regions mentioned in paragraph (a) regarding any activity related to exploration or exploitation of natural resources carried out in this region.
11	Italy	No	
12	Jordan	Yes	As per Algeria - Bulgaria DTA
13	Korea (Republic)	Yes	As per Algeria - Bulgaria DTA
14	Lebanon	Yes	As per Algeria - Bulgaria DTA
15	Portugal	Yes	'...in a geographical sense, it means the territory of the People's Democratic Republic of Algeria, including the territorial sea and any area beyond the territorial sea in which, under the national legislation and/or in accordance with international law, the People's Democratic Republic of Algeria exercises its jurisdiction and sovereign rights for the purposes of exploration for and exploitation of living and non-living natural resources of the sea-bed, its subsoil and the superjacent waters
16	Romania	Yes	'...in a geographical sense it means the territory of Algeria including its territorial waters and the seabed and the maritime subsoil situated adjacent to those territorial waters over which, in accordance with national and international law, Algeria may exercise its sovereign rights and jurisdiction'
17	Russia	Yes	'...in a geographical sense, means the territory of the Republic of Algeria including the territorial sea and, beyond it, the areas on which in accordance with international law and national legislation, the Republic of Algeria exercises jurisdiction or sovereign rights for exploration, exploitation, conservation and management of natural resources of the seabed, their basement and overlying waters'

18	South Africa	Yes	As per Algeria - Bulgaria DTA
19	Spain	Yes	'...in a geographical sense, means the territory of the Republic of Algeria including the territorial sea and, beyond it, on areas which, in accordance with international law, the Republic of Algeria exercises jurisdiction or sovereign rights for exploration and exploitation of natural resources, biological and mineral seabed and subsoil and superjacent water'
20	Switzerland	Yes	As per Algeria - Bulgaria DTA
21	Syria	Yes	As per Algeria - Bulgaria DTA
22	Turkey	Yes	'...in a geographical sense, it means the territory of Algeria including the maritime zone, the seabed and the subsoil adjacent to the territorial sea of Algeria over which Algeria exercises sovereign rights and jurisdiction in accordance with domestic and international law.
23	Ukraine	Yes	As per Algeria - Spain DTA
24	United Arab Emirates	Yes	As per Algeria - Bulgaria DTA

Source: IBFD Treaty Database (last accessed 1 June 2010)

## I.2 Egypt

Number	Country	Definition of Algeria	Offshore rights per DTA
1	Albania	Yes	'...in a geographical sense, includes the territorial sea and any area adjacent to the coast beyond the territorial waters, over which Egypt exercises sovereign rights, in accordance with Egyptian legislation and international law, and which has been or may hereafter be designated as an area within which Egypt may exercise rights with respect to the sea bed and subsoil and their natural resources'
2	Algeria	Yes	'...includes the territorial sea and any area beyond the boundary of territorial waters over which Egypt exercises sovereign rights and jurisdiction in accordance with the Egyptian law and international law, and which is or may be defined as an area over which Egypt exercises rights which affect the seabed or the subsoil and its natural resources'
3	Arab Economic Union Council	No	
4	Austria	No	
5	Bahrain		No translation
6	Belarus	Yes	As per Egypt - Albania DTA
7	Belgium	Yes	'...in a geographical sense, it means: (a) the national territory, (b) the territorial sea, (c) the area beyond and adjacent to the territorial sea over which Egypt has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources whether living or non living of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the area and other rights in accordance with international law, (d) the continental shelf'

8	Bulgaria	Yes	'...in a geographical sense, includes the territorial sea and any area adjacent to the coast beyond the territorial waters, over which Egypt exercises sovereign rights, in accordance with Egyptian legislation and international law, and which has been or may hereafter be designated as an area within which Egypt may exercise rights with respect to the sea bed and subsoil and their natural resources'
9	Canada	Yes	As per Egypt - Albania DTA
10	China (People's Republic)	Yes	'...in a geographical sense, the term "Egypt" includes: (a) the Egyptian territory; (b) the territorial seas thereof; and (c) the seabed and subsoil of the submarine areas adjacent to the coast thereof, but beyond the territorial sea, over which Egypt exercises sovereign rights, in accordance with international law for the purpose of exploration or the exploitation of the natural resources of such area, but only to the extent that the person, property or activity to which the Convention is being applied is connected with such exploration or exploitation'
11	Cyprus	Yes	As per Egypt - China DTA
12	Czech Republic	Yes	As per Egypt - Albania DTA
13	Denmark	Yes	As per Egypt - Albania DTA
14	Finland	No	
15	France	Yes	'...the Arab Republic of Egypt and areas situated outside the territorial waters adjacent to those territorial waters, over which, in accordance with international law, Egypt may exercise sovereign rights with respect to the seabed and subsoil'
16	France (Protocol)	No	
17	Germany	Yes	'...in a geographical sense, the area in which the tax law of the Contracting State concerned is in force, as well as the continental shelf adjacent to the territorial sea, insofar as the Contracting State concerned exercises there in conformity with international law sovereign rights to explore the continental shelf and exploit its natural resources'

18	Greece	Yes	'...in a geographical sense, includes the territorial sea and any area adjacent to the coast beyond the territorial waters, over which Egypt exercises sovereign rights, in accordance with Egyptian legislation and international law and which has been or may hereafter be designated as an area within which Egypt may exercise rights with respect to the sea bed and subsoil and their natural resources'
19	Hungary	Yes	As per Egypt - Albania DTA
20	India	No	
21	Indonesia	Yes	As per Egypt - Albania DTA
22	Iraq	No	
23	Italy	No	
24	Japan	Yes	'...in a geographical sense, means respectively all the territory in which the laws relating to tax of Japan or the United Arab Republic of Egypt are enforced'
25	Jordan		No translation
26	Korea (Republic)	Yes	'...in a geographical sense, the term means all the territory in which the laws relating to Egyptian tax are in force. The term also includes the territorial sea thereof and the seabed and subsoil at the submarine areas adjacent to the coast thereof, but beyond the territorial sea, over which Egypt exercises sovereign rights, in accordance with international law, for the purpose of exploration and exploitation of the natural resources of such area'
27	Kuwait	Yes	'...in a geographical sense includes the territorial waters of any contiguous zone beyond the territorial waters of which it exercises Egypt sovereign rights under Egyptian legislation and in accordance with international law, which established or may be determined as a practice by Egypt rights with respect to the seabed or the subsoil or natural resources'
28	Lebanon		No translation

29	Libya	Yes	'...in a geographical sense intended. 1 the national territory. 2 the territorial sea. 3 the area beyond the territorial sea adjacent to that exercised by Egypt sovereign rights under international law with a view to exploring and exploiting, conserving natural resources and management, whether living or non-living that exist in the water above the seabed or at the bottom of the bottom and inwardly, as well as other activities related to economic exploitation and exploration in the region and all other rights. 4 the Continental Shelf'
30	Malaysia	Yes	As per Egypt - Belgium DTA
31	Malta	Yes	'...in a geographical sense, means the territory and the territorial waters of the Arab Republic of Egypt and its exclusive economic zone and continental shelf as defined in accordance with international law.'
32	Morocco		No translation
33	Netherlands	Yes	As per Egypt - Albania DTA
34	Norway	No	
35	Pakistan	No	
36	Palestinian Autonomous Areas	Yes	'...in a geographical sense intended: 1 National territory. 2 Territorial sea. 3 The area beyond the territorial sea adjacent to it and practiced by Egypt sovereign rights under international law with a view to exploring and exploiting, conserving natural resources and management, whether living or inanimate, which are found in the waters above the seabed or the bottom of the bottom and inwardly, as well as other activities related to exploitation economic organization, explore, and all other rights. 4 Continental shelf'
37	Poland	Yes	As per Egypt - Albania DTA
38	Romania	Yes	As per Egypt - Korea DTA

39	Russia	Yes	'...including the land territory, the territorial sea, as well as [its] exclusive economic zone and continental shelf determined in accordance with the 1982 UN Convention on the Law of the Sea'
40	Serbia and Montenegro	No	
41	Singapore	No	
42	South Africa	Yes	As per Egypt - Albania DTA
43	Spain	Yes	'...in a geographical sense include each Party's territory and territorial waters as well as any area outside the territorial sea where, in accordance with the domestic law of each Party and international law, either Party exercises or may in the future exercise jurisdiction or sovereign rights with respect to the seabed, subsoil and superjacent waters and their natural resources'
44	Sudan	No	
45	Sweden	Yes	'...in a geographical sense, the term "Egypt" includes: (a) the national territory; (b) the territorial seas thereof; and (c) the seabed and subsoil of the submarine areas adjacent to the coast thereof, but beyond the territorial sea, over which Egypt exercises sovereign rights, in accordance with international law for the purpose of exploration or the exploitation of the natural resources of such area, but only to the extent that the person, property or activity to which the Convention is being applied is connected with such exploration or exploitation'
46	Switzerland	Yes	As per Egypt - Albania DTA

47	Syria	Yes	'...in a geographical sense and is intended to: 1 the national territory 2 And the territorial sea 3 the area beyond the territorial sea adjacent to it which it exercises Egypt sovereign rights under international law with a view to exploring and exploiting, conserving natural resources and management, whether living or non-living that exist in the water above the seabed or at the bottom of the bottom and inwardly; as well as other activities related to economic exploitation and exploration of the area and all other rights 4 of the Continental Shelf'
48	Tunisia	No	
49	Turkey	Yes	As per Egypt - Albania DTA
50	Ukraine	Yes	As per Egypt - Albania DTA
51	United Arab Emirates	Yes	'...in a geographical sense, the expression Egypt include: 1 The national territory 2 Regional sea 3 Area beyond the territorial sea and adjacent exercised by Egypt sovereign rights under international law with a view to exploring and exploiting, conserving natural resources and management of both whether living or non-living that exist in the water above the seabed or at the bottom of the bottom and a hidden and 0 as well as other activities on the economic exploitation and exploration of the area and all other rights. 4 Continental Shelf'
52	United Kingdom	Yes	As per Egypt - Albania DTA
53	United States	No	
54	Yemen		No translation

Source: IBFD Treaty Database (last accessed 1 June 2010)

### I.3 Libya

Number	Country	Definition of Algeria	Offshore rights per DTA
1	Arab Maghreb Union	No	
2	Egypt	Yes	'...in a geographical sense intended. 1 the national territory. 2 the territorial sea. 3 the area beyond the territorial sea adjacent to that exercised by Egypt sovereign rights under international law with a view to exploring and exploiting, conserving natural resources and management, whether living or non-living that exist in the water above the seabed or at the bottom of the bottom and inwardly, as well as other activities related to economic exploitation and exploration in the region and all other rights. 4 the Continental Shelf'
3	France	Yes	'...the territory of the Great Socialist People's Libyan Arab Jamahiriya, including airspace, territorial sea, and beyond it the zone in which, in accordance with international law, the Great Socialist People's Libyan Arab Jamahiriya has sovereign rights for exploration and exploitation of natural resources of the seabed and subsoil and the superjacent waters'
4	India	No	
5	Malta	No	
6	Malta (Protocol)	No change	
7	Ukraine	Yes	'...the territory of the Great Socialist People's Libyan Arab Jamahiriya including the air space, the territorial waters , and any other area outside the territorial waters in which Libya has according to the international law, rights of sovereignty for purposes of exploration and exploitation of the natural resources of the seabed and its subsoil as well as its waters above it'
8	United Kingdom	Yes	As per Libya - Ukraine DTA

Source: IBFD Treaty Database (last accessed 1 June 2010)

## I.4 Nigeria

Number	Country	Definition of Algeria	Offshore rights per DTA
1	Belgium	Yes	'...including any area outside the territorial waters of the Federal Republic of Nigeria which in accordance with international law has been or may hereafter be designated, under the laws of the Federal Republic of Nigeria concerning the continental shelf, as an area within which the rights of the Federal Republic of Nigeria with respect to the seabed and subsoil and their natural resources may be exercised'
2	Canada	Yes	As per Nigeria - Belgium DTA
3	China (People's Republic)	Yes	As per Nigeria - Belgium DTA
4	Czech Republic	Yes	As per Nigeria - Belgium DTA
5	France	Yes	'...including any area outside the territorial sea of the Federal Republic of Nigeria which in accordance with international law has been or may hereafter be designated, under the laws of the Federal Republic of Nigeria and in accordance with international law concerning the continental shelf, as an area within which the rights of the Federal Republic of Nigeria with respect to the sea-bed, sub-soil, their natural resources, and superjacent waters may be exercised'
6	Netherlands	Yes	As per Nigeria - Belgium DTA
7	Pakistan	Yes	As per Nigeria - Belgium DTA
8	Romania	Yes	As per Nigeria - Belgium DTA
9	Slovak Republic	Yes	As per Nigeria - Belgium DTA
10	South Africa	Yes	As per Nigeria - Belgium DTA
11	United Kingdom	Yes	As per Nigeria - Belgium DTA

Source: IBFD Treaty Database (last accessed 1 June 2010)

## I.5 Sudan

Number	Country	Definition of Algeria	Offshore rights per DTA
1	Arab Economic Union Council	No	
2	China (People's Republic)	Yes	'...including any area outside the territorial sea of the Republic of the Sudan which in accordance with international law has been or may be hereafter be designated, under the laws of the Republic of the Sudan concerning the continental shelf, as an area within which the rights of the Republic of the Sudan with respect to sea-bed and sub-soil and their natural resources may be exercised'
3	Egypt	No	
4	India	Yes	'...in the geographical sense, it includes any area outside the territorial sea of the Republic of the Sudan, which in accordance with international law, has been or may hereafter be designated under the laws of the Republic of the Sudan, concerning the continental shelf, as an area within which the sovereign right of the Republic of the Sudan with respect to the seabed and sub-soil and their natural resources may be exercised'
5	Indonesia	No	
6	Malaysia	Yes	As per the Sudan - China DTA
7	Romania	Yes	'...the territory of Sudan, including any area over which the Republic of Sudan shall exercise, in accordance with international law, sovereign rights or jurisdiction'
8	Turkey	Yes	'...the Sudan territory, territorial sea, as well as the maritime areas over which it has jurisdiction or sovereign rights for the purposes of exploration, exploration and conservation of natural resources, pursuant to international law'

9	United Kingdom	Yes	'...including any area outside the territorial sea of the Democratic Republic of the Sudan which in accordance with international law has been or may hereafter be designated, under the laws of the Democratic Republic of the Sudan concerning the Continental Shelf, as an area within which the rights of the Democratic Republic of the Sudan with respect to the sea bed and sub-soil and their natural resources may be exercised'
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Source: IBFD Treaty Database (last accessed 1 June 2010)

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## **J Annexure J: DTAs entered into by the selected 'oil rich' African countries with the largest countries importing oil**

### **J.1 Algeria**

Rank	Oil import country	DTA entered into with country by Algeria
1	United States	×
2	France	✓
3	Germany	✓
4	Italy	✓
5	United Kingdom	×
6	Canada	✓
7	Japan	×
8	Korea (Republic)	×

Source: EIA. (2010). Country Analysis Briefs - Algeria. Available: <http://www.eia.doe.gov/emeu/cabs/Algeria/Oil.html>. Last accessed 20/12/2010.

### **J.2 Angola**

Rank	Oil import country	DTA entered into with country by Angola
1	United States	×
2	France	✓
3	Germany	✓
4	Italy	✓
5	United Kingdom	×
6	Canada	✓
7	Japan	×
8	Korea (Republic)	×

Source: EIA. (2010). Country Analysis Briefs - Angola. Available: <http://www.eia.doe.gov/emeu/cabs/Angola/Oil.html>. Last accessed 20/12/2010.

### J.3 Egypt

Rank	Oil import country	DTA entered into with country by Egypt
1	None identified	

Source: EIA. (2010). Country Analysis Briefs - Egypt. Available: <http://www.eia.doe.gov/emeu/cabs/Egypt/Oil.html>. Last accessed 20/12/2010.

### J.4 Libya

Rank	Oil import country	DTA entered into with country by Libya
1	Italy	×
2	Germany	×
3	France	✓
4	Spain	×
5	United States	×

Source: EIA. (2010). Country Analysis Briefs - Libya. Available: <http://www.eia.doe.gov/emeu/cabs/Libya/Oil.html>. Last accessed 20/12/2010.

### J.5 Nigeria

Rank	Oil import country	DTA entered into with country by Nigeria
1	United States	×
2	France	✓
3	Germany	×
4	Netherlands	✓
5	United Kingdom	✓
6	Japan	×
7	China	✓
8	Brazil	×
9	South Africa	✓

Source: EIA. (2010). Country Analysis Briefs - Nigeria. Available: <http://www.eia.doe.gov/emeu/cabs/Nigeria/Oil.html>. Last accessed 20/12/2010.

## J.6 Sudan

Rank	Oil import country	DTA entered into with country by Sudan
1	China	✓
2	Indonesia	✓
3	Japan	✗
4	India	✓
5	Malaysia	✓
6	Netherlands	✗
7	Thailand	✗

Source: EIA. (2010). Country Analysis Briefs - Sudan. Available: <http://www.eia.doe.gov/emeu/cabs/Sudan/Oil.html>. Last accessed 20/12/2010.

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## **K Annexure K: Objectives of the CAEU**

The objectives of the CAEU are:

- To formulate regulations, legislations, and tariffs, aiming at the creation of a unified Arab custom area.
- To co-ordinate foreign trade policies with a view to ensuring the co-ordination of the region's economy vis-à-vis world economy.
- To co-ordinate economic development and formulate programs for the attainment of joint Arab development project.
- To co-ordinate policies related to agriculture, industry, and internal trade.
- To co-ordinate financial and monetary policies with the aim of achieving monetary unity.
- To co-ordinate legislations for taxes and duties.
- To formulate unified regulations for transport and transit in the contracting countries.
- To draft common legislations on labour and social security.
- To prepare a budget for the CAEU council and its affiliated bodies.

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IRS in Ltr. Rul. 82-41-032; cf. the Dutch lower court's decision of 5 December 1974 (No. 161/72 M1)

The German Pipeline Case: German Tax Court: Decision of October 30, 1996, II R 12/92

## **Online research resources**

Business Monitor International - <http://www.businessmonitor.com/cgi-bin/request.pl>

Central Intelligence Agency: World Factbook - [www.cia.gov/library/publications/the-world-factbook/index.html](http://www.cia.gov/library/publications/the-world-factbook/index.html)

Energy Information Administration: Country Analysis Briefs –  
<http://www.eia.doe.gov/emeu/cabs.html>

IBFD Tax Research Platform - <http://k-online2.ibfd.org/kbase/>

OECD – <http://www.oecd.org>

World Trade Organisation – <http://www.wto.org>

## **Other**

Short reports of the discussions from the meeting of research students 2006, Thursday 6 July 2006, Chair: Prof. Huub Bierlaagh/Joanna Wheeler/Prof. Wim Wijnen. Available: [http://www.ibfd.org/portal/synopsis\\_olsen\\_report.html](http://www.ibfd.org/portal/synopsis_olsen_report.html)

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