Does South Africa have a coherent policy for source-based taxation based on the Permanent Establishment concept, and how has this policy been implemented in its bilateral tax treaties?

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I hereby declare that I have read and understood the regulations governing the submission of a Master of Laws (LLM) Specialising in International Taxation minor research dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this minor research dissertation conforms to those regulations.

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ABSTRACT

The difference between South Africa's domestic PE definition and the PE definition in its various DTCs and regional MTCs suggest some material inconsistency in South Africa's PE policy.

The research question this minor dissertation seeks to answer is whether South Africa has a coherent PE policy for source-based taxation. In addressing this question, this thesis considered what South Africa's PE negotiating policy is and identified trends in its tax treaty practice in order to determine any inconsistency with its domestic PE definition.

The key finding arising from the research of this minor dissertation is that South Africa does not have a coherent PE policy as its domestic policy is based on the OECD PE definition from time to time, whereas its tax treaty negotiating position and tax treaty practice is closely aligned with the 2006 SA MTC.

Finally, this thesis provide recommendations to South Africa's relevant fiscal authorities on how to reform the PE policy in a coherent manner.

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I) INTRODUCTION

A) Background

A key component of international tax policy and the policy of a country's fiscal treatment of non-residents is the permanent establishment (PE) concept. One of the general rules commonly found in bilateral double tax conventions (DTC), which is designed to avoid double taxation, is that one contracting state cannot tax the profits of an enterprise of the other contracting state unless it carries on its business through a PE situated therein. In essence, a PE serves as a threshold to determine the right of the source contracting state to tax business profits of a non-resident enterprise.

The PE concept does not only find relevance in a tax treaty context, but are also incorporated in many countries' domestic tax legislation, including that of South Africa.

South Africa has concluded a number of DTCs from as early as 1932 with the majority having been concluded or re-negotiated from 1992 to encourage trading partners to re-enter the South African economy.[1] All of South Africa's 79 DTCs which are currently in force specifically include, to some extent, a definition of a PE.

It appears however from an initial overview of South Africa's tax treaties that very few of South Africa's DTC's are the same. Whereas the PE definition in some DTC's seem to be based on the wording formulated in earlier versions of the OECD MTC, others are worded closely to more recent versions. Many of the PE definitions in South Africa's tax treaty network appear to be more closely aligned with the United Nations (UN) Model Double Taxation Convention between Developed and Developing Countries (UN MTC) PE definition while other tax treaties contain specific provisions that appear in neither the OECD or UN MTC PE definition and seems to have be adopted from other MTCs.

The PE concept was defined in South Africa's domestic legislation for the first time in 2001 in South Africa's Income Tax Act 58 of 1962, as amended (the Act), and used in a number of provisions under South Africa's income tax law to determine the source of income. The PE definition in Section 1 of the Act is based on the PE definition as set out, from time to time, in Article 5 of the OECD MTC. The result of this ambulatory definition is that South Africa's

[1] C West 'From colonialism to apartheid: International influence on tax treaties in South Africa (1932-1990)' in P.J. Hattingh, J Roeleveld and C West (eds) *Income Tax in South Africa: The First 100 Years* (2016) 226.

domestic PE definition was amended in November 2017 to follow the amended article 5 of the 2017 OECD MTC.

The amendment to the OECD MTC PE definition in 2017, and consequently South Africa's domestic PE definition, introduced a number of new provisions expanding the scope of the PE definition, specifically with regard to activities of agents and closely related enterprises.

The difference between South Africa's domestic PE definition and the PE definitions in its various DTCs tend to suggest some material inconsistency in South Africa's PE policy.

This minor dissertation therefore aims to identify whether there exist trends in the formulation of the PE definition in South Africa's tax treaty practice that can be explained with reference to the country's tax policy position on the PE concept. In order to successfully do so, it is necessary to establish what South Africa's tax treaty PE position is.

B) Objective

The first objective of this thesis is to establish South Africa's PE policy, particularly with regard to its tax treaty PE negotiation position, which will serve as the base upon which this minor dissertation will critically analyse the PE definitions in South Africa's tax treaties in order to identify whether there exist trends in the PE definition of South Arica's DTCs that can be explained.

Identifying trends in South Africa's tax treaty practise will make it possible to analyse the extent to which South Africa's tax treaty practice deviates from its domestic PE definition, which is necessary to answer the research question whether there exists coherence in South Africa's PE tax policy.

In addition, this minor dissertation will consider how South Africa's domestic and tax treaty PE definitions have been interpreted by the South African courts, as a contrast to recent developments in foreign case law or positions adopted by the OECD and UN. Domestic legislation as well as rulings and guidelines provided by the South African Revenue Service (SARS) will also be considered. These sources can explain changes in South Africa's PE tax policy and provides the full legal meaning of the PE concept.

The research performed for this minor dissertation was captured in comprehensive summary tables of South Africa's tax treaty PE practice from which trends and deviations under each of the respective parts of the PE definition were extrapolated. These tables are appended to the dissertation.

C) Research Method

The method used to meet the objectives of this minor dissertation and answer the research question mainly involved comparing selected aspects of South Africa's DTCs and selected MTCs. Desktop research was performed by analysing South Africa's domestic income tax legislation, tax treaties, local and international case law as well as both domestic and international tax literature on the subject of PE.

D) Limitations and assumptions

This minor dissertation will only consider South African DTCs which are in force up to 30 March 2019 which is a total of 79 DTCs. All of these DTCs, as they may be amended to date, will be considered. This minor dissertation considers South Africa's domestic income tax legislation only to the extent that it has been promulgated up to 31 January 2018.

Further, this minor dissertation is limited to the OECD, UN, ATAF and SADC MTCs and accompanying commentaries because South Africa principally consider these in formulating its international tax policy.

It is important to note that whilst deviations between South Africa's tax treaty PE practice, its domestic PE definition and PE policy will be identified, any observations about these deviations simply reflect the comments of the researcher and must not be construed as factual reasons. The reasons for some of these deviations may require other research methods such as interviews with tax treaty negotiators, which is beyond the scope of this thesis.

The researcher has prepared this minor dissertation on the assumption that the reader is familiar with the basic concepts of the PE principle.

E) Benefit

The international tax landscape has been subject to tremendous developments over the past decade with various initiatives having been introduced to counter Base Erosion and Profit Shifting

(BEPS), the most prominent of which is the OECDs Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) which effectively serves as an instrument in terms of which countries can amend existing tax treaties without the need to renegotiate them individually on bilateral basis.

However, in practice, many countries have already began renegotiating tax treaties bilaterally. This research may be particularly helpful to underpin 'informed speculation' as to how the PE definition may be worded/constructed in South Africa's future re-negotiated tax treaties.

Further, the South African fiscal authorities announced in the February 2019 Budget Speech that the domestic definition of a PE may be revised[2]. This thesis provides an analytical framework that these authorities may consider in their deliberations of how to reform the PE concept in a coherent manner, based on the existing legal framework and international developments.

F) Chapter outline

The structure of this minor dissertation is explained and summarised below.

Chapter I provide the background on the minor dissertation and also sets out the research objectives, limitation and benefit of the minor dissertation as well as providing the chapter outline.

Chapter II will provide the reader with a brief overview of the introduction of the PE concept to South Africa's domestic income tax law and its ongoing development under domestic legislation and case law. Consideration will also be given to the application and interpretation of tax treaties as well as the position and use of MTC materials and foreign case law under South African tax law to date.

Chapter III will analyse South Africa's tax treaty policy and tax treaty negotiating position with regard to PE.

Chapter IV will analyse South Africa's tax treaty PE practise and aim to identify trends in the implementation of its PE policy as well as deviations to its domestic PE definition. The structure of this chapter will be sub-divided into the respective parts of the 2017 OECD MTC PE definition.

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[2] *See* Annexure C: Additional tax policy and administrative adjustments in National Treasury of South Africa 'Budget Review 2019' 11.

Chapter V brings the thesis to conclusion. This chapter summarises the key findings of this minor dissertation and provide recommendations that could be considered by the relevant fiscal authorities in the reform discussion of South Africa's PE policy.

II) DEVELOPMENT AND INTERPRETATION OF THE PE CONCEPT UNDER SOUTH AFRICA'S DOMESTIC LAW

A) Development of South Africa's domestic PE concept

The PE concept has not been part of South African income tax law for the major part of its existence since its introduction in 1914. The concept of the source of income, which had to be given meaning through ad-hoc development via case law and, later, source statutory rules, primarily determines liability of non-residents for income tax. The PE concept was introduced piecemeal only after the end of apartheid and the start of constitutional democracy in the 1990s.[3]

The Katz Commission was appointed in 1995 to investigate the feasibility of retaining a source basis of taxation. It recommended retention of the source basis for active income and the introduction of a residence basis for passive income.[4] As part of these measures, the introduction of the PE concept was suggested. The Katz Commission was of the view that because the PE concept was an internationally recognized and accepted tax concept it would contribute to certainty.[5]

Based on the recommendations of the Katz Commission, the concept of a PE was introduced for the first time in 1997 in South Africa's domestic tax legislation in a new source rule dealing with the taxation of investment income of non-residents (other source rules remained unaffected).[6] When the source basis of taxation for residents was replaced with worldwide tax liability in 2000,[7] the PE concept was used to delineate the scope of South Africa's transfer pricing provisions.[8]

Before 2001, South Africa did not impose income tax on gains of a capital nature. When these capital gains became taxable the scope of liability for capital gains tax on non-residents was also based, in part, on the presence of a PE in South Africa.[9]

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[3] Oguttu, AW *International Tax Law: Offshore Tax Avoidance in South Africa* (2015) 69.
[4] Fifth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa to the Joint Standing Committee on Finance (1997) 4.
[5] Ibid 15.
[6] Section 9C of the Act as introduced by clause 9(1) of the Income Tax Amendment Act 28 of 1997. The PE concept was used as a source deeming rule for non-residents earning annuity, interest, rental or royalty income (s 9(2)(b)).
[7] Introduction of Revenue Laws Amendment Act 59 of 2000.
[8] Section 31 the Act.
[9] Paragraph 2(1)*(b)(ii)* of the Eighth Schedule of the Act.

The Katz Commission recommended that the OECD MTC be used to provide the basic concepts and terminology for the South Africa's domestic PE definition, but also recommended that the scope should extend the definition to situations described in the PE definition under the UN MTC.[10] This recommendation was not followed. The definition of a PE for domestic income tax purposes reads as follows: 'means a permanent establishment as defined from time to time in Article 5 of the Model Tax Convention on Income and on Capital of the Organisation for Economic Co-operation and Development'.[11]

The ambulatory nature of the domestic PE definition should be noted, as it allows for South Africa's domestic law to change as and when the OECD changes the model definition of a PE. Accordingly, at present (2019) the 2017 OECD MTC definition of a PE applies as matter of South Africa's domestic income tax law, subject to one adjustment, as will be discussed below.

In 2010 a proviso was added to the domestic definition of a PE.[12] The amendment was introduced in an attempt to incentivise foreign investors to utilise South Africa as a regional investment fund location.[13] A proviso was added to the wording of the domestic PE definition in terms of which the activities of certain foreign partnerships and trusts used in the fund management industry will not create a PE in South Africa for foreign investors.[14] The proviso to the domestic PE definition is as follows:

> Provided that in determining whether a qualifying investor in relation to a partnership, trust or foreign partnership has a permanent establishment in the Republic, any act of that partnership, trust or foreign partnership in respect of any financial instrument must not be ascribed to that qualifying investor.[15]

The meaning and practical application of this proviso is discussed in Chapter IV.

B) The PE as source

It is important to note that for South African domestic income tax law purposes, a PE is still not generally used to establish a nexus for taxing non-residents. While the concept of a 'permanent

[10] Fifth Interim Report op cit (n4) 27-28.
[11] Section 1 of the Act.
[12] Section 6(1)(v) Taxation Laws Amendment Act 2010.
[13] National Treasury of South Africa 'Explanatory Memorandum on the Taxation Laws Amendment Bill, 2010' 83.
[14] Ibid 84.
[15] Definition of 'permanent establishment' in s 1 of the Act.

establishment' is important for several areas under the South African domestic tax laws, the starting point for the taxation of non-residents is still the 'source' of income.

The term 'source' was historically not defined and had been considered by South African courts on various occasions, most notably in *CIR v Lever Brothers & Unilever Ltd*.[16] Case law thus gave rise to source guidelines and, in certain instances, the legislature codified or overrode these judicial guidelines by introducing ad-hoc statutory source rules, such as for dividends, royalties and interest. In 2009, the statutory source rules were revamped and extended to further categories of income and gains, but still are not comprehensive. These 'new' source rules employ the concept of a PE in three of eleven situations.[17]

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[16] *Commissioner for Inland Revenue v Lever Brothers & Unilever Ltd* 1946 AD 441, 14 SATC 1. In terms of this case, the test to determine the source of income consists of two legs: first, the determination of the originating cause of income being received, and, secondly, the location of the originating cause once determined. This test has become the yardstick whereby source issues are generally approached in South Africa.

[17] Section 9 of the Act states that an amount is received by or accrues to a person from a source within South Africa in the following cases: (i) Section 9(2)(a) treats a dividend declared by a resident company as being from a South African source. (ii) Section 9(2)(b) deals with interest contemplated in s 24J (which defines interest widely). Interest is from a South African source if it is paid by a South African resident or is earned on funds invested or used in South Africa. If the *interest is attributable to a PE* (of a South African resident) outside of South Africa, it is treated as not being from a South African source. (iii) Section 9(2)(c) provides that a royalty incurred by a South African resident is from a South African source. If the *royalty is attributable* to a PE which is situated outside of South Africa, it will not be regarded as being from a South African source. (iv) Section 9(2)(d) provides that a royalty is from a South African source if it is received or accrued in respect of the use or right of use, or permission to use, in South Africa, any intellectual property as defined in s 23I (s 23I defines intellectual property as patents, designs, trademarks, copyrights and knowledge connected with the use of such intellectual property). (v) Section 9(2)(e) provides that income is from a South African source if it is attributable to an amount incurred by a person who is a South African resident, and is received or accrued in respect of the imparting of, or the undertaking to impart knowledge or information, this includes that rendering of a services or assistance in connection with the use of the knowledge or information. (vi) Section 9(2)(f) determines that payments in relation to the imparting or undertaking to impart knowledge or information for use in South Africa will be from a South African source. This includes rendering any assistance or service in connection with the application or utilization of scientific, technical, industrial or commercial knowledge or information. (vii) Section 9(2)(g) determines that income earned in respect of the holding of a public office is from a South African source. (viii) Section 9(2)(i) treats an amount as being from a South African source if it is a pension or annuity and is received by or accrues in respect of services rendered in South Africa. Where services are provided partly inside South Africa and partly outside of South Africa, the apportionment doctrine will apply. (ix) Section 9(2)(j) determines that amounts received or accrued in respect of the disposal of immovable property situated in South Africa as being from a South African source. Immovable property includes any interest or right of whatever nature in immovable property, it also includes certain equity shares where 80% of the value of the shares is attributable to immovable property situated in South Africa. (x) Section 9(2)(k) determines that an amount received by or accrued in respect of the disposal of a movable asset is from a South African source if held by a non-resident and that *asset is attributable to a PE* situated inside South Africa. If the asset is held by a resident, it will be from a South Africa source, *unless the asset is attributable to a PE* situated outside of South Africa. (xi) Section 9(2)(l) treats an exchange difference as being from a South African source if it is an exchange difference as contemplated in s 24I. If the party is a South African resident, the exchange difference is from a South African source *if it is not attributable to a PE* situated outside of South Africa, and is not subject to income tax outside of South Africa. If the party is a non-resident, the exchange difference should relate to a PE situated within South Africa. *See* further J Hattingh, C de Bruyn & D Lermer 'South Africa' in E Reimer, M Orell &

C) PE concept under indirect tax

South Africa's value added tax legislation does not use the concept of a PE as such. Rather, VAT registration is required when any person 'carries on an enterprise' in South Africa.[18] The concept of carrying on an enterprise is understood to be wider than a PE.[19]

D) Interpretation of tax treaties

The matter of *SIR v Downing*[20] remains in many respects the leading authority in South Africa on the interpretation and application of double tax treaties. The appellant division of the Supreme Court confirmed the decision of the court of first instance in which the existence and use of an 'international tax language' was recognised as a valid source to consider for purposes of the interpretation of double tax treaties. Since 1975, and still presently, the Supreme Court of Appeal refers to foreign tax treaty cases, particularly cases from the United Kingdom.

i) Commentaries

Despite not being a member of the OECD, the Commentaries on the OECD MTC have been considered in a number of South African cases. It is accepted by South African authors that the *Downing* case and, more recently, *Oceanic Trust Co v SARS*[21] provide authority for considering the OECD Commentaries and foreign cases as useful aids to interpret the meaning of provisions contained in South Africa's double tax treaties.[22] This is not to say, however, that they are in any way binding.

The position of OECD materials and foreign cases in the Tax Courts are, however, not always consistent with those of the higher courts. It is important to note that South African Tax Court decisions do not provide precedent in South Africa. For example, a Tax Court decision of 2015 in *AB LLC v CSARS*[23] rejected an interpretation of article 5(2) of the South Africa - United States DTC (1997) based on the OECD Commentaries on the basis that the wording of the treaty

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S Schmid (eds) *Permanent Establishments: A Domestic Taxation, Bilateral Tax Treaty and OECD Perspective* 4e (2015) § 16.02; Olivier, L & Honiball, M (eds) *International Tax: A South African Perspective* 5e (2011) 13, 16-18.

[18] Section 23(1) Value-Added Tax Act 89 of 1991.

[19] The interaction between domestic law and treaty (PE) reference to 'enterprise' is specifically discussed in Chapter IV(C)(ii)(b).

[20] *SIR v Downing* 1975 (4) SA 518 (A); 37 SATC 249.

[21] *Oceanic Trust Co Ltd NO v C: SARS* 2012 (74) SATC 127 at 147.

[22] *See* J Hattingh 'Elimination and Avoidance of International Double Taxation' in A De Koker & E Brincker (eds) *Silke on International Tax* § 36.20; Olivier and Honiball op cit (n17) 311 for commentary on the case.

[23] *AB LLC v Commissioner of the South African Revenue Services* 2015 ZATC 2; 17 ITLR 911.

deviated from the OECD MTC. The Tax Court did note, however, that it would not be uncommon to rely on the OECD Commentaries in interpreting an article in a double tax treaty if such article is based on an article in the OECD MTC.[24] The court stated that the explanations provided in the OECD Commentaries are of 'immense value'.[25] It is worth noting that no South African court has to date referred to the UN MTC.

There are examples of other cases in which the courts did not refer to the OECD Commentaries when they clearly could have.[26] Authors are of the view that this inconsistent treatment of the OECD Commentaries by the South African lower courts has led to uncertainty as to whether courts are obliged to consider the OECD Commentaries, or whether they may do so at their own discretion.[27]

The better view is that it can be expected that South Africa's tax treaty negotiators had the OECD MTC (and UN MTC) in mind when they negotiate, as can be seen in the Explanatory Memoranda they provide to Parliament during ratification procedures.[28] In terms of the modern approach to legal interpretation in South Africa, as well as pursuant to article 32 of the Vienna Convention, the circumstances of conclusion of treaties provide important supplementary means of interpretation that should be considered.[29] Of course, it does not mean that the Commentaries are binding as they were never intended to be annexed or incorporated into the text of a treaty.[30]

ii) Approach of interpretation of tax treaties

South African courts have not yet addressed the issue as to whether an ambulatory approach to the interpretation of tax treaties is preferred over a static approach. The general approach to legal interpretation by the highest South African courts suggests that retrieval of meaning from

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[24] Ibid 12.
[25] Ibid 14. *See* also I Du Plessis 'The interpretation of double taxation agreements: a comparative evaluation of recent South African case law' (2016) 3 *Journal for South African Law* 487.
[26] I Du Plessis 'Some thoughts on the interpretation of tax treaties in South Africa' (2012) 24(1) *South African Mercantile Law Journal* 31-51.
[27] I Du Plessis 'The interpretation of double taxation agreements: a comparative evaluation of recent South African case law' (2016) 3 *Journal of South African Law* 484-499.
[28] *See* Hattingh op cit (n22) § 36.20. *See* also Explanatory Memorandum on the draft DTC between South Africa and Tanzania.
[29] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) 18 where it was held that 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole *and the circumstances attendant upon its coming into existence* [emphasis added]'.
[30] Article 29 2017 OECD MTC.

circumstances prevailing during negotiation of a text, as well as consistent and established practice in the application of legal instruments, are relevant extra-textual sources to consult during the process of establishing the meaning of a legal instrument.[31] This approach, which is similar to article 32 of the Vienna Convention, suggests that reference to both OECD materials in existence at the time of conclusion of a tax treaty, as well as subsequent additions or changes thereto, may be considered. Subsequent materials would need to be analysed to establish their relevance, for example, whether they informed consistent practice or shared understandings of the South African fiscal authorities and counterparts. It is worth stressing that consideration of these materials does not mean that they are binding; they are mere supplementary aids used as a check on the meaning derived through the process envisaged under article 31 of the Vienna Convention.

The ambulatory nature of South Africa's domestic PE definition, and its reliance on the OECD MTC as it evolves, suggests that an evolutionary interpretation be adopted for domestic income tax purposes, although that cannot and should not be automatically transposed on South Africa's tax treaties.

iii) Current position

In conclusion it would appear that there is, to date, still no definitive answer to the legal status of the OECD Commentaries in South Africa other than to say that courts use their discretion in referring to such extra-textual material as an aid to interpretation.[32]

E) Ongoing development of the PE concept under domestic and treaty law

Although the concept of a PE has been present in South African tax treaty law for nearly seven decades, it was introduced much later in 1996 in South African domestic law. The introduction of

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[31] *See Natal Joint Municipal Pension Fund* supra (n29) 18; *Commissioner for the South African Revenue Service v Bosch* 2015 (2) SA 174 (SCA) 17 where it was held that 'There is authority that, in any marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation. This is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon those words. The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question. As such it may be a valuable pointer to the correct interpretation.'

[32] EC Jansen van Rensburg *A South African perspective on the meaning of 'beneficial ownership' in Article 10 of the OECD Model Tax Convention on Income and Capital in the context of conduit company treaty shopping* (unpublished LLD thesis, University of Pretoria 2018) 243-245; LA Steenkamp 'An analysis of the applicability of the OECD Model Tax Convention to non-OECD member countries: The South African case' (2017) 10 *Journal of Economic and Financial Science* 1 at 83-93.

the PE definition was done on a piecemeal basis and has therefore brought partial alignment of South Africa's income tax legislation after re-entering global trade from isolation under the apartheid regime.

The decision to base the domestic PE definition on the OECD MTC definition, as it develops, ensured that South Africa aligned itself with an internationally recognized and accepted tax concept, but the divergence with the country's tax treaty policy on PEs results in an overall picture of incoherence.

As will be shown in Chapter III of this minor dissertation, the alignment of South Africa's domestic PE definition with the OECD Model results in conflicting positions when compared with the tax treaty negotiation position of the country. Whereas its domestic PE definition follows the principles generally formulated to support developed countries under the OECD MTC, its tax treaty practice is more aligned with the UN Model PE definition, designed to support developing countries.

i) Legislation

The only truly local development of the South African domestic PE definition concerns the exclusion in 2010 of certain activities by foreign trusts and partnerships in the fund management industry (*see* Chapter IV(B)(a)(iB)). More recently, the most significant changes to South Africa's domestic PE definition is the introduction of the amendments included in the 2017 OECD MTC which has incorporated the recommendations made under the OECD BEPS project such as the expansion of the specific exempt activity exemption and deemed agency provisions and the inclusion of definition of a person closely related to an enterprise (*see* a detailed discussion of these amendments in Chapter III(C)).

ii) Case law

There has been no South African case law on the domestic PE definition. At the tax treaty level, the matter in *AB LLC v CSARS* (2015) concerned the PE definition in the South Africa-United States DTC (1997).[33] The Tax Court had to decide whether income earned by a US-resident enterprise from certain consulting services rendered by employees in South Africa to a South

[33] *AB LLC* supra (n23).

African resident company created a PE for the two US enterprises in terms of article 5(2)(k) of the 1997 tax treaty, which determined:

> (2) The term 'permanent establishment' includes especially: […]
>
> > (k) the furnishing of services, including consultancy services, within a Contracting State by an enterprise through employees or other personnel engaged by the enterprise for such purposes, but only if activities of that nature continue (for the same or a connected project) within that State for a period or periods aggregating more than 183 days in any twelve month period commencing or ending in the taxable year concerned.

The most significant aspect of the judgment was the rejection by the Tax Court of the orthodox OECD idea that all the listed examples, which would have included paragraph (k), was part of the illustrative list of PEs that still had to comply with the requirements of article 5(1); instead, the court held that paragraph (k) extended the definition in article 5(1).[34] This case is discussed in detail under Chapter IV.

F) Position papers

In July 2017, the Davis Tax Committee[35] published its second and final report on BEPS in an advisory capacity to the Minister of Finance. The committee identified a number of BEPS risks for South Africa's PE definition. The most relevant being:

i. to ensure that each of the exceptions to PE status under article 5(4) of the OECD PE definition is restricted to activities that are otherwise of a 'preparatory or auxiliary' character;
ii. the introduction of a new anti-fragmentation rule to ensure that it is not possible for entities to benefit from these exceptions through the fragmentation of business activities among closely related enterprises; and
iii. expanding the deemed agency PE provisions.[36]

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[34] Ibid 13.
[35] The Davis Tax Committee is chaired by South African High Court Judge Davis and consists of well-regarded tax and finance experts with the objective to assess South Africa's tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability. For more information, see http://www.taxcom.org.za/aboutus.html (accessed 21 October 2018).
[36] Davis Tax Committee 'Second Interim Report on Base Erosion and Profit Shifting (BEPS) in South Africa, Summary of DTC Report on Action 1: Address the Tax Challenges of the Digital Economy' (2016) 1.

These risks identified by the committee have been addressed in the 2017 OECD MTC, and as such, are covered by South Africa's domestic PE definition. However, South Africa's provisional reservation to articles 12 and 14 of the MLI means that the recommendations about agency PEs and anti-fragmentation rules will not be followed at the tax treaty level.

The committee also recommended that consideration be given to South Africa's controlled foreign company (CFC) legislation to include definitions of CFC income that would attract income typically arising from the digital economy, which is generally taxed in the jurisdiction of the ultimate parent company.[37] These recommendation follows the Davis Tax Committee's detailed findings in which it addresses the impact of the digital economy following the BEPS Action 1 Report. The committee's report contains an extensive set of proposals for reforming the income tax and VAT rules, as well as associated administrative procedures. Significantly, at the time, the committee did not recommend the introduction of a separate digital tax but rather that South Africa should follow proposals by the OECD on how to adapt or change the PE concept to deal with digitization.[38] The Davis Tax Committee emphasized that from a policy perspective, the aim of any changes to South Africa's tax laws should be 'to create a level playing field so that South African companies dealing with digital goods and services are able to compete' with foreign counterparts.[39] In other words, the reason for any changes should not only be whether foreign taxpayers operating in the digital economy are complicit in tax avoidance or base eroding payments.

The committee further recommended that since the challenges that South Africa faces with respect to taxation of the digital economy are of an international nature, a 'wait and see' approach was proposed as far as direct taxes are concerned.

[37] Ibid 2.
[38] Ibid 4-6.
[39] Ibid 5.

III) SOUTH AFRICA'S TAX TREATY PRACTICES AND DEPARTURES FROM THE OECD MTC

A) Deviations between South Africa's domestic PE definition and its tax treaty practice

At present, South Africa has operative tax treaties with 79 jurisdictions, all of which include, to some extent, a definition of a PE. An analysis of the 79 tax treaties suggest that despite the fact that South Africa's domestic PE definition is based on the OECD MTC as it reads from time-to-time, the majority of South Africa's tax treaties in their PE definitions are more closely aligned with the various versions of the UN MTC.

The most common deviations, which will be discussed in more detail under Chapter IV, concern service fee income and are:

- The substitution of the construction/installation deemed PE provision as set out in article 5(3) of the OECD MTC with the UN MTC version, which considers, in addition, any consultancy or supervisory activities;

- The inclusion of a deemed service PE of an enterprise when individuals, including employees, perform services, including consultancy services, as generally described in article 5(3)(b) of the UN MTC; and

- The inclusion of a deemed service PE for individuals performing activities of an independent character as set out under article 14 of the UN MTC.

The extent of the deviations seems to largely depend on either the economic development of the other contracting jurisdiction or the protection of a specific industry in such other jurisdiction. It is apparent that the tax treaties which deviate most from the 2017 OECD MTC PE definition are treaties concluded with developing countries, whereas tax treaties concluded with developed nations tend to be more aligned with the 2014 OECD MTCs PE definition.[40]

None of South Africa's tax treaties follow article 5 of the 2017 OECD MTC. There are, however, a couple of treaties that include provisions which are similar, especially additions that

[40] *See* the table in Appendix 1 for the list of countries.

appear to be similar to the OECD's BEPS Report (as further discussed in Chapter IV, specifically section B(i), section D(ii)(d) and section H).

B) National and regional models

i) SA MTC

The South African Model Agreement for the Avoidance of Double Taxation (SA MTC) is not an official published document but rather an unofficial internal SARS document. The SA MTC first reached the public domain when it was presented to the Parliament's Finance Portfolio Committee on 16 Augustus 2005 as a comparison between the OECD MTC, the SA MTC and the draft DTC between South Africa and Malaysia for ratification by Parliament. The last occasion this MTC has appeared publically was on 23 August 2006 when the SA MTC was submitted to the Finance Portfolio Committee on occasion of the approval of the draft DTCs with Tanzania and Spain.[41]

As can be seen from the comparison in Appendix 11, the SA MTC seems to follow a combination of the OECD MTC, UN MTC and ATAF Model Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (2016) (ATAF MTC).

ii) SADC MTC

South Africa is a member of a number of African regional organizations aimed at promoting regional economic growth and tax harmonization. One of these is the Southern African Development Community (SADC) of which South Africa has been a member since 1994. One of the SADC's initiatives to harmonize and improve the region's collective tax landscape was through the development of the SADC Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Tax on Income (2012) (SADC MTC), which is being used by its member countries in negotiating tax treaties among themselves and with other countries outside the region. It is understood that the SADC MTC is considered to be outdated and in the process of revision – it is therefore not further discussed.

[41] Parliamentary Monitoring Group's Finance Standing Committee 'Minutes of Meeting: Double Taxation Agreements between SA & Spain and SA and Tanzania' (22 August 2006). The SA MTC is dated 2006 and is presented in Appendix 11.

iii) ATAF MTC

South Africa is also the founding member of another African organization, the African Tax Administrators Forum (ATAF), which aims to improve tax systems in Africa and build capable African tax administrations that develop, share and implement best tax practices. Similar to the SADC, the ATAF developed the ATAF MTC to be used by its members in negotiating tax treaties with each other, and with other jurisdictions around the world.

C) Positions taken by South Africa on 2017 OECD MTC

As a non-OECD member, South Africa has noted several positions on article 5 of the OECD MTC, as follows:[42]

i. to negotiate a period of time after which a building site or construction, assembly, or installation project should be regarded as a PE under paragraph 3;

ii. to treat an enterprise as having a PE if the enterprise carries on supervisory activities in connection with a building site or a construction, assembly, or installation project that constitute a PE under paragraph 3;

iii. to treat an enterprise as having a PE if the enterprise furnishes services, including consultancy services, through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project), within the country for a period or periods aggregating more than 6 months within any 12-month period;

iv. to deem any person performing professional services or other activities of an independent character to have a PE if that person is present in the state for a period or periods exceeding in the aggregate 183 days in any 12-month period; and

v. to deem a PE to exist if, for more than 6 months, an enterprise conducts activities relating to the exploration or exploitation of natural resources.

[42] Paragraphs 10, 11, 14, 14.1, 14.6 OECD MTC (2017) 'Non-OECD Economies' Positions' on article 5'.

It is understood that the above positions on article 5 of the OECD MTC provide South Africa's negotiating position and therefore its tax treaty policy as regard its PE status. Generally, when the responsible South African authorities present a signed tax treaty to Parliament for ratification, an Explanatory Memorandum accompanies the treaty in which the following statement is typically encountered (the example of the 1993 treaty with France is used, being one of the first to be signed after the end of apartheid):

> 'The Organisation for Economic Co-operation and Development (OECD) has developed a model double taxation agreement for use as the basis for agreement between OECD member States. This model has in certain respects been modified by the United Nations (UN) as a proposed basis for agreement between developed and developing States. Although South Africa is not a member of the OECD, the OECD model, with or without the UN modifications, is considered to be an ideal basis for the negotiation of agreements. A major benefit in adhering as closely as possible to the OECD MTC, is the ready availability of international experience in the interpretation of the agreement.'
>
> The agreement concluded with France closely follows the OECD MTC.[43]

Based on the above statement it can be deduced that South Africa's negotiating position is to ask for inclusion of article 5 of the OECD MTC, but subject to the five deviations as noted on the OECD MTC. This position, together with South Africa's tax treaty practice, specifically the most common deviations from the 2017 OECD MTCs PE definition, is mostly reflected in the SA MTC which discussed above.

D) South Africa's options on the MLI

South Africa is a signatory of the MLI but has not yet (January 2019) deposited its instrument of ratification, acceptance or approval with the OECD. As a result, the MLI has not come into force in respect of any of South Africa's tax treaties.

South Africa has however submitted its preliminary 'Status of List of Reservations and Notifications at the Time of Signature' with the OECD in 2017.[44] These reservations, to the extent that they deal with the PE definition of a covered tax agreement, and their alignment with South Africa's domestic PE definition and tax treaty practice is discussed below.

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[43] National Treasury of South Africa 'Explanatory Memorandum on the Double Taxation Agreement between the Republic of South Africa and the French Republic' (1992) 1.

[44] Republic of South Africa's Status of List of Reservations and Notifications at the Time of Signature pursuant to article 28(7) and 29(4) of the MLI (2017).

i) Article 12 MLI: Artificial avoidance of PE status through commissionaire arrangements and similar strategies

Article 12 of the MLI aims to address the artificial avoidance of PE status through commissionaire arrangements and similar strategies. This article contains similar wording to that of article 5(5) and (6) of the 2017 OECD MTC PE definition, and as such South Africa's domestic PE definition, which deals with the activities of independent and dependent agents. The wording of article 12 of the MLI has also been incorporated into the PE definition of the UN and ATAF MTCs (*see* the PE definitions in the UN and ATAF MTCs listed in Appendix 11) to which South Africa is a member.

Despite the fact that the provisions under article 12 of the MLI has been incorporated into South Africa's domestic PE definition, South Africa opted not to implement article 12 of the MLI.[45] This reservation is however aligned with South Africa's tax treaty practice as the analysis of South Africa's tax treaties, which is discussed in detail under 4.5, indicates that the elements for an expanded agency PE as envisaged under article 5(5) and (6) of the 2017 OECD MTC are not found in any of South Africa's tax treaties.

Furthermore, it must also be noted that this reservation goes against the Davis Tax Committee recommendation that South Africa should implement the OECD BEPS recommendations that hardened into article 12 of the MLI (*see* Chapter II(F)).

There is no official explanation why South Africa opted out of article 12 of the MLI considering the fact that the provisions under article 12 aligns not only with South Africa's domestic PE definition, but also with the UN and ATAF MTC which have shown to greatly influence the PE definition in South Africa's tax treaties A possible reasons may include that the OECD's work on profit attribution to new types of PEs based on article 5(5) and (6) of the 2017 OECD MTC was not finalized when the MLI was signed. Another view may be that commissionaire structures that lead to these changes to the OECD MTC are hard to replicate or may even be a legal impossibility under South African law, hence, it may not be of great concern. It is possible for South Africa to still change its position in this regard under the MLI.

[45] Ibid 33.

ii) Article 13 MLI: Artificial avoidance of PE status through the specific activity exemptions

South Africa has opted for article 13, Option A of the MLI to apply to its covered tax treaties, and therefore to be aligned with article 5(4) of the 2017 OECD MTC.[46] It appears to be South Africa's treaty negotiating policy to follow article 5(4) of the OECD MTC (*see* Chapter III and Appendix 11), hence the justification to opt into this aspect of the MLI.

Furthermore, the decision to opt for article 13 of the MLI follows the Davis Tax Committee's recommendation that South Africa should implement the OECD BEPS recommendations to ensure that each of the exceptions to PE status under article 5(4) of the OECD PE definition is restricted to activities that are otherwise of a 'preparatory or auxiliary' character (*see* Chapter II(F)).

The discussion at Chapter IV(E) will show that there are notable variations between South Africa's existing tax treaties with article 5(4) of the 2017 OECD MTC; significant number of deviations are based on article 5(4) of the UN MTC, often in treaties with other developing countries.

iii) Article 14 MLI: Splitting up of contracts

South Africa opted not to implement article 14 of the MLI. See Chapter IV(H) for a discussion of existing tax treaties that contain clauses dealing with the splitting-up of contracts by associated enterprises, which are reminiscent of article 14 of the MLI.[47]

The Davis Tax Committee recommended that South Africa should implement the OECD BEPS recommendations that hardened into article 14 of the MLI (*see* Chapter II(F)).

It is unclear why South Africa opted out of article 14 of the MLI, particularly since article 5(4.1) of the ATAF MTC aligns with article 5(4.1) of the 2017 OECD MTC. Presumably, it was considered sufficient to introduce the PPT in South Africa's tax treaties to deal with artificial arrangements by taxpayers to obtain tax treaty benefits.

[46] Ibid 34.
[47] Ibid 36.

iv) Article 15 MLI: Definition of a person closely related to an enterprise

South Africa has indicated that it will opt for article 15 of the MLI, which will introduce a general definition in covered tax treaties of a person closely related to an enterprise. At this stage, the definition is required due to election for article 13, Option B of the MLI to apply in regard to artificial avoidance of PE status through the specific activity exemptions.

E) Observations on MLI options

These reservations raised questions about the coherence of South Africa's overall PE policy, as both the expansion of the deemed agency PE provision and the anti-avoidance contracting splitting clauses encapsulated in articles 4(1) and 5(5) of the 2017 OECD MTC automatically apply to South Africa's domestic tax law. Article 13 of the MLI concerning artificial avoidance of PE status through the specific activity exemptions will apply to South Africa's covered tax treaties.

As a result of the incoherence created, Treasury proposed in its 2019 Budget speech that the domestic PE definition be reviewed. Treasury noted that the domestic definition has been 'expanded' as a result of the 2017 amendment to article 5 of the 2017 OECD MTC, and that based on South Africa's provisional reservation to the MLI, South Africa's tax treaties use a 'narrow' PE definition. Treasury noted that its proposal to review the domestic PE definition must be to determine whether or not a 'limitation' to its domestic PE definition is warranted.

F) South Africa's current position on MLI

South Africa signed the MLI on 7 June 2017 and lodged its provisional list of expected reservations and notifications on the MLI. However, initial briefing to Parliament indicated that there were several questions about the domestication process of the MLI due to its unique nature. At present, the process of ratifying the MLI appears to have stalled, although it is understood that special cabinet approval is awaited to allow the ratification process to proceed.

Since signature of the MLI the results of negotiation (or renegotiation) of bilateral tax treaties by South Africa has not yet become public and it is therefore hard to indicate whether South Africa will follow its preliminary positions on the MLI in actual negotiations.

G) Observations

The table in Appendix 11 compares South Africa's negotiating position on article 5, as derived from its observations on the 2017 OECD MTC and its provisional reservations on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), with the 2006 SA MTC, 2017 OECD, 2017 UN and 2016 ATAF MTC PE definitions. As mentioned, South Africa's domestic law PE definition follows the 2017 OECD MTC. The comparison shows that the South African tax treaty negotiation policy and the SA MTC (at least up to 2006) is the root cause for the tendency that actual PE definitions deviate from its domestic PE definition. The comparison further highlights the inconsistency between South Africa's domestic PE definition and the PE definition in its own Model Agreement as well as the inconsistent position on MTC PE definitions adopted in regional MTCs in which South Africa participates.

IV) TRENDS IN SOUTH AFRICA'S TAX TREATY PRACTICE AND DEPARTURES FROM AND INTERPRETATION UNDER DOMESTIC LAW

A) Introduction

As noted in the introductory chapter, this chapter deals with the main topic of this thesis in that it will aim to identify trends in South Africa's tax treaty practise with regard to the PE definitions in its DTCs. This chapter will follow the structure of South Africa's domestic PE definition, i.e. 2017 OECD MTC PE definition, in that it will be sub-divided according to the different components /sub-paragraph of article 5 of the domestic PE definition. Accordingly, South Africa's tax treaty practice with regards to each sub-paragraph, and the interpretation thereof by South African courts with regards to the latest developments in domestic tax law, will be analysed below.

B) Article 5(1): Fixed place of business PE

i) South Africa's tax treaty practice with regard to article 5(1)

With the exception of South Africa's four oldest tax treaties – Germany (1973), Malawi (1971), Sierra Leone (1960) and Zambia (1956) – South Africa's tax treaties are based on article 5(1) of the OECD MTC. There is no deviation in the UN, SADC and ATAF MTCs, all of which influence South Africa's tax treaty policy (*see* Chapter III).

The tax treaties concluded with Germany and Malawi deviate from the standard wording of the general definition of a PE, as defined in the 2017 OECD MTC, in that it follows the general definition of a PE as defined under the 1963 OECD MTC which reads as follow:

> '…"permanent establishment" means a fixed place of business <u>in</u> which the business of the business of the enterprise is wholly or partly carried on [emphasis added].'

The definitions of a PE in the Germany and Malawi treaties are included as 'general definitions' under article 3 and 2 of each respective tax treaty. The requirement in the Germany and Malawi tax treaties that the business of an enterprise must be carried on *in* a fixed place of business, rather than *through* it, may suggest a narrower interpretation compared to a business being carried on *through* a fixed place of business, which was the reason why the OECD changed the wording in 1977.[48]

[48] Vogel, K *Klaus Vogel on Double Taxation Conventions* E Reimer & A Rust (eds) 4e (2015) 357.

Paragraph 20 of the Commentary on Article 5(1) of the 2017 OECD MTC specifically suggest that the phrase 'through which' should be given a wide meaning in order for it to apply to any situation where the business is carried on at the location which is at the disposal of the enterprise for that purpose. Given the inconsistent use by South African courts of the OECD Commentaries,[49] it is not clear whether the South African courts will interpret these tax treaties in reading the PE definition of these tax treaties as a place of business *through which*, rather than *in which* the business of an enterprise must be carried on. It is submitted that the main requirement remains that the location should be at the disposal of the enterprise and used in order to fulfil the purpose of the enterprise.

The tax treaties with Zambia and Sierra Leone came into force in 1956 and 1960 respectively when South Africa was still under British control. The PE definition under these tax treaties predates the 1963 OECD MTC and determines that:

> 'The term "permanent establishment", when used with respect to an enterprise of one of the Contracting States, means a branch, management, factory, or other fixed place of business….'

These PE definitions are open-ended and courts may arguably take account of how the PE concept has evolved over time in the OECD/UN MTC when they may be called on to interpret these older treaties.

ii) South Africa's domestic tax law with regard to article 5(1)

South Africa's domestic law PE definition was discussed in overview above under Chapter III. As was indicated, the domestic definition of a PE relies on the OECD MTC definition, as it reads from time to time.[50] The discussion below concerns one important amendment made in 2010 as a measure to encourage foreign investment.

a) 2010 amendment to PE

iA) Reasons for amendment

In his address to the National Assembly on the Taxation Laws Amendment Bill 2010, the Minister of Finance referred to South Africa's world-class financial services industry, the stable financial regulatory system and well-functioning financial infrastructure as features that encourage foreign

[49] *See* Chapter III(A).
[50] The definition of 'permanent establishment' in s 1 of the Act.

investment. The minister noted that to take full advantage of these opportunities, certain stumbling blocks needed to be addressed. One of the concerns related to uncertainty about the income tax treatment of international portfolio investments, particularly private equity investments, which are often set up as either limited liability partnerships (LLP), limited liability companies (LLC) or vesting trusts.[51]

The Ministry of Finance considered that South Africa's extensive tax treaty network (the largest in Africa), as well as its investment protection agreement structure, provide ideal access to the African region and may result in South Africa being a preferred jurisdiction through which international investment will be structured.[52]

In practice, should an LLP, LLC or vesting trust be used to invest in or through South Africa, such entities may in practice appoint a managing partner in South Africa (typically a South African resident) to carry on the business of the entity by way of managing an investment portfolio on behalf of the other partners who act as passive investors.[53] This may be similar when an investment trust, structured as a vesting trust, nominates and appoints a trustee in South Africa to manage the portfolio of the trust on behalf of non-resident beneficiaries.[54]

The tax treatment of a partnership and vesting trusts in South Africa is based on their common law classification as transparent entities.[55] A partnership and a vesting trust are therefore considered transparent entities for South African income tax purposes as they will not be considered a taxable person or entity, but would rather be 'look-through' so that partners and vested beneficiaries constitute taxable persons.[56]

For domestic tax purposes each of the partners are deemed to carry on the business of the partnership, regardless of whether or not they are limited partners.[57] Non-resident partners are liable for South African income tax to the extent that any such profits are derived from a source with South Africa.[58] Similarly, profits received by non-resident vested beneficiaries may be subject

[51] National Treasury of South Africa op cit (n13) 82.
[52] Ibid 83.
[53] Ibid 82.
[54] Ibid.
[55] Ibid 81.
[56] Ibid.
[57] Section 24H(2) of the Act.
[58] *CIR v Epstein* 1954 (3) SA 689 (A), 19 SATC 221; *see also* Olivier & Honiball op cit (n17) 168.

to tax to the extent that such profits have been derived from a source within South Africa. Because of these general income tax principles, a general partner entitled to habitually conclude contracts on behalf of non-resident partners in South Africa will be considered to act on behalf of the partnership. When such a managing partner has a presence in South Africa (e.g. an office), this presence will most likely create a PE for each of the non-resident investing partners, resulting in them being subject to South African income tax in respect of each partner's proportionate share of the passive income (less expenditure attributable to the PE).[59] From an agency PE perspective, a deemed PE may arise also if the general partner is entitled to regularly conclude contracts on behalf of the partnership in the source state (i.e. South Africa).[60]

Some commentators argue further that even in the absence of any contractual authority, a general partner may already create a PE in South Africa if the partner performs duties on behalf of the partnership from a fixed place of business located in South Africa.[61]

Similar PE risks arise for a trustee of a vesting trust to the extent that such a trustee carries on business in the source state by way of managing an investment portfolio. The activities of the trustee may create a South African PE for non-resident beneficiaries to the extent that the beneficiaries are vested in the underlying income generated by the trust.

The Ministry of Finance considered these PE risks arising from the activities of South African-based fund managers to be a disincentive. Concern was expressed over two issues. The first being that due to foreign investors' possible reluctance to appoint local fund managers in South Africa, South Africa's fund managers will be denied the opportunity to manage foreign investment funds associated with the region and potentially lose out on developing expertise within the South African investment labour market.[62] The second concern identified is that South Africa's unattractive investment landscape may ultimately lead to foreign investors favouring a parallel investment structure through another, more friendly, tax jurisdiction, such as Mauritius to invest into Africa.[63] The use of such parallel structures may ultimately pose a threat to South Africa's competitive position as the 'investment gateway into Africa'.

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[59] *See* Oliver and Honiball op cit (n17) 169-170.
[60] W Horak 'Permanent Establishment' in A De Koker & E Brincker (eds) *Silke on International Tax* § 18.2.
[61] Ibid.
[62] National Treasury of South Africa op cit (n13) 83.
[63] Ibid.

iB) 2010 Proviso

The 2010 amendment to the domestic PE definition addressed these concerns, by virtue of adding the following proviso:

> Provided that in determining whether a qualifying investor in relation to a partnership, trust or foreign partnership has a permanent establishment in the Republic, any act of that partnership, trust or foreign partnership in respect of any financial instrument must not be ascribed to that qualifying investor.[64]

The amendment included the concept of 'qualifying investor', which is generally defined to refer to any member of a partnership or beneficiary of a trust, if the liability of such partner or beneficiary to any creditor is limited to such partner or beneficiary's contribution.[65]

According to the Ministry of Finance, the result of the amendment is that a partnership or trust will effectively be treated as an independent agent in relation to its qualifying investors.[66] Subject to specific requirements, certain activities of such a general partner or trustee undertaken in South Africa, on behalf of its qualifying investors, will not compromise the tax status of investors by precluding creation of a deemed PE solely by virtue of the activities of the managing partner/trustee.

iC) Effect of proviso

It can be questioned whether this adjustment to the domestic PE definition applies also to the PE definition in South Africa's tax treaties. The Ministry of Finance is of the view that it should apply on the basis that 'South African enabling legislation treats tax treaty rules as if fully incorporated into South African tax law'.[67] This reasoning is controversial, as it implies that through domestic law, both existing and future tax treaty PE definitions are unilaterally amended. Arguably, because the impact is only to provide relief, no taxpayer will contest such a unilateral tax treaty override.

The relief provided under the relaxation of the domestic PE definition is limited to gross receipts and accruals derived from financial instruments or the disposal of those financial instruments. Any other form of partnership or trust income may be subject to South African income

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[64] The definition of 'permanent establishment' in s 1 of the Act.
[65] The definition of 'qualifying investor' in s 1 of the Act.
[66] National Treasury of South Africa op cit (n13) 84.
[67] Ibid.

tax through creation of a PE by virtue of the activities of a managing partner or trustee of a vested trust.[68]

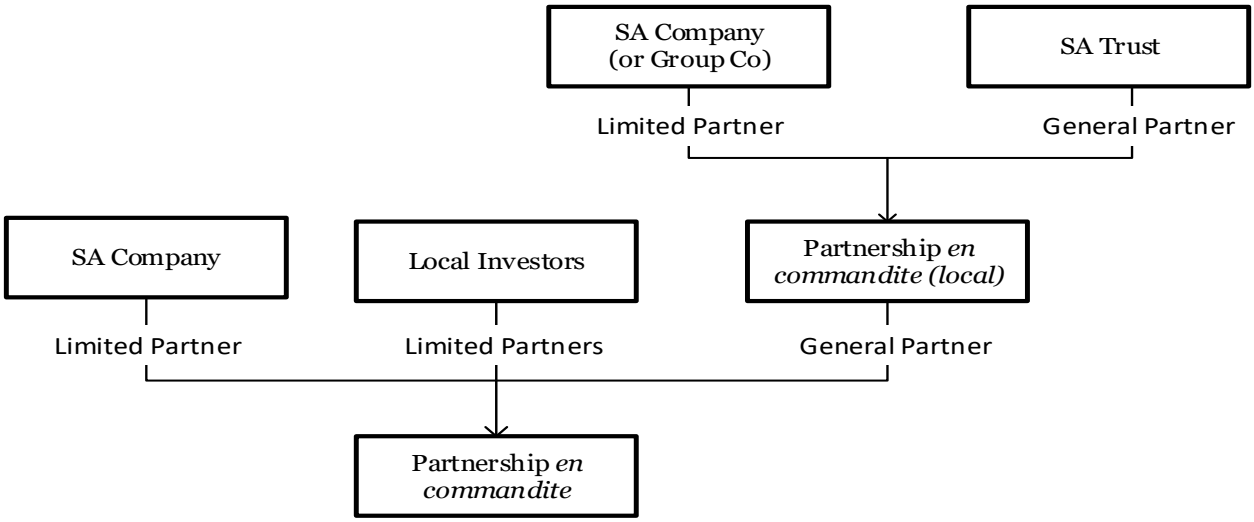
iD) SARS rulings

aa) Background

The particular activities to be excluded under the proviso to South Africa's PE definition has not been set out or defined. Possible guidance on the SARS's interpretation of what activities are to be excluded by a general partner/trustee acting as a fund manager can be found in Binding Class Ruling 17 of 5 February 2010, which was published by the SARS shortly before the amendment of the domestic PE definition.

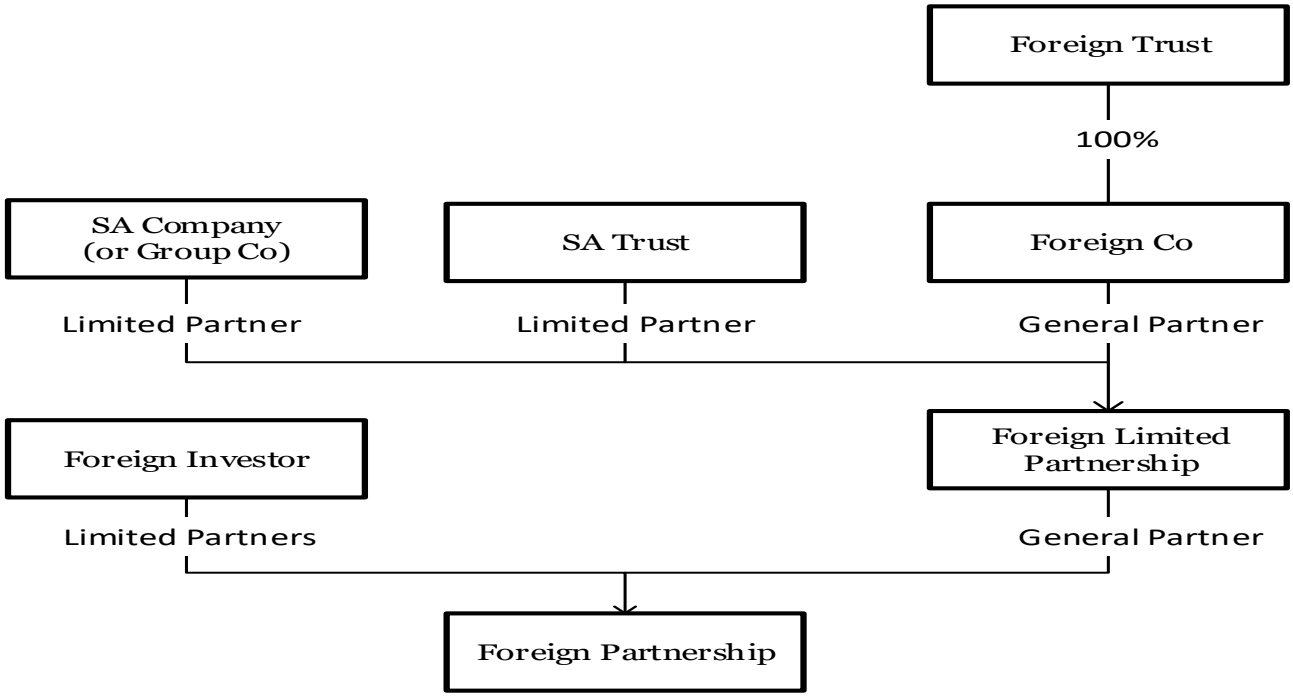
The ruling specifically deals with the question as to whether the activities to be performed by an agent in South Africa of a foreign partnership (a foreign fund) will create a PE through which such foreign fund will be seen as carrying on business in South Africa. The applicant in the ruling was a subsidiary of a South African company. The parties/investors to the proposed fund can be summarized as indicated below:

Local fund:

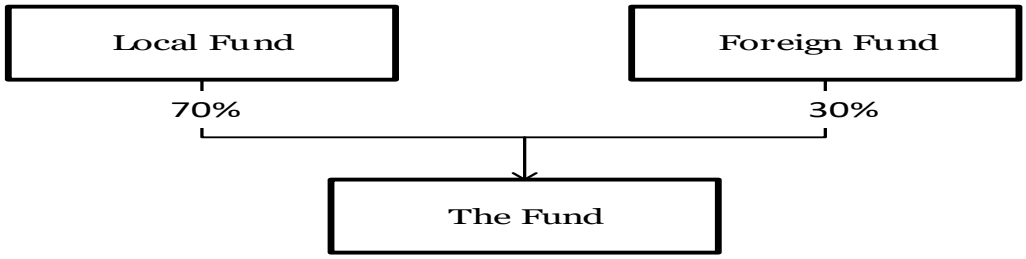


[68] Ibid.

Foreign fund:



It was envisaged that the two partnerships representing the local and foreign fund will invest in a South African private equity fund in the following manner:



From the above proposed investment structure, the South African private equity fund will essentially consist of two funds that are made up of a partnership between a local limited partnership, and a foreign limited partnership.

The general partners for the local and foreign fund are a local *en commandite* partnership and a second foreign limited partnership respectively. It is important to note that the general partner for the local *en commandite* partnership is made up of a third partnership with a South African Trust (SA Trust) acting as the general partner, and a foreign company (Foreign Co) acting as the general partner of the foreign limited partnership. Effectively, the general partners for the local and foreign fund will be SA Trust and Foreign Co respectively.[69]

In terms of the ruling, the applicant confirmed that by virtue of the fact that Foreign Co and SA Trust will be the general partners of the local *en commandite* partnership and foreign limited partnership respectively, they will be responsible for the management and administration of the foreign funds and the local funds. They will further make the final decisions relating to the acquisition and/or disposal of the investments of these funds.[70]

However, in terms of an advisory agreement between the applicant and the general partners of the two funds (i.e. SA Trust and Foreign Co) the applicant will identify all investment opportunities, and will refer such opportunities to general partners for consideration. The general partners will have the final authority to approve or decline these investment opportunities and the applicant will not be at liberty to negotiate the essential elements and details of any agreement in a way that may be binding on Foreign Co or SA Trust in their capacities as general partners of the foreign funds and the local funds respectively. Furthermore, SA Trust will not have any authority to take decisions or bind its foreign counterparts in any way.

The services to be provided by the applicant in terms of the ruling includes the following:

- sourcing, identifying, evaluating and recommending suitable investments;
- advising and assisting with due diligence on prospective investments;
- advising on the merits, structure and financing of any investment, including any additional capital required to satisfy any obligation of the funds;

[69] SARS Binding Class Ruling 17 (5 February 2010) 3.
[70] Ibid 4.

- advising on the negotiation of various agreements relating to the acquisition of an investment and its financing; and
- monitoring the performance of investments and making divestment recommendations.[71]

In essence, the applicant will be contracted by the general partners to develop a proposed portfolio strategy which will be submitted to the general partners of the two funds for approval. Only once both general partners are satisfied will the proposed overall portfolio strategy be approved.

It is further noted in the ruling that the applicant will be providing services to a variety of funds and, as such, the survival of its business will not be dependent on just the fund management activities of this proposed investment structure.[72]

Furthermore, the premises of the applicant will not be owned, leased or paid for by either of the general partners, nor will the general partners exercise any control over the offices or will any of the executive or managerial decisions be made in respect of the business of either general partner. The applicant will also not be able to conclude agreements on behalf of Foreign Co or any of the foreign investors.[73]

bb) Ruling made by SARS

Without providing any reasons for its decision, the SARS ruled that no PE will be created in South Africa on the part of the foreign investors by the activities, as listed in the ruling, to be performed by the applicant within South Africa in respect of the fund. The SARS also noted that Foreign Co's place of effective management is located in South Africa.[74] It is noteworthy that the activities which have been outsourced to the applicant under the services agreement in this particular ruling are the activities typically to be rendered by general partners on behalf of the limited partnership/vesting trust.

The researcher find the SARS's ruling of particular interest. It would appear that the envisaged effect in adding the proviso to South Africa's domestic PE definition in respect of the activities to be rendered by general partners on behalf of its foreign investors was already achieved

[71] Ibid 4.
[72] Ibid 5.
[73] Ibid 6.
[74] Ibid 7-9.

under the independent agent principles set out under article 5(6) of the then existing South Africa domestic PE definition (which was based on the 2010 OECD MTC PE definition at such time). The amendment of the domestic PE definition therefore seems to be a clarification of the application of the PE principles under domestic law, rather than providing additional tax relief as argued by the Ministry of Finance.[75] The amendment also provides, in the view of the researcher, a clear indication of how the PE definition can be interpreted in the spirit of the tax competitive position of a country's tax regime – in this context particularly South Africa's approach to the African investment market.

b) Interaction between domestic law and treaty reference to 'enterprise'

This issue of whether an activity of a taxpayer constitutes 'the business of an enterprise' under a tax treaty concluded with South Africa has not been challenged in any South African court nor have the SARS issued any guidance on this matter.

The phrase 'business of an enterprise' in article 5(1) of the OECD MTC consist of two separate concepts, namely *business* and *enterprise*. These terms are not provided with an exhaustive definition in the OECD MTC and must accordingly be interpreted under the domestic law, as provided for in terms of article 3(2) of the 2017 OECD MTC, unless the context requires otherwise.

South Africa's domestic law, like many other common law countries,[76] does not generally use the expression 'business' or 'enterprise' in its domestic income tax law; instead, the concept of 'carrying on a trade' is used, which includes 'business' along with several other concepts, such as 'profession', 'occupation' or 'venture'.[77] There is accordingly no exact literal alignment with the terms 'business' or 'enterprise' as used in article 5(1) of the 2017 OECD MTC and South Africa's domestic income tax law.

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[75] National Treasury of South Africa op cit (n13) 83.

[76] JF Avery Jones et al 'The Origins of Concepts and Expressions Used in the OECD Model and their Adoption by States' (2006) 60 *Bulletin for International Taxation* 6 sec 2.3.1.

[77] The definition of 'trade' in s 1 of the Act determines: '"trade' includes every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent as defined in the Patents Act or any design as defined in the Designs Act or any trade mark as defined in the Trade Marks Act or any copyright as defined in the Copyright Act or any other property which is of a similar nature'. Common law countries do not all use the same concepts, *see* JF Avery Jones 'Tax and Taxability: 'Trade, profession or vocation" seen through the eyes of Jane Austen, in Studies in the History of Tax' D. de Cogan (ed) forthcoming.

The approach established by the highest court in South Africa in *Downing*[78] on the interpretation of the PE definition in South Africa's tax treaties is to take cognisance of the fact that the language used is that of an 'international tax language', the meaning of which may be derived from the models upon which the treaty is based, such as OECD materials and relevant foreign case law. In this regard, the approach followed in the Australian case of *Thiel v Commissioner of Taxation*[79] is most likely also the approach that a South African court may follow.

In *Thiel*, the court considered whether a one-off sale of Australian listed shares by a non-resident Swiss individual in Australia fell with the meaning of an 'enterprise' for purposes of determining whether a PE in Australia has been created. The court essentially raised two questions: whether the taxpayer's activity amounted to 'an adventure in the nature of trade', which was the Australian internal tax law concept. Second, if it did, whether the Swiss individual carried on an 'enterprise', which was the treaty expression. In relying on similar provisions to article 3(2) of the OECD MTC at the time of the judgment, the Australian High Court held that in interpreting the word 'enterprise' under its domestic law, a one-off transaction could give rise to an enterprise, even though the concept of an enterprise was little known in Australian domestic tax law.

The expressions 'carrying on of a trade and 'carrying on of a business' are familiar phrases in South Africa's tax law.

In *Burgess v CIR*,[80] the court confirmed the wide and non-exhaustive meaning of 'carrying on of any trade'. Commentators argue that a trade can consist of continues activities as well as a single venture where, for example, a taxpayer seeks to make what can be considered a 'quick buck'.[81]

There are various interpretations on the relationships between 'trade', as defined in section 1 of the Act, as amended, and 'business' with respect to 'carrying on of a business' in South African case law.

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[78] *Downing* supra (n20) 256; *see also CSARS v Tradehold Ltd* 2012 132/11 ZASCA 61; 2013 (4) SA 184 SCA 18.
[79] *Thiel v Commissioner of Taxation* 1990 (171) CLR 338 at 349.
[80] *Burgess v CIR* 1993 (4) SA 161 (AD); 1993 (2) All SA 496 (A) 17 at 26.
[81] De Koker, AP & Williams, RC *Silke on South African Income Tax* § 7.2.

The Tax Court has held that the phrase 'carrying on of a business' has a narrower meaning than 'trade' since the definition of 'trade' includes, inter alia, a business.[82] The approach of higher courts to determine whether a 'business' has been carried on is to consider the nature and scope of the activities, the presence or absence of the profit motive and the continuity of activities.[83]

Based on the above approach of South African courts, the phrase 'business of an enterprise' in the general PE definition will likely be interpreted in a wide, unrestricted manner.

c) Human presence

There are no cases in South Africa dealing with the question whether human presence is necessary on a continuous or, at least, a recurrent basis in order for a business to be regarded as carried on at the fixed place under the general PE definition.

The Tax Court decision in *AB LLC v CSARS* involved service PEs in South Africa on the basis of recurrent presence of employees, but only in certain years.[84] A United States-based international consulting group provided advisory services to, inter alia, the airline industry. It won a contract in South Africa to perform services for the national airline and, to this end, it commenced its contract in February 2007. The final phase ended in May 2008 and a success fee was paid in 2009.[85]

During the period February 2007 to May 2008, the taxpayer made seventeen of its employees available to go to South Africa as and when required by a project manager. Three of the employees' work formed a core aspect of the project, who were each present in South Africa at the client's premises (an office) on a rotational basis for three weeks at a time. During the 2007 calendar year, which was also the taxpayer's tax year, the employees were in South Africa for a period exceeding 183 days. Contract fees were paid during 2007 and 2008 years of assessment and, in 2009, a success fee was paid based on the results achieved arising from the implementation of the consultancy recommendations.[86]

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[82] *ITC No 615* 1946 (14) SATC 399(U) 404.
[83] *Platt v Commissioner for Inland Revenue* 1922 (32) SATC 142 at 147-148; *Stephan v Commissioner for Inland Revenue* 1919 (32) SATC 54 at 61; *Estate G v Commissioner of Taxes* 1964 (26) SATC 168 at 176.
[84] *AB LLC* supra (n23).
[85] Ibid 7.
[86] Ibid 8.

The Tax Court found that a PE was created on the basis that the services of the taxpayer met the requirements of article 5(2)(k) of the South Africa-United DTC (1997) (a deemed services PE provision similar to that of article 5(3) of the UN MTC) and therefore did not have to examine whether the requirements of article 5(1) were met.[87] Despite this, the court proceeded in any event to examine the activities of the taxpayer against article 5(1) and found there was no doubt that the taxpayer had a fixed place of business at the South African client's premises.[88]

In determining whether a fixed place of business was established, the court took concise consideration as to the extent of the taxpayer's employees' physical (i.e. human) presence at its client's business premises, and underlined the fact that throughout its stay in South Africa, the client's employees were sufficiently physically present, albeit on a rotational basis, at the client's premises during the 2007 and 2008 years.[89]

The more controversial finding of the Tax Court was to allow the taxation of the success fee paid in 2009 on the basis that a PE was created in the preceding years (2007 and 2008), when the US company in 2009, in fact, clearly no longer had any employees present in South Africa. The court held that while the taxpayer had no physical presence (i.e. human presence) in South Africa during any part of the 2009 fiscal year, the success fee received was based on work done in the preceding 2 years, when the taxpayer did in fact have a PE in South Africa, and was accordingly deferred payment that was received for the completion of the operations in 2008, but which could only be accounted for in 2009.[90]

In the leading case of *Downing*, the court said of article 5(1) and (2) of an OECD MTC-based tax treaty that:

> It contemplates the situation where, by reason of factors such as occupation and control, the fixed place of business can be said to be the taxpayer's place of business and does not cover the case where the taxpayer's business is conducted through an agent who himself carries on his own business on his own business premises.[91]

Occupation presupposes human presence, but control can be exercised from a distance through, for example, remote control over equipment. In principle, it is therefore possible to

[87] Ibid 23.
[88] Ibid 24
[89] Ibid 25.
[90] Ibid.
[91] *Downing* supra (n20) 257.

establish a PE in South Africa without human presence but provided the necessary control may be exercised over the place of business.

iA) SARS rulings on 'human presence'

In Binding Private Ruling 82 of 19 May 2010, one question was whether the presence of web servers in South Africa constituted a PE for a non-resident. The facts concerned software programs that were comprised of three components, as far as its operations were concerned: a database server, a processing server and a web server. These servers were set up as follows:[92]

- The database server was owned by a non-resident and located in its country of residence. It stored and retrieved all records of business transactions of the software users.

- The processing server will be located in the country of residence of the same non-resident and perform batch processing of data to produce financial transactions. The processing server accessed the database server to retrieve and process the necessary transaction and store transaction information, and submitted transactions to relevant South African financial institutions.

- The web server was located in South Africa and was owned and operated by a South African company. The web server provided access to the software programs via a collection of web pages. The web server accessed the database server to retrieve information, store any new data, allow software users to process transactions, view customer details and historic transactions, and view and print reports.

Both the non-resident owner of the database and processing servers and the South African company that owned the web server were partners in the same partnership. [93]

The SARS ruled that the web server in South Africa (belonging to the one partner) will not create a PE for the non-resident partner who owned the other servers. Regrettably, no reasoning for this ruling was provided.[94]

[92] SARS Binding Private Ruling 82 (19 may 2010) 4.
[93] Ibid 3.
[94] Ibid 5.

In Binding Private Ruling 102 of 4 May 2011 the SARS appears to have considered the absence of employees or human agents in South Africa, key in confirming that a non-resident company with a secondary corporate law registration in South Africa did not have a PE.[95]

d) The 'at the disposal' requirement

Under the previous heading the highest court's approach in *Downing* was discussed. The Supreme Court's approach was that for a PE to be created under the rule of article 5(1) and (2), a situation should prevail:

> '…where, by reason of factors such as occupation and control, the fixed place of business can be said to be the taxpayer's place of business and does not cover the case where the taxpayer's business is conducted through an agent who himself carries on his own business on his own business premises.'[96]

The emphasis here on occupation and control can be reconciled with the 'at the disposal of' requirement that the Commentary on Article 5(1) of the 2017 OECD MTC implies.[97]

The question of whether having a certain amount of space at a taxpayer's disposal and using it for business activities is sufficient for creating an enterprise to have a PE was addressed in the matter of *AB LLC v CSARS*.[98] The non-resident taxpayer was granted space inside the board room of a client from where it conducted most of its activities under a consultancy contract.[99] The taxpayer was allowed to use tables, chairs and telephones and had access and use of the room and equipment during normal business hours (no access was possible after hours).[100] The nature of the services to be provided required the taxpayer's employees to be based at the premises of the client at all times, and essentially the boardroom served as the 'engine room' of the taxpayer's operations at the client.[101] At times, some of the employees of the taxpayer would, for short periods, have to

[95] SARS Binding Private Ruling 102 (4 May 2011) 5. The facts in this ruling were that non-resident company was managed by a board of directors in accordance with predefined investment objectives and strategies exclusively at a location outside South Africa. This board appointed a foreign investment advisor to conduct research on targets and industries in Africa, which includes South Africa.
[96] *Downing* supra (n20) 257.
[97] Paragraphs 10, 12 and 14 OECD MTC (2017) 'Commentary on article 5'.
[98] *AB LLC* (n23) 8. *See* also PJ Hattingh 'Commentary: *AB LLC and another v Commissioner of the South African Revenue Services* 2015 17 ITLR 911.
[99] Ibid 7.
[100] Ibid 8
[101] Ibid.

go to another department of the client (mostly to interview employees), however, all of these activities were geographically located in one place.[102]

The court found that the boardroom of the South African client was at the disposal of the non-resident taxpayer.[103] The court was convinced that throughout its stay in South Africa, the taxpayer, through its employees, had a physical presence in the boardroom. [104] The court noted that while some of the taxpayer's employees may have moved to other areas of the client's premises, the taxpayer was, at all times, present in the boardroom during the tenure of the contract.[105]

Even though the taxpayer's employees did not spend all of their time in the boardroom, but were also required to work in other areas such as meeting with employees in other divisions, all of this work took place within the same geographical premises of the client. This is consistent with paragraph 25 of the Commentary on Article 5 of the 2017 OECD MTC.[106]

The taxpayer argued that it did not have access to the boardroom after normal working hours, nor did it have any keys to the boardroom. The court, however, found that despite the taxpayer only having access to these premises on week days and during working hours, at no stage did the taxpayer ever request access to the boardroom or any other part of the premises after working hours.[107] During such time that the client's offices were used, the court found that the client's boardroom served as the 'engine room' of the taxpayer's operations.

The taxpayer also raised the point that while it was present in the taxpayer's boardroom, it was restricted to solely conduct the business relating to the contract with the client, and in doing so unable to conduct any of its other business. The court found that for the purposes of article 5(1), it was not necessary for the non-resident taxpayer to carry out all of its business from the 'fixed place of business', as it would still create a fixed place of business even though it only performed part of its obligations in terms of the contract at the premises.[108]

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[102] Ibid.
[103] Ibid 23.
[104] Ibid 24.
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid 25.

Whether or not a formal legal right to use a particular place of business is required to meet the 'at the disposal' requirement has not been explicitly dealt with by the South African courts to date, nor has SARS issued any guidance on this matter. The view of the Supreme Court of Appeal in *Downing* that either occupation or control is sufficient, suggests that a formal legal right is not a requirement (in South African law occupation is a factual question and the concept of illegal occupation is well known).[109]

There have been no prescribed standards set by SARS or South African case law in determining the level of 'control' necessary to meet the 'at the disposal' requirement. In this regard, the matter of 'control' was briefly considered in *AB LLC v CSARS* in determining whether the taxpayer's employees had a presence in its client's boardroom. The court held that the taxpayer had exclusive use of the space for the entire duration of the contract since it had at its disposal, as its employees had, constant access to the boardroom during working hours.

The issue of whether a company, forming part of a multinational group, to have a PE in the offices of another same group company by way of the employees of such latter company follow the directions of senior staff of the first-mentioned group company has not been raised in South Africa case law nor has SARS issued any guidance. The researcher is of the view that South African courts are likely to consider OECD materials and, perhaps, the Supreme Court of Italy's decision in the *Philip Morris* case (generally foreign tax cases from common law countries are considered).

e) The 'fixity' and 'permanency' requirements

Similar to the general PE definition in article 5(1) of both the OECD and UN MTCs, no specific time period has been laid down in South Africa's domestic PE definition, or in any of its PE definitions as set out in its tax treaties, in terms of which a place of business must exist for a specified length of time before it can be considered to be 'permanent'. Although there has not been any guidance issued by SARS on the 'fixed' or 'permanency' elements of the PE general definition, there are two South African cases that may provide some guidance on these concepts.

[109] *Downing* supra (n20) 257.

iA) 'Permanency' under South African case law

In the matter of *Transvaal Associated Hide and Skin Merchants v Collector of Income Tax Botswana* it was found, on the facts, that the regular occupation of a shed in South Africa which was rented annually at an annual show by a merchant indicated that such taxpayer's occupation of the premises was permanent and not temporary or occasional of nature, and could be regarded as continuing indefinitely.[110] The judgment in this case supports the view expressed in the 2017 Commentary on Article 5(1) at paragraph 32: the use of premises need to be permanent and not temporary (unless of a recurring nature) in order for the required degree of permanency to constitute a fixed place of business.[111]

In *AB LLC v CSARS*, as discussed above, the Tax Court specifically considered whether the short-term recurrent presence of the non-resident taxpayer's employees in South Arica constituted a 'permanent presence'. Even though certain employees were only physically present at the client's offices in South Africa for three weeks at the time, the court was satisfied that the non-resident achieved a sufficient level of permanence in South Africa through the recurrent nature of the activities of its employees at a client's offices since their presence, in aggregate, exceeded the 183-day threshold in terms of article 5(2)(k) of the South Africa-United States DTC (1997).[112]

iB) 'Permanency' under South Africa's tax treaties

An issue that often arises in practice, given South Africa's wealth of natural resources, is exploration activities taking place both on land and at sea in a demarcated area for a very short period in time, often because of licence terms. No guidance has been provided by the South African courts or SARS on the treatment of such short-term exploration activities. Certain activities which are typically performed for short durations at a time are included in a select number of South Africa's tax treaties. For example, in the tax treaties with Australia (1999, as amended by way of a protocol in 2008) and New Zealand (2004)[113], activities relating to the exploration or exploitation of natural resources and the use of substantial equipment is specifically addressed. In the tax treaty with Australia, activities, including the operation of substantial equipment in the other state in the

[110] *Transvaal Associated Hide and Skin Merchants v Collector of Income Tax Botswana* (1967) 29 SATC 97 at 115.
[111] Olivier and Honiball op cit (n17) 339-340 argue that in their view, what this case implies is that it is not so much the activities that need to be exercised with the necessary degree of permanence, but rather that the place of business needs to be set up with a certain degree of permanence.
[112] *AB LLC* supra (n23) 25.
[113] *See* art 5(4)(b) of the South Africa's DTCs with Australia and New Zealand.

exploration for or exploitation of natural resources situated in that other state, will be deemed to constitute a PE should such activities continue for a period exceeding in aggregate 90 days in any 12-month period.[114]

In both the tax treaties with Australia and New Zealand a PE will also be deemed to have been established to the extent that substantial equipment (unrelated to the exploration for or exploitation of natural resources) is operated in the other state for a period or periods exceeding 183 days in any 12-month period.[115]

The tax treaty concluded with Israel (1979) includes, under its list of non-exhaustive deemed PEs, the maintenance of substantial equipment or machinery within a state for a period of more than 6 months.[116]

In the tax treaty with Greece (2003), a person or entity of one contracting state carrying on activities in connection with preliminary surveys, exploration, extraction or exploitation of natural resources situated in the other contracting state shall be deemed to be carrying on such activities through a PE, unless such activities are carried on for a period or periods not exceeding 30 days in the aggregate in any 12-month period.[117]

In the tax treaty concluded with Bulgaria (2005), a drilling rig or ship used for exploration for natural resources will constitute a PE to the extent that the activity in respect of such exploration continues for a period or periods exceeding 3 months in any 12-month period.[118]

In the tax treaty between South Africa and Cameroon (2015), an enterprise shall only be deemed to have a PE in a contracting state if it provides services or supplies equipment and machinery on hire used, or to be used, in exploration for, extraction of, or exploitation of mineral resources in that the other state to extent that such activities continue for a period or periods exceeding in the aggregate 183 days in any 12-month period.[119]

In the tax treaty with Kuwait (2007), if substantial technical, mechanical or scientific equipment or machinery is used in one contracting state under contract by any person or enterprise

[114] Article 5(4)(b) Australia – South Africa DTC.
[115] Ibid art 5(4)(c) and art 5(4)(b) New Zealand – South Africa DTC.
[116] Article 5(2)(i) Israel – South Africa DTC.
[117] Article 5(7) Greece – South Africa DTC.
[118] Article 5(2)(g) Bulgaria – South Africa DTC.
[119] Article 5(3)(c) Cameroon – South Africa DTC.

in the other state for more than 6 months within any 12-month period, a PE will deemed to have been created in the state in which these machinery or equipment are used.[120]

The table in Appendix 1 indicates the PE time periods in South Africa's tax treaties for:

i) activities related to a building site, construction, installation or assembly project or supervisory activities connected therewith (where applicable);
ii) the furnishing of employee services; and
iii) independent professional services.

Collectively, it is evident that South Africa's tax treaty practice, to a large extent (71 per cent of the total), considers the activities of a non-resident in South Africa to be sufficiently permanent if they exceed 183 days in any 12-month period. In considering these three categories collectively, it is interesting to note that South Africa's tax treaty PE policy with regard to permanency is not only more aligned to the UN MTC that to the OECD MTC, but is also aligned with the PE time periods prescribed in the SA MTC. This policy is inconsistent with South Africa's domestic PE policy, not only due to the fact that South Africa's PE definition is based on the OECD MTC, but also because South Africa's domestic PE definition does not include any provisions for employee and independent professional services.

The following specific observations can be made about the time periods (*see* Appendix 1 for details about specific tax treaties):

- *Construction PE timeframes:* With the exception of the older colonial-era tax treaties with Grenada (1960) Sierra Leone (1960) and Zambia (1965), all of South Africa's tax treaties include a provision that specifically deals with a building site, construction or installation project with all but 7 including supervisory activities connected therewith. 37 tax treaties (47 per cent) provide that such projects or activities constitute a PE where the duration of such activities exceed a period of 6 months. Equally 37 tax treaties (45 per cent) provide that a PE will only be created to the extent that such a project or activity continues for a period of at least 12 months. Older treaties, such as the tax treaties with Malawi (1971), Grenada, Sierra Leone (1960) and Zambia (1965), do not include any time period with

[120] Article 5(5) Kuwait – South Africa DTC.

regard to building sites, construction, installation or assembly projects. The tax treaty with Romania (1995) includes a 9-month window period.

- *Corporate service PE timeframes:* With regard to the services PE provisions, which deal with the rendering of services by an enterprise through employees, the bulk of treaties with such clauses (79 per cent of the 33 tax treaties) consider the physical presence of such employees to constitute a PE where they are present for a period exceeding 6 months. Only two treaties increase the period to 12 months, namely Canada (1997) and China (People's Rep.) (2001). The tax treaties concluded with Belarus (2003), Greece (2003) and Indonesia (1998) require such employees to continue rendering services in a contracting state for a period of at least 120 days, whereas the tax treaties concluded with Lesotho (2016), Oman (2003) and Swaziland (2005) only require an enterprise to render any services through its employees in a contracting state for 90 days. With the exception of China, which measures the rendering of these services by an enterprise through its employees over a period of 24 months, all of South Africa's other tax treaties measure the rendering of such services over a 12-month window.

- *Professional service PE timeframes:* The great majority of deemed independent professional services PE provisions in South Africa's tax treaties require physical presence for a period longer than 6 months in any 12-month period. The tax treaty concluded with Belarus reduces the period to 120 days, whereas in the tax treaties concluded with Lesotho, Oman and Swaziland, the threshold is 90 days in any 12-month period.

Overall, of the 37 tax treaties that include a 6-month window period for construction PEs, 30 (81 per cent) of such treaties also include a corporate service PE, and in most cases, also an independent professional services PE. With the exception of the tax treaties with Greece, Indonesia, Lesotho, Oman and Swaziland, 25 of the aforementioned 30 tax treaties (83 per cent) follow a consistent 6-month approach for all three types. This represents 32 per cent of South Africa's tax treaties, which are mostly with developing nations. The majority (63 per cent of 22 tax treaties) of South Africa's tax treaties that use a 12-month threshold period for a construction PE do not include any service PE. Only 13 (35 per cent) of the 37 tax treaties that use a 12-month threshold include a service PE.

C) Article 5(2): List of fixed places of business PE

i) South Africa's tax treaty practice with regard to article 5(2)

South Africa's older tax treaties, such as with Germany (1973), Israel (1980) and Malawi (1971), follow the 1963 OECD MTC in including in the examples list 'building site or construction or assembly project which exists for more than 12 months'.[121]

As for further inclusions in the list of activities listed under article 5(2) the 2017 OECD MTC, South Africa has a clear treaty practice to request or accept an expanded list. The most notable deviations in South Africa's tax treaties, which is set out in Appendix 2, are as follows:

- In 29 tax treaties (37 per cent of the total) activities such as the exploitation and/or exploration of natural resources are added to the list in article 5(2). In some of them, these activities are described, such as referring to equipment (drilling rigs) or installation projects (*see* Chapter IV(J)(c)).[122]

- 15 tax treaties (19 per cent of the total) list warehousing and storage facilities. A few add sales outlets.[123] All these treaties, except the tax treaty with the United States, were concluded by South Africa with other developing countries.

- 10 tax treaties (13 per cent of the total) include a building site, construction, installation or assembly project, all of which also include supervisory or consultancy activities in connection with such projects.[124]

- 7 tax treaties (9 per cent of the total) include agriculture or forestry locations such as farms and/or plantations and, in some cases, orchards, vineyards and/or guest farms.[125] All these treaties were concluded by South Africa with predominantly other developing countries or a few developed countries in the Middle East.

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[121] Article 3(1)(j)(bb) Germany – South Africa DTC; art 5(2)(h) Israel – South Africa DTC and art 2(1)(k)(ii)(gg) Malawi – South Africa DTC.
[122] *See*, for example, art 5(2)(g) of the Bulgaria – South Africa and Cameroon – South Africa DTCs.
[123] *See*, for example, art 5(2)(h) and (i) of the Cameroon – South Africa DTC; art 5(2)(f) Indonesia – South Africa DTC; art 5(2)(h)-(g) South Africa – United States DTC.
[124] *See*, for example, art 5(2)(g) of the Italy, Russia and Turkey DTCs with South Africa.
[125] *See*, for example, art 5(2)(g) Israel – South Africa DTC; art 5(2)(h) Namibia – South Africa DTC; art 5(2)(g) South Africa – United Arab Emirates DTC.

Service PEs require a special mention: 43 tax treaties (54 per cent of the total) contain a service PE clause. In 3 of these tax treaties, service-type PEs, some as described in article 5(3)(b) of the 2017 UN MTC, are instead of a stand-alone provision, included rather under the list of examples contained in article 5(2).[126] South Africa's tax treaty policy is clear in that inclusion of a service PE in line with article 5(3)(b) of the UN MTC is the negotiating position. One therefore must infer that the explanation for rather including service PEs as examples in these three treaties was the result of compromise during negotiation.

ii) South Africa's domestic tax law with regard to article 5(2)

South Africa's domestic PE definition follows the non-exhaustive list of PE examples as set out in article 5(2) of the 2017 OECD MTC.

The listing of service PEs under article 5(2) instead as a stand-alone clause has caused considerable confusion and disputes.

Prior to *AB LLC v CSARS* the approach in South Africa was thought to be as laid down since 1977 in the OECD Commentary, namely that article 5(2) of the OECD MTC (as well as that of the UN MTC) merely includes a list of examples that constitute *prima facie* PEs, subject to the condition that they meet the requirements of article 5(1).[127]

The judgment in *AB LLC v CSARS* dealt with a number of interpretational issues for the deviating aspects of the PE definition. The most far-reaching aspect of this judgment is that it rejected the OECD approach to understand the list of activities under article 5(2).[128] The Tax Court rejected the idea that additional items in the list of article 5(2) are merely illustrative *prima facie* examples subject to compliance with the general definition in article 5(1).[129] Such examples rather extend the definition in article 5(1), as they create different substantial requirements for a PE to arise than those embedded in article 5(1).

[126] These are art 5(2)(g)(ii) Namibia – South Africa DTC; art 5(2)(h)-(i) Swaziland – South Africa DTC and art 5(2)(k) South Africa – United States DTC.
[127] Olivier & Honiball op cit (n17) 337.
[128] *See* Hatting op cit (n99) 4.
[129] Ibid 3.

The taxpayer argued that it was not liable for tax in South Africa since it did not carry on business through a PE in South Africa. Reliance was placed on article 5(2)(k) of the South Africa-United States DTC (1997):

> 5(2) The term 'permanent establishment' includes especially:
>
> > (k) the furnishing of services, including consultancy services, within a Contracting State by an enterprise through employees or other personnel engaged by the enterprise for such purposes, but only if activities of that nature continue (for the same or a connected project) within that State for a period or periods aggregating more than 183 days in any twelve month period commencing or ending in the taxable year concerned.

The taxpayer relied on paragraph 12 of the OECD Commentary on Article 5 of the 2010 OECD MTC, and argued that as the entire list is merely illustrative, it was still necessary to find that the taxpayer had complied with the requirements of the general definition as defined in article 5(1) of the treaty, and that the facts indicated that this was not the case.[130] This interpretation was supported by the Canadian Federal Court of Appeal in *The Queen v Dudney*,[131] where Mr Dudney, a US resident providing advice to a client in Canada in circumstances not dissimilar to those of this case, was found not to have a fixed base regularly available to him in Canada under the Canada-United States DTC (1980).

The Tax Court underlined the importance of the OECD Commentary and noted that it is of 'immense value'.[132] The Tax Court, however, found that given the fact that there is no equivalent item in article 5(2) of the OECD MTC, the OECD Commentary was of no assistance.[133]

The Tax Court stated that it was, in its view, crucial in the first instance to take note of the prominence of the expression 'includes especially' in article 5(2) and to give intelligent meaning to the concept of 'permanent establishment.[134] Relying on dictionary definitions and non-tax case law,[135] the court found that the word 'include' used in a statute is often used to extend or enlarge the meaning of a thing or concept, and that it brings within the scope of the thing or concept others that may not ordinarily or naturally be part of the thing or concept.[136] The court noted the warning

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[130] *AB LLC* supra (n23) 14.
[131] *The Queen v Dudney* WA (2000) DTC 6169.
[132] *AB LLC* supra (n23) 15.
[133] Ibid 19.
[134] Ibid 16. *See* also Hattingh op cit (n99) 4.
[135] *See Jones & Co v Commissioner for Inland Revenue* 1926 CPD 1 at 5; *Rosen v Rand Townships Registrar* 1939 WLD 5 at 10 and *R v Debele* 1956 (4) SA 570 (A) 575.
[136] Hattingh op cit (n99) 4.

given by Baker,[137] namely the danger that in some countries, a revenue authority or tribunal may conclude that a place of business within the illustrative list was a PE, even though it did not satisfy all the requirements of article 5(1).[138] The court seems to have misconstrued Baker's warning as rather an invitation to follow an interpretation which he (Baker) clearly did not mean to approve.

The Tax Court took the view that the drafters of the treaty must have been particularly drawn towards making sure that those factors, i.e. the services under article 5(2)(k) of the treaty, are given special attention. Were this not the case, the Tax Court argued, they (the drafters of the treaty) would not have used the words 'includes especially'. Accordingly, the court concluded that the contents of article 5(2)(k) must be read to mean that they are an integral part of article 5(1), and that as soon as the taxpayer's activities fell within the ambit of article 5(2)(k) of the treaty, a PE was established and there was no need for a further or separate enquiry as to whether or not the requirements of article 5(1) had been met.[139]

The Tax Court acknowledged that this interpretation is contrary to what is recommended in the Commentary on Article 5 of the OECD MTC.[140] The court noted that unlike article (5)(a) to (f) of the OECD MTC, each of which refers to a place of work, article 5(2)(k) of the treaty refers to a form of work and therefore is a 'different species'.[141] Consequently, the court concluded that the interpretive approach adopted with regard to article (5)(a) to (f) of the OECD MTC 'cannot be replicated without thought or input'.[142] In addition, the court found further support for its approach in the US Technical Explanation to the tax treaty because of the following statement therein:

> 'As indicated in the OECD Commentaries … a general principle to be observed in determining whether a permanent establishment exists (*except with respect to the furnishing of services under subparagraph (k)*) is that the place of business must be "fixed" in the sense that a particular building or physical location is used by the enterprise for the conduct of its business' [emphasis added].[143]

The legal status of the Technical Explanation as a unilateral document was not discussed by the Tax Court.

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[137] Baker, PP 'Double Taxation Conventions' para 5B.14.
[138] Hattingh op cit (n99) 4.
[139] Ibid 3.
[140] *AB LLC* supra (n23) 18.
[141] Ibid.
[142] Hattingh op cit (n99) 3.
[143] *AB LLC* supra (n23) 22.

D) Article 5(3): Construction PE

i) South Africa's tax treaty practice with regard to Article 5(3)

As indicated in Appendix 3, only 2 (3 per cent of the total) of South Africa's tax treaties follow the construction PE wording proposed in the 2017 OECD MTC.[144] Total of 71 of South Africa's tax treaties (91 per cent of the total) follow the wording proposed in article 5(3)(a) of the 2017 UN MTC, which includes an 'assembly project'.[145] Out of these 71 tax treaties, 70 (89 per cent) include supervisory and/or consulting activities in connection with such projects.[146]

The time threshold period included in the construction PE provision of South Africa's tax treaties is equally divided between 6 months (37 tax treaties, 47 per cent of the total) and 12 months (36 tax treaties, 46 per cent of the total). The Romania-South Africa DTC (1993) uses a 9-month threshold, while some older tax treaties do not have any time threshold.[147]

With the exception of the Mauritius-South Africa DTC (2013), all 22 tax treaties concluded by South Africa with African countries use a 6-month threshold in accordance with the 2017 UN MTC.[148]

As discussed under Chapter III(C), South Africa as a non-OECD member noted its position on article 5(3) of the 2017 OECD MTC to negotiate a deemed PE time period threshold relating to a building site, construction, installation or assembly projects and to consider any supervisory activities connected therewith as constituting a PE. This position is aligned with article 5(3)(a) of the 2006 SA MTC, 2016 ATAF MTC and of the 2017 UN MTC. From the treaty analysis summarized above it appears that South Africa's policy position is successfully implemented in most of the construction PE clauses in its tax treaties because they provide that an 'assembly project' and supervisory activities in connection with a building site, construction, assembly or installation project will constitute a PE. South Africa is less successful in negotiating for a 6-month time threshold with developed countries.

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[144] These are the Austria – South Africa DTC and the Republic of Korea – South Africa DTC.
[145] *See*, for example, art 5(3) Chile – South Africa DTC and art 5(3) Hong Kong – South Africa DTC.
[146] *See*, for example, art 5(4)(a) of the 2008 protocol to the Australia – South Africa and art 5(3) Belgium – South Africa DTC.
[147] *See* the Malawi – South Africa DTC, Grenada – South Africa DTC, Sierra Leone – South Africa DTC and South Africa - Zambia DTC.
[148] This is due to the fact that the UN MTC clearly favours the source state by providing a shorter window period for construction activities. *See* Olivier & Honiball op cit (n17) 343.

As to the structure of South Africa's PE definitions in tax treaties, the construction clause generally features an article 5(3) similar to the OECD MTC.[149] In 9 tax treaties (11 per cent of the total) this provision is listed under the *prima facie* PE examples in article 5(2) of such treaties.[150] One can conclude that South Arica's tax treaty negotiation position would be to ask for the construction PE provision as a separate sub-article and that the explanation for including this provision under the PE example list in 9 tax treaties was the result of compromise during negotiations. The listing of a construction PE under the examples list leads to uncertainty and interpretive difficulty (i.e. whether it needs to comply with the requirements of article 5(1)), as the discussion of local case law shows (*see* Chapter IV(C)(ii)).

ii) South Africa's domestic tax law with regard to article 5(3)

a) Misalignment with domestic definition

There are no local reported court decisions or rulings by the SARS that deal with the interpretive questions raised by the PE construction clauses.

The way in which South Africa negotiates its construction PE clauses in tax treaties is not aligned with South Africa's domestic income tax position: under domestic law, article 5(3) of the 2017 OECD MTC applies, which excludes an assembly project and any supervisory activities from constituting a PE and includes a time period threshold of 12 months after which a building site, installation or construction project will constitute a PE. This conflict does not necessarily mean that there may be a mismatch in the assertion over taxing rights for non-residents. As explained at Chapter II(B), the PE concept is not used for all source rules to establish the liability of non-residents. In regard to income from services, the source of income is located at the place where the services are rendered (regardless of the presence of a PE). In other words, a payment for, say, supervisory activities in connection with an assembly project in South Africa will be considered to be received from a local source when the supervisor physically renders the service at the assembly project in South Africa. There is no minimum time threshold to establish the tax liability

[149] The construction PE clause features as an 'article 5(3)' in 64 of South Africa's tax treaties (81 per cent of the total). Older tax treaties, such as the Germany - South Africa DTC, Malawi - South Africa DTC and South Africa - Zambia DTC include the construction PE provision in the definition article of such tax treaties.

[150] *See*, for example, Swaziland – South Africa DTC, Turkey – South Africa DTC and United States – South Africa DTC.

of the non-resident recipient, although time apportionment is allowed when the services are rendered both within and outside South Africa.[151]

b) OECD v UN Commentaries

One will expect that given the fact that South Africa's domestic PE definition follows the 2017 OECD MTC, the South African courts may consider the view of the 2017 OECD Commentaries that a building site, construction or installation project shall only constitute a PE if it lasts more than the time threshold noted in that provision.[152] However, considering the fact that 89 per cent of South Africa's tax treaties follow the construction PE provision of article 5(3)(a) of the UN MTC, there would clearly be a case to consider the 2017 UN Commentary: 'when a building site, construction, installation or assembly project exists for 6 months, it will in practice almost invariably also meet the requirements of article 5(1)'.[153] As mentioned in Chapter II(D)(i), no South African court has referred to the UN MTC when faced with a treaty interpretation question.

c) Article 5(3) as a *lex specialis*

There are South African commentators who take the view that article 5(3) is *lex specialis* and therefore overrides the basic rule contained in article 5(1).[154] The Ministry of Finance's view on the interpretation of the construction PE provision can be seen in Explanatory Memorandum on draft tax treaties (*see* Chapter II(D)(i)), which are presented to the responsible Parliamentary committees who must approve a treaty for ratification.[155] There it is noted that a Construction PE provision which follows article 5(3)(a) of the UN MTC provides expressly that a building site or construction, installation, assembly or installation project only constitutes a PE if it continues for more than the time period stipulated in the treaty. Furthermore, the Explanatory Memorandum specifically states that supervisory activities carried on in connections with such a site or project will only constitute a PE if such services meet the time period threshold, irrespective of whether the foreign enterprise has no fixed place of business in the source state.

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[151] For an overview of the source case law guidance in South Africa, *see* J Hattingh 'Commentary: *X v Commissioner for the South African Revenue Service* 2018 (20) ITLR 658' 661-672.
[152] Commentary on article 5 op cit (98) Paragraph 49.
[153] Paragraph 1 UN MTC (2017) 'Commentary on Article 5'.
[154] Olivier & Honiball op cit (n17) 343.
[155] *See* for example Explanatory Memorandum op cit (n28) 3.

d) Potential abuse of time threshold in Article 5(3)

If indeed it is the case that construction PE clauses that feature as stand-alone sub-clauses in South Africa's tax treaties are *lex specialis* vis-à-vis article 5(1) of these clauses, avoidance of the time threshold becomes an obvious avenue to preclude the existence of a PE. The circumvention of the time threshold may be achieved, for example, by splitting up the relevant contracts among group companies. As noted above under Chapter III(D)(iii), South Africa has not opted for the application of article 14 of the MLI for the clauses that will address the splitting up of contracts as a means to artificially avoid PE status.[156] South Africa's tax treaties with Australia (1999, as amended through 2008), Mexico (2009) and New Zealand (2004) contain detailed anti-avoidance rules aimed to address splitting up of contracts to avoid PE status – these are discussed in more detail in Chapter IV(I). It is arguable that South Africa's domestic GAAR applies to its tax treaties, although the adoption of the principal purposes test (PPT) pursuant to the MLI will put that question beyond any doubt.

E) Article 5(4): Preparatory and auxiliary activities

i) South Africa's tax treaty practice with regard to Article 5(4)

None of South Africa's tax treaties follows article 5(4) of the 2017 OECD MTC, nor does any of the tax treaties concluded by South Africa to date include an anti-fragmentation rules like article 5(4)(1) of the 2017 OECD MTC (*see* Appendix 4).

A total of 16 tax treaties (21 per cent of the total) concluded by South Africa follow article 5(4) of the 2017 UN MTC, which covers neither facilities used for the purpose of delivery of goods and merchandise, nor stocks of goods or merchandise maintained for the purpose of delivery. It is interesting to note that all these tax treaties also include a provision similar to that of article 5(5)(b) of the 2017 UN MTC, which is discussed in more detail in Chapter IV(F)(i) below.

In total, 20 of South Africa's tax treaties (26 per cent of the total) deviate from article 5(4) of the 2014 and 2017 OECD MTC. The most common deviation includes the addition of 'maintenance of a fixed place of business solely for the purpose of advertising, or for the supply

[156] Republic of South Africa's Status of List of Reservations and Notifications op cit (n45) 36. *See* also the discussion under Chapter III(D)(i).

of information, for the enterprise', which appears in 17 (85 per cent) of these tax treaties. Other notable deviations include:

- in 5 tax treaties, article 5(4) of such treaties does not include article 5(4)(f) of the 2014 and 2017 OECD MTC, which refers to 'the maintenance of a fixed place of business solely for any combination of activities';[157]

- 3 tax treaties include in the list under article 5(4) 'the sale of goods or merchandise belonging to the enterprise displayed at an occasional temporary fair or exhibition after the closing of the said fair or exhibition';[158] and

- the 2000 Protocol to the Mexico-South Africa DTC (2010) includes a provision in terms of which the competent authorities of the two countries shall by mutual agreement settle the mode of application of article 5(4)(f), which provides that the maintenance of a fixed place of business for any combination of activities mentioned in article 5(4)(a) to (e) shall not constitute a PE in so far as 'the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character'.

ii) South Africa's domestic tax law with regard to article 5(4)

As mentioned elsewhere, South Africa's domestic income tax law follows article 5 of the 2017 OECD MTC (*see* Chapter II(A)). Again, ostensibly a diversion arises although domestic source rules do not always rely on the domestic PE concept. In this regard, one of the relevant statutory source rules dealing with the disposal of assets by non-residents relies on the domestic PE concept (and therefore article 5(4) of the 2017 OECD MTC).[159] In other words, where application of the 2017 OECD MTCs approach leads to the conclusion of a PE in South Africa in connection with the disposal of assets (e.g. trading stock), application of South Africa's tax treaties, which do not follow the updated approach of the 2017 OECD MTC, may mean that no PE would exist, and source taxation may be precluded.

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[157] *See*, for example, Chile – South Africa DTC.
[158] *See*, for example, Saudi Arabia – South Africa DTC.
[159] Section 9(2)(*k*)(ii) of the Act: 'An amount is received by or accrues to a person from a source within the Republic if that amount … constitutes an amount received or accrued in respect of the disposal of an asset … if … that person is not a resident and that asset is attributable to a permanent establishment of that person which is situated in the Republic'.

South Africa has therefore opted for article 13, Option A of the MLI that will change covered tax treaties to be aligned with article 5(4) of the 2017 OECD MTC (*see* Chapter III(D)(ii)).

F) Article 5(5) and (6): Agency PE

i) South Africa's tax treaty practice with regard to Article 5(5) and (6)

The analysis of South Africa's tax treaties for this minor dissertation, which has been summarised in Appendix 5, indicates that the elements for an expanded agency PE under article 5(5) and (6) of the 2017 OECD MTC are not found in any of South Africa's tax treaties, nor has South Africa opted for their implementation via article 12 of the MLI.[160] Accordingly, where a tax treaty applies such expanded source taxing rights will be restricted.

A common deviation from article 5(6) of the 2017 OECD MTC is that some tax treaties concluded by South Africa with developing countries specifically excludes as independent agents those agents whose activities are 'wholly or mainly' 'devoted' to the enterprise (7 tax treaties).[161] In 6 of these tax treaties, an additional arm's length requirement must be met before the agent loses independent status (i.e. 'conditions are made and imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises').[162] In the Mexico-South Africa DTC, this is the sole test to disqualify independence.[163]

In 5 of South Africa's older tax treaties,[164] a person shall not be considered a dependant agent of an enterprise if such person habitually exercises an authority to conclude contracts in the name of the enterprise, but such activities are limited to the purchase of goods or merchandise for that enterprise.

It is interesting to note that in South Africa's oldest tax treaties, the tax treaties with Grenada, Sierra Leone and Zambia, include wording that appears closely aligned with article 5(5) of the new 2017 OECD MTC. Wording is included in these treaties that deem a person

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[160] Republic of South Africa's Status of List of Reservations and Notifications op cit (n45) 33.
[161] *See*, for example, art 5(7) Cameroon – South Africa DTC, art 5(6) Iran – South Africa DTC and art 5(7) Kenya – South Africa DTC.
[162] *See*, for example, art 5(6) Malta – South Africa DTC.
[163] *See* art 5(7) of this DTC.
[164] *See*, for example, art 3(1)(j)(dd) Germany – South Africa DTC, art 5(4) Italy – South Africa DTC and art 5(5) Poland – South Africa DTC.

'negotiating' contracts on behalf of an enterprise as a dependent agent. This begs the question as to what extent the South African courts will interpret this wording in line with the wording found in article 5(5) of the 2017 OECD MTC which considers a person a dependent agent of an enterprise if such person 'habitually plays the principal role leading to the conclusion of contracts'.[165]

In another instance, such as the 2008 Protocol to the Australia-South Africa DTC, wording is included under the dependent agent PE provision which is reminiscent of the BEPS-related changes per the 2017 OECD MTC.[166]

A total of 20 tax treaties concluded by South Arica (25 per cent of the total)[167] all of which are with developing countries, use wording similar to article 5(5)(b) of the 2017 UN MTC which deems an enterprise to have a PE in a contracting state where 'a person habitually maintains in a state a stock of goods or merchandise from which that person regularly delivers goods or merchandise on behalf of the enterprise'. Total of 5 of these tax treaties contain the exact same wording as article 5(5)(b) of the 2017 UN MTC with the other 15 all having minor exclusion and/or additions, the most prominent being the following:

- In 8 of the 20 tax treaties it is required that the stock of goods or merchandise must belong to the enterprise;[168] and
- In 6 of these tax treaties, an enterprise will also be deemed to have a PE where a person regularly/habitually fills or secures orders wholly/almost wholly/mainly for that enterprise.

Since this provision does not generally accord with South Africa's tax treaty policy on article 5, it is suggested that such provisions were requested by the respective treaty partners during negotiations.

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[165] *See* art 2(1)(j) Grenada – South Africa DTC and Sierra Leone – South Africa DTC as well as art 2(1)(k) Zambia – South Africa DTC.
[166] *See* the wording of art 5(7) 2008 protocol to the Australia – South Africa DTC compared to art 5(5) 2017 OECD MTC.
[167] See, for example, art 5(5) of the Egypt – South Africa, Hong Kong – South Africa and Kenya – South Africa DTCs.
[168] *See*, for example art 5(4)(b) and (c) Namibia – South Africa DTC, art 5(5)(b) Russia – South Africa DTC and art 5(4)(b) Thailand – South Africa DTC.

ii) South Africa's domestic tax law with regard to article 5(5) and (6)

There are as yet no court cases or guidance or rulings by the tax authority as to the meaning of article 5(5)-(6) of the 2017 OECD MTC.

Due to the ambulatory nature of South Africa's domestic PE definition, article 5(5) and (6) of the 2017 OECD MTC applies. Domestic source rules do not always rely on the domestic PE concept (*see* Chapter II(B)). However, like the situation in respect of article 5(4) discussed above, one of the relevant statutory source rules dealing with the disposal of assets by non-residents relies on the domestic PE concept (and therefore article 5(5)-(6) of the 2017 OECD MTC). The ambulatory incorporation of the 2017 OECD MTC in South Africa's income tax charging law therefore has a significant expanding effect on the source liability of non-residents who sell assets (e.g. merchandise, capital goods, etc.) in South Africa through sales personnel that hitherto did not create a deemed agency PE under prior versions of the OECD MTC.

The leading South African case on the understanding of article 5(5)-(6) of the OECD MTC before its change in 2017 is *Downing*.[169] In this matter, a South African taxpayer, who at such time was living in Switzerland, instructed a stockbroker to manage a portfolio of listed South Africa shares on his behalf from the broker's offices in South Africa. The Appeals Court mainly dealt with the question how to establish when an agent, who habitually concludes contracts in the name of a principal, can be considered to be independent and so not lead to the establishment of an agency PE under article 5(6). Significant findings by the court was that to determine under article 5(6) whether the agent is acting in 'the ordinary course of his business', consideration should be given to what the 'particular type of independent agent normally does in the course of carrying on his business'.[170] The court said that this understanding derives from an overall reading together of articles 5(5) and (6):

> 'It seems to me that the emphasis falls broadly upon a distinction between non-independent agents acting habitually on behalf of a non-resident principal and agents of independent status who conduct the business of the principal in the ordinary course of their own business operations. It can readily be appreciated that in the former case the agent could be regarded as a permanent establishment; but in the latter not.'[171]

[169] *Downing* supra (n20).
[170] Ibid 260-261.
[171] Ibid 261.

Based on *Downing*, the position in South Africa is that factual evidence about the particular agent's normal business will determine whether or not they may be regarded as independent. Important facts in *Downing* were that the stockbroker's services to the Swiss taxpayer were no different to services provided to other clients (there was no tailored service), the fee charged was a standard fee and like those charged for other clients and the broker did not solely rely on the Swiss taxpayer for business.

G) Article 5(7): Subsidiary companies as PE of the parents (and vice versa)

There are no deviations in South Africa's tax treaties from article 5(7) of the 2017 OECD MTC.

The researcher is not aware of any reported cases or rulings dealing with the possibility that a subsidiary as such may form a PE for a non-resident parent company (or vice versa).

H) Article 5(8): Closely related enterprises

South Africa's 1999 tax treaty with Australia was amended in 2008 to insert a number of anti-avoidance clauses in the PE definition dealing with fragmentation of contracts and strategies to artificially avoid minimum time periods by associated enterprises; for this purpose the following definition was inserted in the treaty:

Under this article, an enterprise shall be deemed to be associated with another enterprise if:

i. one is controlled directly or indirectly by the other; or
ii. both are controlled directly or indirectly by the same person or persons.[172]

Due to the ambulatory nature of the domestic definition of a PE in South Africa's domestic income tax law, article 5(8) of the 2017 OECD MTC applies to the extent that the source rules rely on the PE concept.

As noted in Chapter III(D)(iv) South Africa has indicated that it opts for article 15 of the MLI, which will introduce a general definition in covered tax treaties of a person closely related to an enterprise.[173]

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[172] Article 5(5)(c) Australia – South Africa DTC. *See* also art 5(6) New Zealand – South Africa DTC which contains the same wording as the Australia – South Africa DTC with regard to the circumstances under which to enterprises will be deemed to be associated with one another.
[173] Republic of South Africa's Status of List of Reservations and Notifications op cit (n45).

I) Anti-avoidance and the splitting up of contracts

From an analysis of South Arica's tax treaties, 4 of South Africa's tax treaties – Australia (1999), Greece (2004), Mexico (2010) and New Zealand (2004) – contain provisions that address the splitting up of contracts by associated enterprises in order to possibly avoid establishing sufficient permanency.

The PE definition in the Australia-South Africa DTC was replaced by protocol in 2008. The treaty with New Zealand operates in original format. Both the Australia and New Zealand tax treaties contain similar anti-avoidance provisions in article 5(5) and (6), respectively. Under these provisions, the time period to establish construction PEs, service PEs, natural resource extraction PEs or substantial equipment PEs must be determined by: 'aggregating the periods during which activities are carried on in a Contracting State by associated enterprises provided that the activities of the enterprise in that State are connected with the activities carried on in that State by its associate'.[174] Concurrent activities by associated enterprises in the same state will be counted only once for the purpose of determining the duration of the activities. Enterprises are associated with another to the extent that one is controlled directly or indirectly by the other, or where both are controlled directly or indirectly by the same person or persons.

The Mexico-South Africa DTC includes a similar anti-avoidance provision to that found in the Australia and New Zealand treaties but with a narrower application. In terms of this anti-avoidance provision, the period during which activities are carried on by an enterprise and its associated enterprise will only be aggregated in so far as the activities of both enterprises are 'identical or substantially similar'. The tax treaty with Mexico does not define to what extent two enterprises will be associated, but makes reference to 'an enterprise within the meaning of Article 9'.[175]

The tax treaty between South Africa and Greece includes a specific anti-avoidance provision dealing with activities in connection with preliminary surveys, exploration, extraction or exploitation of natural resources. Article 5(7) of this tax treaty stipulates that these activities will not result in a PE if they are carried on for a period or periods not exceeding 30 days in the

[174] *See*, for example, art 5(6) New Zealand – South Africa DTC.
[175] Article 5(3) of this DTC.

aggregate in any 12-month period. In order that this relief may not be abused, where one enterprise who is related to another in the sense of article 9:

> [C]ontinues as part of the same project the same activities that are or were being carried on by the first-mentioned enterprise, and the activities carried on by both enterprises exceed a period or periods of 30 days in the aggregate in a twelve-month period, then each enterprise shall be deemed to be carrying on business through a permanent establishment.

J) Other specific types of PE

i) Service PE

a) Corporate services

South Africa's tax treaty policy since the 1990s has been to negotiate for the inclusion of a corporate service PE for an enterprise (*see* Chapter III). South Africa's tax treaty negotiation position thus aligns not only with the SA MTC but also the domestic income tax position that non-residents are liable for net taxation on service fee income sourced in South Africa (no gross-based tax is charged at source).

As discussed in Chapter III(A), corporate service PE clauses appear in more than half of South Africa's tax treaties. In 42 tax treaties corporate services PE clauses are included, 3 of which appear as *prima facie* PE examples listed in article 5(2) of these treaties and the remainder are stand-alone clauses (*see* Chapter IV(C)(ii) above for the interpretation difficulties arising from the practice to list service PEs in the example list). As set out in Appendix 6, in 39 of these clauses it is added that the corporate service PE can be constituted 'for the same or a connected project' - which is in line with the position noted by South Africa against article 5 of the 2017 OECD MTC as a non-OECD member (*see* Chapter III(C)).

As set out in Appendix 1, in 27 of the 43 tax treaties (63 per cent) that include a corporate services PE clause, the time threshold required for the employees of an enterprise to render services in the other country is the same as the time period threshold laid down in the construction PE clause.

A total of 33 of the 42 tax treaties which include this corporate service PE clause (79 per cent of the total) use a threshold of 183 days, thus being aligned with the 2017 UN MTC. However, of the 14 tax treaties in which the corporate services PE time threshold differs from the threshold under the construction PE clause, 6 tax treaties include a very short time period threshold of either

90 or 120 days.[176] Given that South Africa's tax treaty negotiation position with regard to corporate service PEs is to follow the 2017 UN MTC time threshold, one can accept that these shorter periods would have been requested by the counter party.

b) Independent professional service PE

A service PE for individuals performing professional services or other activities of an independent character only appears in 22 of South Africa's tax treaties (28 per cent of the total, as can be seen from Appendix 1 and 6) despite being included under the PE definition in the SA MTC. In all cases, except for the United Kingdom, the same treaty includes a corporate service PE for an enterprise. Therefore, 20 tax treaties contain only a corporate service PE for an enterprise but not a service PE for individuals performing activities of an independent character. This may suggest that South Africa more easily gives up the independent professional service PE during negotiations.

With the exception of the South Africa-United Arab Emirates DTC (2016), the time threshold in these 22 tax treaties for both a service PE for an enterprise, as well as independent professional services PE, are the same (namely 183 days/6 months).

The tax treaty with Swaziland is the only tax treaty that includes independent professional service PEs in the PE examples list under article 5(2).[177]

ii) Insurance PE

As can be seen from Appendix 7, in 11 of South Africa's tax treaties (14 per cent of the total), all with developing countries, an insurance PE provision is included with similar wording to that of article 5(6) of the 2017 UN MTC. It is interesting to note that the structure of the wording in these provisions are more closely aligned with article 5(6) of the 2016 ATAF MTC, however, this structure of wording does not change the effect or application of this provision from the 2017 UN Model.[178]

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[176] *See*, for example, art 5(3)(b) Belarus – South Africa DTC, Greece – South Africa DTC, Indonesia – South Arica DTC, Lesotho – South Africa DTC, Oman – South Africa DTC and art 5(2)(h) Swaziland – South Africa DTC which require a significant shorter time period threshold of either 120 days or 90 days.
[177] Article 5(2)(i) Swaziland – South Africa DTC.
[178] *See*, for example, art 5(7) Botswana – South Africa DTC; art 5(6) Cameroon – South Africa DTC and art 5(6) Mexico – South Africa DTC.

As discussed in Chapter III, is not the policy of South Africa to request inclusion of article 6(6)/5(7) of the 2016 ATAF/2017 UN MTC when it negotiates a tax treaty.

The rest of the above 11 PE definitions are further closely aligned to other aspects of article 5 of the 2017 UN MTC, as follows:

- all 11 of these treaties follow article 5(3)(a) of the 2017 UN MTC and 10 follow article 5(3)(b) of the 2017 UN MTC;
- 7 of these treaties follow article 5(4) of the 2017 UN MTC in excluding delivery of goods and/or merchandise; and
- 7 of these treaties follow article 5(5)(b) of the 2017 UN MTC.

It is therefore evident that when these treaties were negotiated, South Africa must have acceded to a request from the other side to include all these aspects of article 5 of the UN MTC.

iii) Extractive industry

a) Natural resources provisions under article 5(2)

A provision which deals with the extraction and/or exploitation and/or exploration of natural resources is included under the PE definition in nearly each of South Africa's tax treaties in some form or manner.

As set out in Appendix 8, each of South Africa's tax treaties, other than old colonial-era tax treaties,[179] include under its list of *prima facie* PE examples a place of business which is used for to the extraction and/or exploitation and/or exploration of natural resources.

South Africa's tax treaty negotiating position with regard to the inclusion of a clause under its PE example list dealing with activities relating to the extraction/exploration/exploitation of natural resources is not clear. As a non-OECD member country South Africa noted its reservation to ask for inclusion in the PE definition of a clause that 'deems a permanent establishment to exist if, for more than 6-months, an enterprise conducts activities relating to the exploration or exploitation of natural resources'.[180] On the other hand, the 2006 SA MTC includes a clause under

[179] Such as the Sierra Leonne – South Africa DTC and the Zambia – South Africa DTC.
[180] As discussed under Chapter II(A)(ii); *see also* Non-OECD Economies' Positions' on article 5 op cit (n43) para. 14.6, as well as art 5(2)(f) 2006 SA MTC.

its PE example list that deems a PE to exist where there is a place of extraction or exploitation of natural resources.[181]

It does not appear that South Africa is particularly successful in obtaining inclusion of either of the above clause from the analysis (*see* Appendix 8) performed of South Africa's 79 tax treaties since only 29 tax treaties (37 per cent of the total) include, in addition to the extraction of natural resources, activities relating to the 'exploitation' and/or 'exploration' of natural resources. It would appear that South Africa is much more successful in including under its PE examples list activities relating to the exploitation of natural resources, than the exploration thereof.

A clause with similar wording to that of Article 5(2)(f) of the 2017 OECD MTC is included in 69 of South Africa's tax treaties:

- In 44 of these tax treaties (56 per cent of the total)[182] the wording are the same as that of Article 5(2)(f) of the 2017 OECD MTC, and accordingly South Africa's domestic PE definition, in that it only covers a place of extraction of natural resources;
- In 22 of these treaties (28 per cent of the total)[183] this clause has been extended to include the exploitation of natural resources which is aligned with the 2006 SA MTC;
- In only 3 of these tax treaties is this clause extended to include activities relating to the extraction, exploitation and exploration of natural resources.
- 5 tax treaties exclude the extraction of natural resources and only include activities relating to the exploration and exploitation of natural resources.

b) Special clauses

There are special clauses dealing with the taxation of exploration and exploitation of natural resources in 19 of South Africa's tax treaties (24 per cent of the total), with both developed and developing countries. These clauses are not all in the same format and their scope differs as can be seen from Appendix 9. Some of these apply only to 'offshore activities' and thus not to the

[181] Article 5(2)(f) 2006 SA MTC.
[182] *See*, for example, art 5(2)(f) of the Brazil – South Africa DTC, Mauritius – South Africa DTC and Netherlands – South Africa DTC.
[183] *See*, for example, art 5(2)(f) of the Democratic Republic of the Congo – South Africa DTC and Kenya – South Africa DTC.

onshore extractive industry; while others apply generally, and some are found within the definition of a PE and others may be stand-alone clauses or part of a protocol.

This variation in the treatment of the extractive industry in South Africa's tax treaties is somewhat surprising given the prominence of this industry for the country.

In 11 of South Africa's tax treaties,[184] an installation or structure used for the exploration, extraction or exploitation of natural resources is included under the *prima facie* PE example list under article 5(2), with 5 tax treaties adding to this list the use of a drilling rig or site, or a ship.[185]

The tax treaties with Denmark,[186] Ireland,[187] the Netherlands[188] and Norway[189] contain specific 'offshore activities' articles that deal with activities in connection with the exploration and/or extraction and/or exploitation of natural resources. These articles all include special PE provisions notwithstanding the general PE definition set out in article 5 of these treaties.

The tax treaty with Australia includes a provision under its PE article in terms of which an enterprise will constitute a PE if it carries on activities (including the operation of substantial equipment) in the other country in the exploration for or exploitation of natural resources for a period exceeding in the aggregate 90 days in any 12-month period.[190]

K) Other deviations

A few of South Africa's tax treaties contain further deviations, as set out in Appendix 10. Although there appears to be no pattern, most of these relate to the provision or supplying and/or hire and/or operation of substantial technical, mechanical and/or scientific equipment or machinery.[191]

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[184] *See*, for example, art 5(2)(g) Lesotho – South Africa DTC, art 5(2)(h) Mauritius – South Africa DTC and art 5(2)(g) Rwanda – South Africa DTC.
[185] *See*, for example, art 5(2)(g) of the Bulgaria – South Africa DTC, Cameroon – South Africa DTC and Seychelles – South Africa DTC.
[186] Article 21 Denmark – South Africa DTC.
[187] Article 21 Ireland – South Africa DTC.
[188] Article 24 Netherlands – South Africa DTC.
[189] Article 21 Norway – South Africa DTC.
[190] Article 5(4)(b) Australia – South Africa DTC.
[191] *See*, for example, art 5(4)(c) Australia – South Africa DTC in terms of which an enterprise will constitute a PE to the extent that it operates substantial equipment in the other country for a period exceeding 183 days, art 5(3)(c) Cameroon – South Africa DTC in terms of which an enterprise will constitute a PE if it supplies equipment and machinery on hire used or to be used, in exploration for, extraction of, or exploitation of mineral resources, art 5(5) Kuwait – South Africa DTC where a PE shall be deemed to exist if substantial technical, mechanical or scientific equipment or machinery is used by an enterprise for a specific period and art 5(4)(b) New Zealand – South Africa

In the Nigeria – South Africa DTC (2008) an enterprise will constitute a PE in so far as a fixed place of business is used as a sales outlet, notwithstanding the fact that such fixed place of business is otherwise maintained for any of the activities mentioned article 5(4).[192]

The Greece – South Africa DTC[193] includes a special provision in terms of which a PE will be created to the extent that an enterprise carries on activities in connection with preliminary surveys, exploration, extraction or exploitation of natural resources, unless such activities are carried on for less than 30 days.

DTC where an enterprise shall be deemed to have constituted a PE where substantial equipment is being used in the contracting state by, for or under contract with the enterprise from another contracting state.

[192] Article 5(5) Nigeria – South Africa DTC.

[193] Article 5(7) Greece – South Africa DTC.

V) CONCLUSION

The primary objective of this minor dissertation has been to determine whether South Africa has a coherent PE policy for source-based taxation. In addressing this question, this thesis specifically considered what South Africa's PE negotiating policy is and identified trends in its tax treaty practice in order to determine any inconsistency with its domestic PE definition. In addition, this thesis also considered recent developments in the domestic interpretation of the PE concept.

The key findings of this minor dissertation is accordingly set out below.

A) Key findings

One of the critical questions this minor dissertation addressed is what South Africa's PE negotiating policy is. This minor dissertation has found that the PE definition in the 2006 SA MTC effectively represents South Africa's tax treaty policy as regard its PE status. South Africa's negotiating position is to request the inclusion of article 5 of the 2017 OECD MTC subject to the observations noted thereto by it as a non-OECD member as well as the provisional reservations to the MLI. The reservations noted against article 5 of the 2017 OECD MTC by South Africa include:

i. Allowing South Africa to negotiate a period time after which a building site or construction, assembly, or installation project should be regarded as a PE under paragraph 3 and to treat an enterprise as having a PE if the enterprise carries on supervisory activities in connection with such site or project that constitute a PE under paragraph 3;

ii. to treat an enterprise or individual as having a PE if the enterprise furnishes consultancy services or the individual performs individual professional services or activities within the country for a period or periods aggregating more than 6 months; and

iii. to deem a PE to exist if, for more than 6 months, an enterprise conducts activities relating to the exploration or exploitation of natural resources.

This minor dissertation has illustrated that the trends identified in South Africa's tax treaty practice with regard to PE shows that such practice is very much aligned with its PE tax treaty policy (2006 SA MTC). Furthermore, the trends identified also found that, overall, both South

Africa's tax treaty PE policy and practice is more closely aligned with the PE definitions in the UN MTC and regional MTCs than the OECD MTC.

The key finding of this minor dissertation is that South Africa's tax treaty PE policy is not aligned with its domestic PE policy which is to follow article 5 of the OECD MTC, as set out from time to time (without taking into consideration the reservations noted thereto by South Africa).

Domestically, the most significant developments to the PE definition has been the introduction of the proviso to the PE definition in 2010 which excludes certain fund management activities and, more recently, the amendment to follow article 5 of the 2017 OECD MTC which has incorporated the BEPS recommendations.

To date, there has not been any case law on the domestic PE definition. In interpreting the provisions of the domestic PE definition, the South African courts will refer to local case law which has addressed the same or similar wording but will also take cognizance from 'international tax language' such as the OECD commentaries or foreign case law. Other than the Downing-case, which remains the leading case in understanding the agency provisions of the OECD MTC before its change in 2017, the only new development in South African case law at tax treaty level has been the decision in AB LLC v CSARS. Though the court provided useful guidance in interpreting some of the wording in article 5(1), the most significant aspect of this judgment was the interpretive uncertainty it created by rejecting the established OECD orthodoxy that the prima facie PE examples listed under article 5(2) of the OECD MTC had to comply with the general PE definition in article 5(1).

With regard to the interpretation of the PE concept by South African courts, the legal interpretive analysis in this minor dissertation has shown that the OECD's view on the PE concept is likely to continue to influence the South African judiciary.

B) Recommendations

As a consequence of the incoherence in South Africa's tax policy with regard to PE, Treasury announced that it may revise South Africa's domestic PE definition to determine whether it should continue to follow article 5 of the 2017 OECD MTC. The following recommendations could be considered by Treasury and the relevant fiscal authorities in their deliberation on how to reform South Africa's PE policy in a coherent manner.

i) Red-line PE provisions

One way in which South Africa could potentially create a more coherent PE policy is to tailor such policy on what South Africa's tax negotiators have been able to achieve in concluding DTAs to date. More specifically, the South African fiscal authorities can identify and priorities certain 'red-lines' in its PE definition based the aspects of its current PE policy which South Africa's tax treaty negotiators have been reasonably successful to include in its tax treaty practice. These provisions should then serve as the basis of South Africa's PE tax policy being non-negotiable provisions in both its domestic PE definition as well as during DTA negotiations. It is recommended that the following PE aspects be considered as such red-lines:

i. To include under the list of example PE's in article 5(2) activities relating to the extraction and exploitation and/or exploration of natural resources;
ii. To treat an enterprise as having a PE if the enterprise carries on a building site, a construction, assembly or installation project or supervisory activities in connection therewith;
iii. To treat an enterprise as having a PE if the enterprise furnishes corporate services, including consultancy services, through employees of such enterprise.
iv. To deem the performance of independent professional services or other activities of an independent nature by an individual as a PE if that person is present in a contracting state for a certain amount of time; and
v. That the PE time period threshold of 6 months/183 days be used in which the above activities will constitute a PE.

By prioritising these aspects, South Africa should be more successful at including them in future DTAs which may lead to improved coherency between South Africa's tax treaty PE policy and its tax treaty practice given that these provisions are aligned with the PE position in its regional MTCs as well as the SA MTC. Further, these provisions will also provide greater retention of South Africa's taxing rights over SA source income, particularly with regard to services rendered in South Africa by non-residents.

ii) SA MTC as basis for domestic PE definition

One of the key findings of this minor dissertation has been that South Africa's tax treaty PE policy and the PE definition in the majority of its DTAs, regional MTCs and its own SA MTC are all more closely aligned with the PE definition in the UN MTC. It is therefore questionable whether South Africa should continue to base its domestic PE definition on that of the OECD MTC.

In order to achieve a more cohesive overall PE policy, it is proposed that South Africa's domestic PE definition should no longer be based on the OECD PE definition from time to time, but should rather be amended in line with the SA MTC.

To give effect to such an amendment, Treasury should consider to either amend the domestic PE definition in the Act itself, or to formulate the domestic PE definition in such a manner that it is based on the SA MTC PE definition as it may be published from time to time by public notice, for example, in the Government Gazette.[194] The latter option will allow Treasury to react swiftly to any potential economic or policy changes in the future as it will not be subject to the Act's annual amendment process. For example, should South Africa wish to revise its reservations to the MLI (after it has deposited its instrument of ratification, acceptance or approval) or elect to include/reject new provisions to its PE policy in order to align itself with international standards, Treasury could simply implement these changes by publishing the revised PE definition in the Government Gazette. This option will not require the Minister of Finance to exercise any additional powers to amend South Africa's domestic PE definition. Furthermore, the process of publishing the revised SA MTC PE definition in the Government Gazette will simply formalise such PE definition into domestic legislation and will not create a new PE policy.

As already noted, the SA MTC PE definition represent South Africa's tax treaty PE policy and is essentially based on the OECD and UN MTC. Further, the SA MTC PE definition is also very much aligned with South Africa's tax treaty practice and, more importantly, include the above recommended 'red-lines'. It therefor follows that should South Africa's domestic PE definition be based on the SA MTC PE definition, rather than that of the OECD MTC, South Arica should achieve a cohesive overall PE policy.

[194] A similar approach is currently followed with regard to reportable transactions in terms of s 35 of the Tax Administration Act 28 of 2011.

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Convention between the Republic of South Africa and the Republic of Chile for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital 2016, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

China

Agreement between the Government of the Republic of South Africa and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income 2001, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Democratic Republic of the Congo

Convention between the Government of the Republic of South Africa and the Government of the Democratic Republic of Congo for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2012, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Croatia

Agreement between the Republic of South Africa and the Republic of Croatia for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1997, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Cyprus

Agreement between the Republic of South Africa and the Republic of Cyprus for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and on

Capital 1998, *read with the protocol of 2015 amending this agreement*, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Czech Republic

Convention between the Republic of South Africa and the Czech Republic for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1998, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Denmark

Convention between the Government of the Republic of South Africa and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1995, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Egypt

Agreement between the Republic of South Africa and the Arab Republic of Egypt for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1999, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Ethiopia

Agreement between the Republic of South Africa and the Federal Democratic Republic of Ethiopia for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2006, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Finland

Agreement between the Republic of South Africa and the Republic of Finland for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1995, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

France

Convention between the Government of the Republic of South Africa and the Government of the French Republic for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to taxes on Income and on Capital 1995, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Germany

Agreement between the Republic of South Africa and the Federal Republic of Germany for the Avoidance of Double Taxation with respect to Taxes on Income 1973, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Ghana

Convention between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains 2007, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Greece

Convention between the Republic of South Africa and the Hellenic Republic for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and on Capital 2003, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Hong Kong

Agreement between the Government of the Republic of South Africa and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2015, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Hungary

Convention between the Republic of South Africa and the Republic of Hungary for the Avoidance of Double Taxation with respect to Taxes on Income 1996, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

India

Agreement between the Government of the Republic of South Africa and the Government of the Republic of India for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1997, *read with the protocol of 2015 amending this agreement*, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Indonesia

Agreement between the Republic of South Africa and the Republic of Indonesia for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1999, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Iran

Agreement between the Republic of South Africa and the Islamic Republic of Iran for the Avoidance of Double Taxation and the Exchange of Information with respect to Taxes on Income 1998, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Ireland

Convention between the Government of the Republic of South Africa and the Government of Ireland for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect

to Taxes on Income and Capital Gains 1997, read with the protocol of 2012 amending this agreement, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Israel

Convention between the Republic of South Africa and the State of Israel for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains 1979, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Italy

Convention between the Republic of South Africa and the Republic of Italy for the Avoidance of Double Taxation with respect to Taxes on Income and the prevention of Fiscal Evasion 1999, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Japan

Convention between the Government of the Republic of South Africa and the Government of Japan for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1997, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Kenya

Agreement between the Government of the Republic of South Africa and the Government of the Republic of Kenya for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2015, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Korea

Convention between the Republic of South Africa and the Republic of Korea for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1996, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Kuwait

Agreement between the Government of the Republic of South Africa and the Government of the State of Kuwait for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2007, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Lesotho

Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2016, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Luxembourg

Convention between the Government of the Republic of South Africa and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and on Capital 2000, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Malawi

Convention between the Government of the Republic of South Africa and the Government of the Republic of Malawi for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1971, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Malaysia

Agreement between the Government of the Republic of South Africa and the Government of Malaysia for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2006, *read with the protocol of 2012 amending this agreement*, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Malta

Agreement between the Government of the Republic of South Africa and the Government of Malta for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1997, *read with the protocol of 2014 amending this agreement*, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Mauritius

Agreement between the Government of the Republic of South Africa and the Government of the Republic of Mauritius for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2015, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Mexico

Agreement between the Republic of South Africa and the United Mexican States for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2010, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Mozambique

Convention between the Republic of South Africa and the Republic of Mozambique for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2009, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Namibia

Agreement between the Republic of South Africa and the Republic of Namibia for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains 1999, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Netherlands

Convention between the Republic of South Africa and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and on Capital 2009, *with the protocol read of 2009 amending this agreement*, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

New Zealand

Agreement between the Government of the Republic of South Africa and the Government of New the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income Zealand for 2002, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Nigeria

Agreement between the Government of the Republic of South Africa and the Government of the Federal Republic of Nigeria for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains 2008, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Norway

Convention between the Republic of South Africa and the Kingdom of Norway for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1996, read with the protocol of 2015 amending this agreement, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 201.

Oman

Agreement between the Government of the Republic of South Africa and the Government of the Sultanate of Oman for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2004, *read with the protocol of 2014 amending this agreement*, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Pakistan

Convention between the Republic of South Africa and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1999, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Portugal

Convention between the Republic of South Africa and the Portuguese Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income 2008, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Qatar

Agreement between the Government of the republic of South Africa and the Government of the State of Qatar for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income 2016, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Romania

Agreement between the Republic of South Africa and Romania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gain 1995, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Russia

Agreement between the Government of the Republic of South Africa and the Government of the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income 2000, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Rwanda

Agreement between the Government of the Republic of South Africa and the Government of the Republic of Rwanda for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to taxes on Income 2010, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Saudi Arabia

Convention between the Government of the Republic of South Africa and the Government of the Kingdom of Saudi Arabia for the Avoidance of Double Taxation and the prevention of Tax Evasion with respect to Taxes on Income and on Capital 2009, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Seychelles

Agreement between the Government of the Republic of South Africa and the Government of the Republic of Seychelles for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2003, *read with the protocol of 2006 amending this agreement*, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Singapore

Agreement between the Government of the Republic of South Africa and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2017, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Slovakia

Convention between the Republic of South Africa and the Slovak Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income 1999, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Spain

Convention between the Republic of South Africa and the Kingdom of Spain for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and on Capital 2008, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Swaziland

Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2005, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Sweden

Convention between the Republic of South Africa and the Kingdom of Sweden for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income 1995, *read with the protocol of 2012 amending this agreement*, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Switzerland

Convention between the Republic of South Africa and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income 2009, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Tanzania

Agreement between the Government of the Republic of South Africa and the Government of the United Republic of Tanzania for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to taxes on Income 2007, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Thailand

Convention between the Government of the Republic of South Africa and the Government of the Kingdom of Thailand for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income1996, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Tunisia

Convention between the Republic of South Africa and the Republic of Tunisia for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1999, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Turkey

Agreement between the Republic of South Africa and the Republic of Turkey for the avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2006, *read with the protocol of 2017 amending this agreement*, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Uganda

Convention between the Republic of South Africa and the Government of the Republic of Uganda for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2001, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Ukraine

Convention between the Government of the Republic of South Africa and the Cabinet Ministers of Ukraine for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2005, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 201.

United Arab Emirates

Agreement between the Government of the Republic of South Africa and the Government of the United Arab Emirates for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2016, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

United Kingdom

Convention between the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains 2003, *read with the protocol of 2012 amending this agreement*, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

United States

Convention between the Republic of South Africa and the United States of America for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains 1997, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Zambia

Agreement between the Government of the Union of South Africa and the Government of the Federation of Rhodesia and Nyasaland for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 1956, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

Zimbabwe

Agreement between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income 2017, available at IBFD Tax Treaty Database by subscription, accessed on 31 January 2018.

VII) APPENDIX 1: TIME PERIODS FOR CONSTRUCTION AND SERVICE PE'S UNDER SOUTH AFRICA'S TAX TREATIES

Tax treaty country	Deemed construction/installation PE	Deemed employee services PE	Deemed independent professional services PE
1. Algeria	6 months	6 months	-
2. Australia	6 months	-	-
3. Austria	12 months	-	-
4. Belarus	12 months	120 days	120 days
5. Belgium	12 months	-	-
6. Botswana	6 months	183 days	183 days
7. Brazil	6 months	-	-
8. Bulgaria	6 months	183 days	183 days
9. Cameroon	6 months	183 days	-
10. Canada	12 months	12 months	-
11. Chile	6 months	183 days	183 days
12. China (People's Rep.)	12 months	12 months in 24 – month period	-
13. Congo (Dem. Rep.)	6 months	183 days	183 days
14. Croatia	12 months	183 days	-
15. Cyprus	12 months	-	-
16. Czech Republic	12 months	6 months	-
17. Denmark	12 months	-	-
18. Egypt	6 months	183 days	-
19. Ethiopia	6 months	6 months	6 months
20. Finland	12 months	-	-

Tax treaty country	Deemed construction/installation PE	Deemed employee services PE	Deemed independent professional services PE
21. France	12 months	-	-
22. Germany	12 months	-	-
23. Ghana	6 months	-	-
24. Greece	6 months	120 days	-
25. Grenada	-	-	-
26. Hong Kong	6 months	183 days	183 days
27. Hungary	12 months	-	-
28. India	6 months	-	-
29. Indonesia	6 months	120 days	-
30. Iran	12 months	6 months	-
31. Ireland	12 months	-	-
32. Israel	6 months	-	-
33. Italy	12 months	-	-
34. Japan	12 months	-	-
35. Korea (Rep.)	12 months	-	-
36. Kenya	6 months	183 days	-
37. Kuwait	6 months	6 months	-
38. Lesotho	6 months	90 days	90 days
39. Luxembourg	12 months	-	-
40. Malawi	-	-	-
41. Malaysia	12 months	183 days	-
42. Malta	6 months	6 months	-
43. Mauritius	12 months	183 days	183 days

Tax treaty country	Deemed construction/installation PE	Deemed employee services PE	Deemed independent professional services PE
44. Mexico	6 months	183 days	183 days
45. Mozambique	6 months	180 days	180 days
46. Namibia	6 months	6 months	-
47. Netherlands	12 months	-	-
48. New Zealand	6 months	183 days	183 days
49. Nigeria	6 months	183 days	-
50. Norway	12 months	-	-
51. Oman	6 months	90 days	90 days
52. Pakistan	6 months	6 months	-
53. Poland	12 months (starting from the date when effective work begins)	-	-
54. Portugal	12 months	-	-
55. Qatar	6 months	183 days	183 days
56. Romania	9 months	-	-
57. Russia	12 months	-	-
58. Rwanda	6 months	183 days	183 days
59. Saudi Arabia	6 months	6 months	-
60. Seychelles	6 months	183 days	-
61. Sierra Leone	-	-	
62. Singapore	12 months	183 days	183 days
63. Slovakia	12 months	-	-
64. Spain	12 months	-	-
65. Swaziland	6 months	90 days	90 days
66. Sweden	12 months	-	-

Tax treaty country	Deemed construction/installation PE	Deemed employee services PE	Deemed independent professional services PE
67. Switzerland	12 months	-	-
68. Taiwan	12 months	-	-
69. Tanzania	6 months	183 days	183 days
70. Thailand	6 months	6 months	-
71. Tunisia	6 months	-	-
72. Turkey	12 months	-	-
73. Uganda	6 months	-	-
74. Ukraine	12 months	6 months	6 months
75. United Arab Emirates	12 months	9 months	183 days
76. United Kingdom	12 months	-	183 days
77. United States	12 months	183 days	-
78. Zambia	-	-	-
79. Zimbabwe	6 months	183 days	183 days

VIII) APPENDIX 2: SUMMARY OF SOUTH AFRICA'S TAX TREATIES WHICH INCLUDES ADDITIONAL PRIMA FACIE EXAMPLE TO ITS POSITIVE PE LIST COMPARED TO ARTICLE 5(2) 2017 OECD MTC[195]

Tax treaty country	Exploration or exploitation of natural resources	Sales outlet/ premises	Warehouse	Drilling rig/offshore	Installation structure used for exploration of natural resources	Agriculture/ farm /forestry/ orchard /vineyard	Other
1. Algeria	✓	✓	-	-	-	-	-
2. Australia	✓	-	-	-	-	✓	-
3. Austria	-	-	-	-	-	-	-
4. Belarus	✓	✓	-	-	-	-	-
5. Belgium	-	-	-	-	-	-	-
6. Botswana	✓	-	-	-	✓	-	-
7. Brazil	-	-	-	-	-	-	-
8. Bulgaria	✓	-	-	✓	✓	-	-
9. Cameroon	✓	✓	✓	✓	-	-	-
10. Canada	✓	-	-	-	-	-	-
11. Chile	✓	-	-	-	-	-	-
12. China People's Rep.)	-	-	-	-	-	-	-
13. Congo (Dem. Rep.)	✓	-	-	-	-	-	-
14. Croatia	-	-	-	-	-	-	-
15. Cyprus	-	-	-	-	-	-	-
16. Czech Republic	-	-	-	-	-	-	-
17. Denmark	-	-	-	-	-	-	-
18. Egypt	-	✓	-	-	-		-
19. Ethiopia	✓	-	✓	-	-	✓	-
20. Finland	-	-	-	-	-	-	-
21. France	-	-	-	-	-	-	-
22. Germany	-	-	-	-	-	-	-
23. Ghana	✓	-	-	-	-	-	-
24. Greece	✓	-	-	-	-	-	-
25. Grenada	-	-	-	-	-	-	-
26. Hong Kong	-	-	-	-	-	-	-

195. The term "permanent establishment" includes especially: a place of management, a branch, an office, a factory, a workshop and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

27. Hungary	-	-	-	-	-	-	-
28. India	-	-	✓	-	✓	-	-
29. Indonesia	-	✓	✓	✓	-	-	-
30. Iran	✓	-	-	-	-	-	-
31. Ireland	-	-	-	-	-	-	-
32. Israel	-	-	-	-	-	✓	i. Building site, a construction, assembly or installation project or supervisory activities in connection therewith; ii. Maintenance of substantial equipment or machinery within a State for a period of more than six months.
33. Italy	-	-	-	-	-	-	Building site, a construction, assembly or installation project or supervisory activities in connection therewith;
34. Japan	-	-	-	-	-	-	-
35. Korea (Rep.)	-	-	-	-	-	-	-
36. Kenya	✓	-	-	-	-	-	-
37. Kuwait	✓	-	-	-	-	-	-
38. Lesotho	✓	-	-	-	✓	-	-
39. Luxembourg	-	-	-	-	-	-	-
40. Malawi	-	-	-	-	-	-	-
41. Malaysia	-	-	-	-	-	-	-
42. Malta	-	-	-	✓	-	-	-
43. Mauritius	-	-	✓	-	✓	-	-
44. Mexico	✓	-	-	-	-	-	-
45. Mozambique	✓	-	✓	-	✓	-	-
46. Namibia	-	-	✓	-	-	-	i. Building site, a construction, assembly or installation project or supervisory activities in connection therewith; ii. Corporate employee services; iii. Guest farm or other operation of a similar nature;

47. Netherlands	-	-	-	-	-	-	-
48. New Zealand	✓	-	-	-	-	-	-
49. Nigeria	✓	-	-	-	-	-	-
50. Norway	-	-	-	-	-	-	-
51. Oman	-	-	-	-	-	-	-
52. Pakistan	✓	✓	✓	-	-	-	-
53. Poland	-	-	-	-	-	-	-
54. Portugal	-	-	-	-	-	-	-
55. Qatar	✓	✓	✓	-	-	✓	-
56. Russia	-	-	-	-	-	-	Building site, a construction, assembly or installation project or supervisory activities in connection therewith
57. Romania	✓		-	-	-	✓	Building site, a construction, assembly or installation project or supervisory activities in connection therewith
58. Rwanda	✓	-	-	-	✓	-	-
59. Saudi Arabia	-	-		-	-	-	-
60. Seychelles	-	-	✓	✓	-	-	-
61. Sierra Leone	-	-	-	-	-	-	-
62. Singapore	-	-	-	-	-	-	-
63. Slovakia	-	-	-	-	-	-	-
64. Spain	-	-	-	-	-	-	-
65. Swaziland	-	-	-	-	-	-	i. Building site, a construction, installation or assembly project or any supervisory activity in connection therewith; ii. Corporate employee services iii. Professional independent services
66. Sweden	-	-	-	-	-	-	-
67. Switzerland	✓	-	-	-	-	-	-
68. Taiwan	-	-	-	-	-	-	Building site, construction, installation or assembly project.
69. Tanzania	✓	-	-	-	-	-	-
70. Thailand	-	-	✓	-	-	-	Building site, a construction, assembly or installation project

							or supervisory activities in connection therewith; Corporate services
71. Tunisia	✓	-	-	-	-	-	-
72. Turkey	-	-	-	-	-	-	Building site, a construction, assembly or installation project or supervisory activities in connection therewith
73. Uganda	-	✓	✓	-	✓	-	-
74. Ukraine	✓	✓	✓	-	-	-	-
75. United Arab Emirates	✓	-	-	-	-	✓	-
76. United Kingdom	-	-	-	-	✓	-	-
77. United States	-	✓	✓	✓	✓	-	i. Building site, a construction, assembly or installation project or supervisory activities in connection therewith; ii. Professional independent services;
78. Zambia	-	-	-	-	-	✓	-
79. Zimbabwe	-	-	✓	-	✓	-	-
Total	**29 (37%)**	**10 (13%)**	**15 (19%)**	**6 (8%)**	**11 (14%)**	**7 (9%)**	**10 (13%)**

IX) APPENDIX 3: SUMMARY OF THE CONSTRUCTION PE CLAUSES IN SOUTH AFRICA'S TAX TREATIES[196]

Tax treaty country	Article in Treaty	Deviations from 2017 OECD MTC		Time period threshold	Anti-avoidance rule for splitting up contracts
		Includes assembly project	Includes supervisory activities		
1. Algeria	Art 5.3	✓	✓	6 months	
2. Australia	Art 5.3	✓	✓	6 months	The duration of activities under paragraphs 3 and 4 will be determined by aggregating the periods during which activities are carried on in a Contracting State by associated enterprises provided that the activities of the enterprise in that State are connected with the activities carried on in that State by its associate. The period during which two or more associated enterprises are carrying on concurrent activities will be counted only once for the purpose of determining the duration of activities.
3. Austria	Art 5.3	-	-	12 months	-
4. Belarus	Art 5.3	✓	✓	12 months	-
5. Belgium	Art 5.3	✓	✓	12 months	-
6. Botswana	Art 5.3	✓	✓	6 months	-
7. Brazil	Art 5.3	✓	-	6 months	-
8. Bulgaria	Art 5.3	✓	✓	6 months	-
9. Cameroon	Art 5.3	✓	✓	6 months	-
10. Canada	Art 5.3	✓	✓	12 months	-
11. Chile	Art 5.3	✓	✓	6 months	-

196. A PE is deemed to exist under art 5(3) 2017 OECD MTC where a building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.

12. China	Art 5.3	✓	✓	12 months	-
13. Congo, Dem. Rep	Art 5.3	✓	✓	6 months	-
14. Croatia	Art 5.3	✓	✓	12 months	-
15. Cyprus	Art 5.3	✓	✓	12 months	-
16. Czech Republic	Art 5.3	✓	✓	12 months	-
17. Denmark	Art 5.3	✓	✓	12 months	-
18. Egypt	Art 5.3	✓	✓	6 months	-
19. Ethiopia	Art 5.3	✓	✓	6 months	-
20. Finland	Art 5.3	✓	✓	12 months	-
21. France	Art 5.3	✓ (excludes installation project)	-	12 months	-
22. Germany	Art 3	✓ (excludes installation project)	-	12 months	-
23. Ghana	Art 5.3	✓	✓	6 months	-
24. Greece	Art 5.3	✓	✓	6 months	-
25. Grenada	-	-	-	-	-
26. Hong Kong	Art 5.3	✓	✓	6 months	-
27. Hungary	Art 5.3	✓	✓	12 months	-
28. India	Art 5.3	✓	✓	6 months	-
29. Indonesia	Art 5.3	✓	✓	6 months	-
30. Iran	Art 5.3	✓	✓	12 months	-
31. Ireland	Art 5.3	✓	✓	12 months	-

32. Israel	Art 5.2	✓	✓	6 months	-
33. Italy	Art 5.2	✓	✓	12 months	-
34. Japan	Art 5.3	✓	✓	12 months	-
35. Korea	Art 5.3	-	-	12 months	-
36. Kenya	Art 5.3	✓	✓	6 months	-
37. Kuwait	Art 5.3	✓	✓	6 months	-
38. Lesotho	Art 5.3	✓	✓	6 months	-
39. Luxembourg	Art 5.3	✓	✓	12 months	-
40. Malaysia	Art 5.3	✓	✓	12 months	-
41. Malawi	Art 2	✓ (excludes installation project)	-	-	-
42. Malta	Art 5.3	✓	✓	6 months	-
43. Mauritius	Art 5.3	✓	✓	12 months	-
44. Mexico	Art 5.3	✓	✓	6 months	For the purposes of computing the time limits referred to in this paragraph, the activities carried on by an enterprise associated with another enterprise within the meaning of Article 9 shall be aggregated with the period during which the activities are carried on by the associated enterprise, if the activities of both enterprises are identical or substantially similar.
45. Mozambique	Art 5.3	✓	✓	6 months	-
46. Namibia	Art 5.2	✓	✓	6 months	-
47. Netherlands	Art 5.3	✓	✓	12 months	-
48. New Zealand	Art 5.3	✓	✓	6 months	-
49. Nigeria	Art 5.3	✓	✓	6 months	For the purposes of determining the duration of activities under paragraphs 3, 4 and 5, the period during which activities are carried on

					in a Contracting State by an enterprise associated with another enterprise shall be aggregated with the period during which activities are carried on by the enterprise with which it is associated if the first-mentioned activities are connected with the activities carried on in that State by the last-mentioned enterprise, provided that any period during which two or more associated enterprises are carrying on concurrent activities is counted only once.
50. Norway	Art 5.3	✓	✓	12 months	-
51. Oman	Art 5.3	✓	✓	6 months	-
52. Pakistan	Art 5.3	✓	✓	6 months	-
53. Poland	Art 5.3	✓	✓	12 months	-
54. Portugal	Art 5.3	✓	✓	12 Months	-
55. Qatar	Art 5.3	✓	✓	6 months	-
56. Romania	Art 5.2	✓	✓	9 months	-
57. Russia	Art 5.2	✓	✓	12 months	-
58. Rwanda	Art 5.3	✓	✓	6 months	-
59. Saudi Arabia	Art 5.3	✓	✓	6 months	-
60. Seychelles	Art 5.3	✓	✓	6 months	-
61. Sierra Leone	Art 2	-	-	-	-
62. Singapore	Art 5.3	✓	✓	12 months	-
63. Slovakia	Art 5.3	✓	✓	12 months	-
64. Spain	Art 5.3	✓	✓	12 months	-
65. Swaziland	Art 5.2	✓	✓	6 months	-
66. Sweden	Art 5.3	✓	✓	12 month	-

67. Switzerland	Art 5.3	✓	✓	12 months	-
68. Taiwan	Art 5.2	✓	✓	12 months	-
69. Tanzania	Art 5.3	✓	✓	6 months	-
70. Thailand	Art 5.2	✓	✓	6 months	-
71. Tunisia	Art 5.3	✓	✓	6 months	-
72. Turkey	Art 5.2	✓	✓	12 Months	-
73. Uganda	Art 5.3	✓	✓	6 months	-
74. Ukraine	Art 5.3	✓	✓	12 months	-
75. United Emirates	Art 5.3	✓	✓	12 months	-
76. United Kingdom	Art 5.3	✓	✓	12 months	-
77. United States	Art 5.2	✓	✓	12 months	-
78. Zambia	Art 2	-	-	-	-
79. Zimbabwe	Art 5.3	✓	✓	6 months	-
Total	-	**71**	**70**	-	**3**

X) APPENDIX 4: SUMMARY OF DEVIATIONS FOUND IN THE PE EXCLUSIONARY LIST IN SOUTH AFRICA'S TAX TREATIES COMPARED TO ARTICLE 5(4) 2017 OECD MTC

Table 1: Summary of South Africa's tax treaties following article 5(4) 2017 UN MTC

1. Botswana	9. Oman
2. Cameroon	10. Pakistan
3. Egypt	11. Saudi Arabia
4. Ethiopia	12. Swaziland
5. Hong Kong	13. Thailand
6. Indonesia	14. Tunisia
7. Iran	15. Uganda
8. Kenya	16. Ukraine

Table 2: Summary of South Africa's tax treaties which include advertising, supply of information or scientific research to its PE exclusionary list

1. Chile	10. Mexico
2. Czech Republic	11. Namibia
3. Germany	12. Poland
4. Iran	13. Romania
5. Israel	14. Russia
6. Italy	15. Seychelles
7. Malawi	16. Swaziland
8. Mauritius	17. Switzerland
9. Thailand	

Table 3: Summary of South Africa's tax treaties which include sale of goods displayed at fair or exhibition to its PE exclusionary list

1. Hungary
2. Romania
3. Saudi Arabia

Table 4: Summary of South Africa's tax treaties which does not include wording similar to article 5(4)(f) 2014 OECD MTC

1. Chile
2. Germany
3. Israel
4. Italy
5. Malawi
6. Russia
7. Unites States

Table 5: Other provisions included to the PE exclusionary list in South Africa's tax treaties

Tax treaty country	**Wording**
Hungary	A building site or construction, installation or assembly project carried on by an enterprise of a Contracting State in connection with the delivery of materials, machinery or equipment from that State to the other Contracting State
Malawi	The fact that an enterprise of one of the Contracting States is erecting plant or machinery in the other Contracting State shall not of itself constitute a permanent establishment of such enterprise in the other Contracting State, if the erection is an integral part of the contract for the supply of such plant and machinery.
Romania	Use of facilities…pursuant to a contract of sale of goods or merchandise belonging to the enterprise
Sierra Leone	'The fact that an enterprise of one of the territories maintains in the other territory a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute that fixed place of business a permanent establishment of the enterprise;
Zambia	'The fact that an enterprise of one of the territories maintains in the other territory a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute that fixed place of business a permanent establishment of the enterprise;

XI) APPENDIX 5: SUMMARY OF DEVIATIONS IN SOUTH AFRICA'S TAX TREATIES RELATING TO THE ACTIVITIES OF AGENTS

Table 1: Tax treaties which includes provisions similar to Article 5(5)(b) of 2017 UN MTC[197]

Tax treaty country	Tax treaty article	Deviation
1. Botswana	Article 5(5)(b)	i. Excludes 'personal delivery'. ii. Includes: 'This article is subject to exclusionary list of activities mentioned in paragraph 4 of treaty which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph'.
2. Cameroon	Article 5(5)(b)	Stock of goods or merchandise must belonging to that enterprise.
3. Egypt	Article 5(5)(b)	-
4. Ethiopia	Article 5(5)(b)	Excludes 'personal delivery'.
5. Grenada	Article 2(1)(j)	i. No requirement to habitually maintain stock of goods or merchandise. ii. Excludes 'regular delivery'.
6. Hong Kong	Article 5(5)(b)	-
7. Kenya	Article 5(5)(b)	-
8. Malaysia	Article 5(5)(b)	i. Personal obtainment and execution of orders is excluded. ii. Stock of goods or merchandise must belonging to that enterprise. iii. Excludes delivery of goods or merchandise and include: '…in respect of which orders are regularly obtained and executed on behalf of the enterprise, other than by way of any activity mentioned in paragraph 4.'
9. Namibia	Article 5(4)(b) and (c)	i. No requirement to habitually maintain stock of goods or merchandise. ii. Stock of goods or merchandise must belonging to that enterprise. iii. Includes: 'regularly fills orders or regularly secures orders in the first-mentioned State wholly or almost wholly for the enterprise'
10. Oman	Article 5(5)(b)	Excludes 'regular delivery'
11. Romania	Article 5(5)(b) and (c)	i. No requirement to habitually maintain stock of goods or merchandise. ii. Stock of goods or merchandise must belonging to that enterprise. iii. Excludes delivery of goods or merchandise and include: '…from which he regularly fills orders on behalf of the enterprise; or he regularly secures orders in the first- mentioned Contracting State wholly or almost wholly for the enterprise.'

197. Article 5(5)(b) 2017 UN MTC deems an enterprise to have a PE in a contracting state if such person habitually maintains in that State a stock of goods or merchandise from which that person regularly delivers goods or merchandise on behalf of the enterprise.

12. Russia	Article 5(5)(b) and (c)	i. No requirement to habitually maintain stock of goods or merchandise. ii. Stock of goods or merchandise must belonging to that enterprise. iii. Excludes delivery of goods or merchandise and include: '…from which he regularly fills orders on behalf of the enterprise; or he regularly secures orders in the first- mentioned Contracting State wholly or almost wholly for the enterprise.'
13. Saudi Arabia	Article 5(5)(b)	-
14. Sierra Leone	Article 2(1)(j)	i. No requirement to habitually maintain stock of goods or merchandise. ii. Excludes 'regular delivery'.
15. Swaziland	Article 5(4)(b)	-
16. Taiwan	Article 5(5)(b) and (c)	i. No requirement to habitually maintain stock of goods or merchandise. ii. Stock of goods or merchandise must belonging to that enterprise. iii. Includes: 'regularly fills orders or regularly secures orders in the first-mentioned State wholly or almost wholly for the enterprise'
17. Thailand	Article 5(4)(b) and (c)	i. Stock of goods or merchandise must belonging to that enterprise. ii. Includes: '… from which he regularly fills orders…or habitually secures orders in the first -mentioned State wholly or mainly for the enterprise or for the enterprise and other enterprises which are controlled by it or have a controlling interest in it.'
18. Tunisia	Article 5(5)(b) and (c)	i. Stock of goods or merchandise must belonging to that enterprise. ii. Includes: '… from which he regularly fills orders…or habitually secures orders in the first -mentioned State wholly or mainly for the enterprise.'
19. Ukraine	Article 5(5)	Stock of goods or merchandise must belonging to that enterprise.
20. Zambia	Article 2(1)(k)	i. No requirement to habitually maintain stock of goods or merchandise ii. Excludes 'regular delivery'.

Table 2: Other deviations compared to Article 5(5)[198] and (6)[199] of 2014 OECD MTC

Tax treaty country	Dependent / Independent Agent provision	Tax treaty article	Deviation
1. Australia	Dependant agent	Article 5(7)(a) & (b)	Includes'…authority to substantially negotiate contracts'
		Article 5(7)(b)	Includes 'manufactures or processes in a Contracting State for the enterprise goods or merchandise belonging to the enterprise.'
2. Cameroon	Independent Agent	Article 5(7)	Includes: 'However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, and conditions are made and imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises, he will not be considered an agent of an independent status within the meaning of this paragraph.'
3. Chile	Independent agents	Article 5(7)	Includes: '…provided that such persons are acting in the ordinary course of their business and that the conditions that are made or imposed in their commercial or financial relations with the enterprise do not differ from those which would be generally made by independent agents.'
4. Egypt	Independent agents	Article 5(7)	Includes: 'However, when the activities of such an agent are devoted wholly or mainly on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.'
5. Germany	Dependent Agent	Article 3(1)(j)(dd)	No specific clause that the activities of the dependent agent is subject to the PE exclusionary list. Includes: '…unless his activities are limited to the purchase of goods or merchandise for the enterprise'
6. Grenada	Dependent agent	Article 2(1)(j)	No specific clause that the activities of the dependent agent is subject to the PE exclusionary list. Includes the authority to negotiate contracts on behalf of the enterprise.
7. Iran	Independent agent	Article 5(6)	Includes: 'However, when the activities of such an agent are devoted wholly or mainly on behalf of that enterprise, he shall not be considered an agent of an independent status if the transactions between the agent and the enterprise were not made under arm's length conditions.'
8. Israel	Dependent Agent	Article 5(5)	No specific clause that the activities of the dependent agent is subject to the PE exclusionary list. Includes: '…unless his activities are limited to the purchase of goods or merchandise for the enterprise'
9. Italy	Dependent agent	Article 5(4)	No specific clause that the activities of the dependent agent is subject to the PE exclusionary list.

198. Article 5(5) of the 2014 OECD MTC states that where a person is acting on behalf of an enterprise and has, and habitually exercises, in a contracting state an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a PE in that state in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

199. An enterprise shall not be deemed to have a PE in a contracting state merely because it carries on business in that state through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

			Includes: '…unless his activities are limited to the purchase of goods or merchandise for the enterprise'
10. Kenya	Independent agent	Article 5(7)	Includes: 'However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, and conditions are made or imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises, such agent will not be considered an agent of an independent status within the meaning of this paragraph.'
11. Kuwait	Dependent agent	Article 5(7)	Includes: '…authority to negotiate…'
12. Malawi	Dependant agent	Article 2(1)(k)(v)	No specific clause that the activities of the dependent agent is subject to the PE exclusionary list. Includes: '…unless his activities are limited to the purchase of goods or merchandise for the enterprise'
13. Malta	Independent agent	Article 5(7)	Includes 'However, when the activities of such an agent are devoted wholly or mainly on behalf of that enterprise, he shall not be considered an agent of an independent status if the transactions between the agent and the enterprise were not made under arm's length conditions.'
14. Mexico	Independent agent	Article 5(7)	Includes: '…provided that such persons are acting in the ordinary course of their business and that in their commercial or financial relations with the enterprise conditions are not made or imposed that differ from those generally agreed to by independent agents.'
15. Namibia	Independent Agent	Article 5(5)	Includes: 'However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he or she will not be considered an agent of an independent status within the meaning of this paragraph.'
16. Nigeria	Dependent agent	Article 5(6)(b)	Includes: '…he habitually secures orders for the sales of goods or merchandise in that State exclusively or almost exclusively on behalf of the enterprise or other enterprises controlled by it or which have a controlling interest in it.'
17. Poland	Dependent agent	Article 5(5)	No specific clause that the activities of the dependent agent is subject to the PE exclusionary list. Includes: '…unless his activities are limited to the purchase of goods or merchandise for the enterprise'.
18. Sierra Leone	Dependent agent	Article 2(1)(j)	No specific clause that the activities of the dependent agent is subject to the PE exclusionary list. Includes the authority to negotiate contracts on behalf of the enterprise.
19. Thailand	Dependent agent	Article 5(4)(a) and (c)	No specific clause that the activities of the dependent agent is subject to the PE exclusionary list. Includes: '…unless his activities are limited to the purchase of goods or merchandise for the enterprise or… but habitually secures orders in the first -mentioned State wholly or mainly for the enterprise or for the enterprise and other enterprises which are controlled by it or have a controlling interest in it.
	Independent agent	Article 5(6)	Includes: However, when the activities of such an agent are devoted wholly or mainly on behalf of that enterprise or on behalf of that enterprise and other enterprises, which are controlled by it or have a controlling interest in it, he will not be considered an agent of independent status within the meaning of this paragraph.
20. Uganda	Independent agent	Article 5(6)	Includes: However, when the activities of such an agent are devoted wholly or mainly on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.

21. Zambia	Dependent agent	Article 2(1)(k)	No specific clause that the activities of the dependent agent is subject to the PE exclusionary list. Includes the authority to negotiate contracts on behalf of the enterprise.

XII) APPENDIX 6: SUMMARY OF SERVICE PE PROVISIONS IN SOUTH AFRICA'S TAX TREATIES AND ITS DEVIATIONS FROM 2017 UN MTC

Tax treaty country	**Corporate employee services PE per Art 5(3)(b) 2017 UN MTC[200]**			**Independent professional services PE per Art 14(1)(b) 2017 UN MTC[201]**		
	Included	**Deviations from 2017 UN MTC**		Included	**Deviations from 2017 UN MTC**	
		Wording	**Time period[202]**		**Wording**	**Time period[203]**
1. Algeria	✓	'for the same or a connected project' included.	No	No	-	-
2. Australia	No	-	-	No	-	-
3. Austria	No	-	-	No	-	-
4. Belarus	✓	'for the same or a connected project' included.	120 days	✓	None	120 days
5. Belgium	No	-	-	No	-	-
6. Botswana	✓	'for the same or a connected project' included.	No	✓	None	No
7. Brazil	No	-	-	No	-	-

[200] Article 5(3)(b) 2017 UN MTC reads as follows: 'The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned'.

[201] Article 14(1)(b) UN MTC reads as follows: 'Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also
be taxed in the other Contracting State If his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.' This summary indicates which of South Africa's tax treaties include these clauses under their PE definition, any deviation to the wording of this clause as well as any deviation to the prescribed time threshold.

[202] Deviates from the standard time period threshold of 183 days/6months in any 12 month period.

[203] Deviates from the standard time period threshold of 183 days/6months in any 12 month period.

8. Bulgaria	✓	'for the same or a connected project' included.	No	✓	None	No
9. Cameroon	✓	'for the same or a connected project' included.	No	No	-	-
10. Canada	✓	'for the same or a connected project' included.	12 months	No	-	-
11. Chile	✓	No	No	✓	None	No
12. China	✓	'for the same or a connected project' included.	12 months in any 24-month period.	No	-	-
13. Congo (Dem. Rep.)	✓	'for the same or a connected project' included.	No	✓	None	No
14. Croatia	✓	'for the same or a connected project' included.	No	No	-	-
15. Cyprus	No	-	-	No	-	-
16. Czech Republic	✓	'for the same or a connected project' included.	No	No	-	-
17. Denmark	No	-	-	No	-	-
18. Egypt	✓	'for the same or a connected project' included.	No	No	-	-
19. Ethiopia	✓	'for the same or a connected project' included.	No	✓	None	No
20. Finland	No	-	-	No	-	-
21. France	No	-	-	No	-	-
22. Germany	No	-	-	No	-	-

23. Ghana	No	-	-	No	-	-
24. Greece	✓	'Technical assistance and consultancy services' included.	120 days	No	-	-
25. Grenada	No	-	-	No	-	-
26. Hong Kong	✓	'Consultancy services' not specifically included. 'For the same or a connected project' included.	No	✓	None	-
27. Hungary	No	-	-	No	-	-
28. India	No	-	-	No	-	-
29. Indonesia	✓	'for the same or a connected project' included.	120 days	No	-	-
30. Iran	✓	'for the same or a connected project' included.	No	No	-	-
31. Ireland	No	-	-	No	-	-
32. Israel	No	-	-	No	-	-
33. Italy	No	-	-	No	-	-
34. Japan	No	-	-	No	-	-
35. Korea	No	-	-	No	-	-
36. Kenya	✓	'for the same or a connected project' included.	No	No	-	-
37. Kuwait	✓	No	No	No	-	-

38. Lesotho	✓	'for the same or a connected project' included.	90 days	✓	No	90 days
39. Luxembourg	No	-	-	No	-	-
40. Malaysia	✓	'for the same or a connected project' included.	No	No	-	-
41. Malawi	No	-	-	No	-	-
42. Malta	✓	'for the same or a connected project' included.	No	No	-	-
43. Mauritius	✓	'for the same or a connected project' included.	No	✓	None	No
44. Mexico	✓	'for the same or a connected project' included.	No	✓	None	No
45. Mozambique	✓	'for the same or a connected project' included.	No	✓	None	180 days
46. Namibia	✓	'for the same or a connected project' included.	No	No	-	-
47. Netherlands	No	-	-	No	-	-
48. New Zealand	✓	'for the same or a connected project' included	No	✓	None	No
49. Nigeria	✓	'for the same or a connected project' included	No	No	-	-
50. Norway	No	-	-	No	-	-
51. Oman	✓	'for the same or a connected project' included	90 days	✓	None	90 days
52. Pakistan	✓	'for the same or a connected project' included.	No	No	-	-

53. Poland	No	-	-	No	-	-
54. Portugal	No	-	-	No	-	-
55. Qatar	✓	'for the same or a connected project' included.	No	✓	None	No
56. Romania	No	-	-	No	-	-
57. Russia	No	-	-	No	-	-
58. Rwanda	✓	'for the same or a connected project' included.	No	✓	None	No
59. Saudi Arabia	✓	'for the same or a connected project' included.	No	No	-	-
60. Seychelles	✓	'for the same or a connected project' included.	No	✓	None	No
61. Sierra Leone	No	-	-	No	-	-
62. Singapore	✓	'for the same or a connected project' included.	No	✓	None	No
63. Slovakia	No	-	-	No	-	-
64. Spain	No	-	-	No	-	-
65. Swaziland	✓	'for the same or a connected project' included.	90 days	✓	None	90 days.
66. Sweden	No	-	-	No	-	-
67. Switzerland	No	-	-	No	-	-
68. Taiwan	No			No	-	-
69. Tanzania	✓	'for the same or a connected project' included.	No	✓	None	No

70. Thailand	✓	'for the same or a connected project' included.	No	No	-	-
71. Tunisia	No	-	-	No	-	-
72. Turkey	No	-	-	No	-	-
73. Uganda	No	-	-	No	-	-
74. Ukraine	✓	'for the same or a connected project' included.	No	✓	None	No
75. United Emirates	✓	'for the same or a connected project' included.	9 months	✓	None	No
76. United Kingdom	No	-	-	✓	None	No
77. United States	✓	'for the same or a connected project' included.	No	No	-	-
78. Zambia	No	-	-	No	-	-
79. Zimbabwe	✓	'for the same or a connected project' included.	No	✓	None	No
Total	**42**	**39**	**9**	**23**	**0**	**5**

XIII) APPENDIX 7: SUMMARY OF SOUTH AFRICA'S TAX TREATIES WHICH INCLUDE INSURANCE PE PROVISION

Tax treaty country	Tax treaty article	Wording with deviations from Article 5(7) 2016 ATAF MTC underlined
Botswana	Article 5(7)	Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to reinsurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 6 applies.
Cameroon	Article 5(6)	Notwithstanding the provisions of this Article, an insurance enterprise of a Contracting State shall except in regard to re-insurance be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.
Chile	Article 5(6)	Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in the case of re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or if it insures risks situated therein through a representative other than an agent of independent status to whom paragraph 7 applies.
Egypt	Article 5(6)	Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to reinsurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.
Ethiopia	Article 5(6)	Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to reinsurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.
Kenya	Article 5(6)	Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.
Mexico	Article 5(6)	Notwithstanding the foregoing provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to reinsurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.
Tanzania	Article 5(6)	Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.
Thailand	Article 5(5)	Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other State if it collects premiums in the territory of that other State or

		insures risks situated therein through an employee or through a representative who is not an agent of an independent status within the meaning of paragraph 6 of this Article.
Tunisia	Article 5(6)	Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.
Zimbabwe	Article 5(7)	Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 6 applies.

XIV) APPENDIX 8: EXTRACTIVE INDUSTRY PE PROVISIONS INCLUDED UNDER PE EXAMPLE LIST IN SOUTH AFRICA'S TAX TREATIES

Tax treaty country	Follow the wording of Article 5(2)(f) 2017 OECD MTC[204]	
	Yes / No	Deviation/addition
1. Algeria	✓	Includes in addition the exploitation of natural resources.
2. Australia	X	Does not include the 'extraction of natural resources' but rather includes the following wording: …or any other place relating to the exploration for or exploitation of natural resources.
3. Austria	✓	-
4. Belarus	✓	Includes in addition the exploitation of natural resources.
5. Belgium	✓	-
6. Botswana	✓	Includes in addition the exploitation of natural resources.
7. Brazil	✓	-
8. Bulgaria	✓	Includes in addition the exploitation of natural resources.
9. Cameroon	✓	Includes in addition the exploitation of natural resources.
10. Canada	X	Does not include the 'extraction of natural resources' but rather includes the following wording: …or any other place relating to the exploration for or exploitation of natural resources.
11. Chile	X	Does not include the 'extraction of natural resources' but rather includes the following wording: …or any other place relating to the exploration for or exploitation of natural resources.
12. China	✓	-
13. Congo (Dem. Rep.)	✓	Includes in addition the exploitation of natural resources.
14. Croatia	✓	-

[204] Article 5(2)(f) of the 2017 OECD MTC includes under PE definition especially a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

15. Cyprus	✓	-
16. Czech Republic	✓	-
17. Denmark	✓	-
18. Egypt	✓	-
19. Ethiopia	✓	Includes in addition the exploitation of natural resources.
20. Finland	✓	-
21. France	✓	-
22. Germany	X	-
23. Ghana	✓	Includes in addition the exploitation of natural resources.
24. Greece	✓	Includes in addition the exploitation of natural resources.
25. Grenada	X	-
26. Hong Kong	✓	-
27. Hungary	✓	-
28. India	✓	-
29. Indonesia	✓	-
30. Iran	✓	Includes in addition the exploration or exploitation of natural resources.
31. Ireland	✓	-
32. Israel	✓	-
33. Italy	✓	-
34. Japan	✓	-
35. Korea	✓	-
36. Kenya	✓	Includes in addition the exploitation of natural resources.

37. Kuwait	X	Does not include the 'extraction of natural resources' but rather includes the following wording: …or any other place relating to the exploration for or exploitation of natural resources.
38. Lesotho	✓	Includes in addition the exploitation of natural resources.
39. Luxembourg	✓	-
40. Malaysia	✓	-
41. Malawi	X	Excludes 'an oil or gas well'.
42. Malta	✓	-
43. Mauritius	✓	-
44. Mexico	✓	Includes in addition the exploitation of natural resources.
45. Mozambique	✓	Includes in addition the exploitation of natural resources.
46. Namibia	✓	-
47. Netherlands	✓	-
48. New Zealand	✓	Includes in addition the exploitation of natural resources.
49. Nigeria	✓	Includes in addition the exploitation of natural resources.
50. Norway	✓	-
51. Oman	✓	-
52. Pakistan	✓	Includes in addition the exploitation of natural resources.
53. Poland	✓	-
54. Portugal	✓	-
55. Qatar	✓	Includes in addition the exploitation or exploration of natural resources.
56. Romania	✓	-
57. Rwanda	✓	Includes in addition the exploitation of natural resources.
58. Russia	✓	-

59. Saudi Arabia	✓	-
60. Seychelles	✓	Includes in addition the exploration or exploitation of natural resources.
61. Sierra Leone	X	-
62. Singapore	✓	-
63. Slovakia	✓	-
64. Spain	✓	-
65. Swaziland	✓	-
66. Sweden	✓	-
67. Switzerland	✓	Includes in addition the exploitation of natural resources.
68. Taiwan	✓	-
69. Tanzania	✓	Includes in addition the exploitation of natural resources.
70. Thailand	✓	-
71. Tunisia	✓	Includes in addition the exploitation of natural resources.
72. Turkey	✓	-
73. Uganda	✓	-
74. Ukraine	✓	Includes in addition the exploitation of natural resources.
75. United Emirates	✓	Includes in addition the exploration of natural resources.
76. United Kingdom	✓	-
77. United States	✓	-
78. Zambia	X	Simply states that a PE includes ‘any place of natural resources subject to exploitation’.
79. Zimbabwe	✓	-
Total		

XV) APPENDIX 9: EXTRACTIVE INDUSTRY SPECIAL PE PROVISIONS UNDER SOUTH AFRICA'S TAX TREATIES

Tax treaty Country	Tax treaty article	Wording
1. Australia	Article 5(4)(b)	Notwithstanding the provisions of paragraphs 1, 2 and 3, where an enterprise of a Contracting State carries on activities (including the operation of substantial equipment) in the other State in the exploration for or exploitation of natural resources situated in that other State for a period or periods exceeding in the aggregate 90 days in any 12 month period.
2. Botswana	Article 5(2)(g)	An installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of more than six months.
3. Bulgaria	Article 5(2)(g)	An installation, a drilling rig or ship used for exploration for natural resources, but only if the activity in respect of such exploration continues for a period or periods exceeding three months in any twelve-month period.
4. Cameroon	Article 5(2)(g)	An installation, a drilling rig or ship used for exploration for natural resources, but only if the activity in respect of such exploration continues for a period or periods exceeding three months in any twelve-month period.
5. Denmark	Article 21	1. Notwithstanding the provisions of Articles 5 and 14, a resident of a Contracting State who carries on offshore drilling rig activities or activities in connection with preliminary surveys, exploration or extraction of hydrocarbons or other minerals situated in the other Contracting State shall be deemed to be carrying on in respect of such activities a business in that other Contracting State through a permanent establishment or fixed base situated therein. 2. The provisions of paragraph 1 shall not apply where the activities are carried on for a period or periods not exceeding 30 days in aggregate in any twelve-month period. However, for the purpose of this paragraph, where an enterprise of a Contracting State carrying on activities of this nature in the other Contracting State is associated with another enterprise, within the meaning of Article 9, carrying on substantially similar activities there, the first-mentioned enterprise shall be deemed to be carrying on all such activities of the last-mentioned enterprise, except to the extent that those activities are carried on at the same time as its own activities. 3. Notwithstanding the provisions of paragraphs 1 and 2, profits derived by an enterprise of a Contracting State from the transport by ships or aircraft of supplies or personnel to a location where offshore activities in connection with preliminary surveys, exploration or extraction of hydrocarbons or other minerals are being carried on in the other Contracting State, or from the operation of tugboats and similar vessels in connection with such activities, shall be taxable only in the first-mentioned State. 4. Salaries, wages and other similar remuneration derived by an individual who is a resident of a Contracting State in respect of an employment exercised aboard a ship or aircraft, tugboat or vessel covered by paragraph 3 shall be taxed in accordance with the provisions of paragraph 3 of Article 15.

		5. Notwithstanding the provisions of Article 13, capital gains on drilling rigs used for activities, as mentioned in paragraph 1, which are deemed to be derived by a resident of a Contracting State when the rig activities cease to be subject to tax in the other Contracting State shall be exempt from tax in that other State. For the purpose of this paragraph, the term 'capital gains' means the amount by which the market value at the moment of transfer exceeds the residual value at that moment, as increased by any depreciation taken.
6. Greece	Article 5(7)	Notwithstanding the preceding provisions of this Article and the provisions of Article 14, a person who is a resident of a Contracting State and carries on activities in connection with preliminary surveys, exploration, extraction or exploitation of natural resources situated in the other Contracting State shall be deemed to be carrying on in respect of those activities a business in that other Contracting State through a permanent establishment or a fixed base situated therein, unless such activities are carried on for a period or periods not exceeding 30 days in the aggregate in any twelve-month period. However, for the purposes of this paragraph where an enterprise carrying on activities in the other State is related to another enterprise within the meaning of Article 9 and that other enterprise continues as part of the same project the same activities that are or were being carried on by the first-mentioned enterprise, and the activities carried on by both enterprises exceed a period or periods of 30 days in the aggregate in a twelve-month period, then each enterprise shall be deemed to be carrying on business through a permanent establishment situated in that other State.
7. India	Article 5(2)(f)	A mine, an oil or gas well, a quarry or any other place of extraction of natural resources, including an installation or structure used for the exploration or exploitation of natural resources.
8. Indonesia	Article 5(2)(g)	A ship, drilling rig, installation or other structure used for the exploration or exploitation of natural resources.
9. Ireland	Article 21	1. The provisions of this Article shall apply notwithstanding any other provision of this Convention where activities (in this Article called 'relevant activities') are carried on offshore in connection with the exploration or exploitation of the sea bed and subsoil and their natural resources situated in a Contracting State. 2. An enterprise of a Contracting State which carries on relevant activities in the other Contracting State shall, subject to paragraph 3, be deemed to be carrying on business in that other State through a permanent establishment situated therein. 3. The provisions of paragraph 2 shall not apply where the relevant activities are carried on for a period or periods not exceeding in the aggregate 30 days in any period of twelve months commencing or ending in the fiscal year concerned. However, for the purposes of this paragraph, relevant activities carried on by an enterprise associated with another enterprise shall be regarded as carried on by the enterprise with which it is associated if such activities are substantially the same as relevant activities carried on by the last-mentioned enterprise, except to the extent that those activities are carried on at the same time. For the purposes of this paragraph, an enterprise shall be regarded as associated with another enterprise if it participates directly or indirectly in the management, control or capital of the other enterprise or if the same persons participate directly or indirectly in the management, control or capital of both enterprises.

		4. Profits derived by an enterprise of a Contracting State from the transportation of supplies or personnel to a location, or between locations, where relevant activities are being carried on in the other Contracting State, or from the operation of tugboats and other vessels auxiliary to such activities, shall be taxable only in the first-mentioned State. 5. Salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment connected with relevant activities in the other Contracting State may, to the extent that the duties are performed offshore in that other State, be taxed in that other State. However, such remuneration shall be taxable only in the first-mentioned State if the employment is carried on offshore for an employer who is not a resident of the other State and for a period or periods not exceeding in the aggregate 30 days in any twelve month period commencing or ending in the fiscal year concerned. 6. A resident of a Contracting State who carries on relevant activities in the other Contracting State, which consist of professional services or other activities of an independent character, shall be deemed to be performing those activities from a fixed base in that other State. However, income derived by a resident of a Contracting State in respect of such activities performed in the other Contracting State shall not be taxable in that other State if the activities are performed in that other State for a period or periods not exceeding in the aggregate 30 days in any twelve month period commencing or ending in the fiscal year concerned.
10. Lesotho	Article 5(2)(g)	An installation or structure used for exploration for natural resources.
11. Malta	Article 5(2)(f)	A mine, an oil or gas well, a quarry or any other place of extraction of natural resources including an offshore drilling site.
12. Mauritius	Article 5(2)(h)	An installation or structure used for the exploration of natural resources.
13. Mozambique	Article 5(2)(h)	An installation or structure used for the exploration of natural resources.
14. Netherlands	Article 24	1. The provisions of this Article shall apply notwithstanding any other provisions of this Convention. However, this Article shall not apply where offshore activities of a person constitute for that person a permanent establishment under the provisions of Article 5. 2. In this Article the term ‘offshore activities’ means activities which are carried on offshore in connection with the exploration or exploitation of the seabed and its subsoil and their natural resources, situated in a Contracting State. 3. An enterprise of a Contracting State which carries on offshore activities in the other Contracting State shall, subject to paragraph 4 of this Article, be deemed to be carrying on, in respect of those activities, business in that other State through a permanent establishment situated therein, unless the offshore activities in question are carried on in the other State for a period or periods not exceeding in the aggregate 30 days in any period of 12 months. For the purposes of this paragraph:

		a) where an enterprise carrying on offshore activities in the other Contracting State is associated with another enterprise and that other enterprise continues, as part of the same project, the same offshore activities that are or were being carried on by the first-mentioned enterprise, and the aforementioned activities carried on by both enterprises – when added together – exceed a period of 30 days, then each enterprise shall be deemed to be carrying on its activities for a period exceeding 30 days in a 12 month period; b) an enterprise shall be regarded as associated with another enterprise if one holds directly or indirectly at least one third of the capital of the other enterprise or if a person holds directly or indirectly at least one third of the capital of both enterprises. 4. However, for the purposes of paragraph 3 of this Article the term 'offshore activities' shall be deemed not to include: a) one or any combination of the activities mentioned in paragraph 4 of Article 5; b) towing or anchor handling by ships primarily designed for that purpose and any other activities performed by such ships; c) the transport of supplies or personnel by ships or aircraft in international traffic. 5. A resident of a Contracting State who carries on offshore activities in the other Contracting State, which consist of professional services or other activities of an independent character, shall be deemed to be performing those activities from a permanent establishment in the other Contracting State if the offshore activities in question last for a continuous period of 30 days or more. 6. Salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment connected with offshore activities carried on through a permanent establishment in the other Contracting State may, to the extent that the employment is exercised offshore in that other State, be taxed in that other State. 7. Where documentary evidence is produced that tax has been paid in South Africa on the items of income which may be taxed in South Africa according to Article 7 in connection with respectively paragraph 3 and paragraph 5 of this Article, and to paragraph 6 of this Article, the Netherlands shall allow a reduction of its tax which shall be computed in conformity with the rules laid down in paragraph 2 of Article 23.
15. New Zealand	Article 5(4)(a)	An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if for more than six months…it carries on activities that consist of, or that are connected with, the exploration for or exploitation of natural resources situated in that State…
16. Norway	Article 21	1. The provisions of this Article shall apply notwithstanding any other provision of this Convention. 2. A person who is a resident of a Contracting State and carries on activities offshore in the other Contracting State in connection with the exploration or exploitation of the seabed and subsoil and their natural resources situated in that

		other State shall, subject to paragraphs 3 and 4 of this Article, be deemed in relation to those activities to be carrying on business in that other State through a permanent establishment or fixed base situated therein. 3. The provisions of paragraph 2 shall not apply where the activities are carried on for a period not exceeding 30 days in the aggregate in any period of twelve months commencing or ending in the fiscal year concerned. However, for the purposes of this paragraph, activities carried on by an enterprise associated with another enterprise, within the meaning of Article 9, shall be regarded as carried on by the enterprise with which it is associated if the activities in question are substantially the same as those carried on by the last-mentioned enterprise, except to the extent that those activities are carried on at the same time. 4. Profits derived by a resident of a Contracting State from the transportation of supplies or personnel to a location, or between locations, where activities in connection with the exploration or exploitation of the seabed and subsoil and their natural resources are being carried on in a Contracting State, or from the operation of tugboats and other vessels auxiliary to such activities, shall be taxable only in the Contracting State of which the enterprise is a resident. 5. a) Subject to sub-paragraph b) of this paragraph, salaries wages and similar remuneration derived by a resident of a Contracting State in respect of an employment connected with the exploration or exploitation of the seabed and subsoil and their natural resources situated in the other Contracting State may, to the extent that the duties are performed offshore in that other State, be taxed in that other State. However, such remuneration shall be taxable only in the first-mentioned State if the employment is carried on offshore for an employer who is not a resident of the other State and for a period or periods not exceeding in the aggregate 30 days in any period of twelve months commencing or ending in the fiscal year concerned. b) Salaries, wages and similar remuneration derived by a resident of a Contracting State in respect of an employment exercised aboard a ship or aircraft engaged in the transportation of supplies or personnel to a location, or between locations, where activities connected with the exploration or exploitation of the seabed and subsoil and their natural resources are being carried on in the other Contracting State, or in respect of an employment exercised aboard tugboats or other vessels operated auxiliary to such activities, may be taxed in the Contracting State of which the enterprise carrying on such activities is a resident. 6. Gains derived by a resident of a Contracting State from the alienation of: a) exploration or exploitation rights; or b) property situated in the other Contracting State and used in connection with the exploration or exploitation of the seabed and subsoil and their natural resources situated in that other State; or c) shares deriving their value or the greater part of their value directly or indirectly from such rights or such property or from such rights and such property taken together, may be taxed in that other State.

		In this paragraph 'exploration or exploitation rights' means rights to assets to be produced by the exploration or exploitation of the seabed and subsoil and their natural resources in the other Contracting State, including rights to interests in or to the benefit of such assets.
17. Rwanda	Article 5(2)(g)	An installation or structure used for the exploration for, or the exploitation of, natural resources.
18. Seychelles	Article 5(2)(g)	A mine, an oil or gas well, a quarry or any other place of exploration for, or extraction or exploitation of natural resources, a drilling rig or a working ship.
19. Uganda	Article 5(2)(i)	An installation or structure used for the exploration or exploitation of natural resources.
20. United Kingdom	Article 5(2)(g)	An installation or structure for the exploration for natural resources.
21. United States	Article 5(2)(i)	A ship, drilling rig, installation or other structure used for the exploration or exploitation of natural resources, but only if it lasts more than twelve months;
22. Zimbabwe	Article 5(2)(h)	An installation or structure used for the exploration of natural resources.

XVI) APPENDIX 10: SUMMARY OF OTHER PE DEVIATIONS IN SOUTH AFRICA'S TAX TREATIES

Tax treaty Country	Tax treaty article	Wording
1. Australia	Article 5(4)(b) of 2008 Protocol	Notwithstanding the provisions of paragraphs 1, 2 and 3, where an enterprise of a Contracting State where an enterprise of a Contracting State operates substantial equipment in the other State for a period or periods exceeding 183 days in any 12 month period.
2. Cameroon	Article 5(3)(c)	An enterprise shall be deemed to have a permanent establishment in a Contracting State to carry on business if it provides services, or supplies equipment and machinery on hire used or to be used, in exploration for, extraction of, or exploitation of mineral resources in that State, but only where activities of that nature continue (for the same or a connected project) within the Contracting State for a period or periods exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned.
3. Israel	Article 5(4)	An enterprise shall nevertheless be deemed to have a permanent establishment in the other Contracting State if such an enterprise sells in that Contracting State goods or merchandise which either- (a) were subjected to substantial processing in that Contracting State (whether or not purchased in that Contracting State); or (b) were purchased in that Contracting State and not subjected to substantial processing outside that Contracting State.
4. Kuwait	Article 5(5)	An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if substantial technical, mechanical or scientific equipment or machinery is used for more than six months within any twelve-month period commencing or ending in the fiscal year concerned or installed, in that other Contracting State by, for or under contract with the enterprise.
5. Malawi	Article 2(1)(k)(iv)	An enterprise of one of the Contracting States shall be deemed to have a permanent establishment in the other Contracting State if it carries on the activity of providing the services of public entertainers or of athletes referred to in Article 9, in that other Contracting State.
	Article 2(1)(k)(viii)	The fact that an enterprise of one of the Contracting States is erecting plant or machinery in the other Contracting State shall not of itself constitute a permanent establishment of such enterprise in the other Contracting State, if the erection is an integral part of the contract for the supply of such plant and machinery;
6. Malta	Article 5(4)	An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if equipment is being used or installed in that other State, or supervision thereof is carried out, by, for or under contract with the enterprise during a period or periods aggregating more than six months within any 12 -month period.
7. New Zealand	Article 5(4)(b)	An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if for more than six months substantial equipment is being used in that State by, for or under contract with the enterprise.
8. Nigeria	Article 5(5)	The term 'permanent establishment' shall include a fixed place of business used as a sales outlet notwithstanding the fact that such fixed place of business is otherwise maintained for any of the activities mentioned in paragraph 4 of this Article.

XVII) APPENDIX 11: SOUTH AFRICA'S PE NEGOTIATING POSITION COMPARED WITH 2006 SA MTC, 2017 OECD, 2017 UN AND 2016 ATAF MTCs

South Africa	South Africa MTC	OECD MTC	UN MTC	ATAF MTC
Negotiating position on tax treaty PE definition derived from Non-OECD Economies' Positions on the OECD Model, 2017. Reservations on MLI also indicated.	**South African Model Agreement for the Avoidance of Double Taxation, as it stood in 2006.**	**Model Tax Convention on Income and on Capital [also South Africa's domestic law definition of a PE]**	**Model Double Taxation Convention between Developed and Developing Countries**	**Model Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income**
ARTICLE 5 **PERMANENT ESTABLISHMENT** 1. For the purposes of this Agreement, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.	**ARTICLE 5** **PERMANENT ESTABLISHMENT** 1. For the purposes of this Agreement, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.	**ARTICLE 5** **PERMANENT ESTABLISHMENT** 1. For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.	**ARTICLE 5** **PERMANENT ESTABLISHMENT** 1. For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.	**ARTICLE 5** **PERMANENT ESTABLISHMENT** 1. For the purposes of this Agreement, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term 'permanent establishment' includes especially: a) a place of management; b) a branch; c) an office; d) a factory; e) a workshop, and	2. The term 'permanent establishment' includes especially: a) a place of management; b) a branch; c) an office; d) a factory; e) a workshop; and	2. The term 'permanent establishment' includes especially: a) a place of management; b) a branch; c) an office; d) a factory; e) a workshop, and	2. The term 'permanent establishment' includes especially: a) A place of management; b) A branch; c) an office; d) a factory; e) a workshop;	2. The term 'permanent establishment' includes especially: a) a place of management; b) a branch; c) an office; d) a factory; e) a workshop; and

f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.	f) a mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources.	f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.	f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.	f) a mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources.
3. The term 'permanent establishment' likewise encompasses: a) a building site, a construction, assembly or installation project or any supervisory activity in connection with such site or project, but only where such site, project or activity continues for a period of more than ____ months; b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods exceeding in the aggregate more than six months in any twelve month period commencing or ending in the fiscal year concerned;	3. The term 'permanent establishment' likewise encompasses: a) a building site, a construction, assembly or installation project or any supervisory activity in connection with such site or project, but only where such site, project or activity continues for a period of more than ____ months; b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within the Contracting State for a period or periods exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned;	3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months	3. The term 'permanent establishment' also encompasses: *a*) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months; b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned.	3. The term 'permanent establishment' shall be deemed to include: a) a building site, a construction, assembly or installation project or any supervisory activity in connection with such site or project, but only where such site, project or activity continues for a period of more than ____ months; b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods exceeding in the aggregate ____ days in any twelve month period commencing or ending in the fiscal year concerned;

c) for an individual, the performing of services in a Contracting State by that individual, but only if the individual's stay in that State, for the purpose of performing those services, is for a period or periods aggregating more 183-days within any twelve-month period commencing or ending in the fiscal year concerned. d) if, for more than six months, an enterprise conducts activities in a Contracting State relating to the exploration or exploitation of natural resources.	c) the performance of professional services or other activities of an independent character by an individual, but only where those services or activities continue within a Contracting State for a period or periods exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned.	*[See paragraph 18 of 2014 OECD Commentary, which raises the possibility of inserting a specific provision for exploration and exploitation activities]*		c) for an individual, the performing of services in a Contracting State by that individual, but only if the individual's stay in that State, for the purpose of performing those services, is for a period or periods aggregating more than …..days within any twelve month period commencing or ending in the fiscal year concerned. d) an installation or structure used in the exploration for natural resources provided that the installation or structure continues for a period of not less than ____ days.
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;	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;	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;	4. Notwithstanding the preceding provisions of this Article, the term 'permanent establishment' shall be deemed not to include: a) The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise; b) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;	4. Notwithstanding the preceding provisions of this Article, the term 'permanent establishment' shall be deemed not to include: a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise; b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise; d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise; e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity; f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character. *[South Africa indicated a preliminary reservation not to apply article 14 of the MLI concerning splitting up of contracts.]*	c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise; d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise; e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity; f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.	c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise; d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise; e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity; f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character. 4.1 Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a	c) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise; d) The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise; e) The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity; f) The maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary 4.1 Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a	c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise; d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise; e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity; f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character. 4.1 Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a

		closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character, provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.	closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and character. a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character, provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.	closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character, provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person — other than an agent of an independent status to whom paragraph 6 applies — is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph. *[South Africa indicated a preliminary reservation not to apply article 12 of the MLI concerning artificial avoidance of PE status through commissionaire arrangements and similar strategies.]*	5. Notwithstanding the provisions of paragraphs 1 and 2, where a person — other than an agent of an independent status to whom paragraph 6 applies — is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.	5. Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are a) in the name of the enterprise, or b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or c) for the provision of services by that enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business (other	5. Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 7, where a person is acting in a Contracting State on behalf of an enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, if such a person: a) habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are (i) in the name of the enterprise, or (ii) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or (iii) for the provision of services by that enterprise, unless the activities of such person are limited to those mentioned in paragraph 4	5. Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise and in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are a) in the name of the enterprise**,** or b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or c) for the provision of services by that enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if

		than a fixed place of business to which paragraph 4.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that paragraph. *[See reference in paragraph 114 of the 2017 OECD Commentary, which provides some support for the UN and ATAF provisions.]*	which, if exercised through a fixed place of business (other than a fixed place of business to which paragraph 4.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or b) the person does not habitually conclude contracts nor plays the principal role leading to the conclusion of such contracts, but habitually maintains in that State a stock of goods or merchandise from which that person regularly delivers goods or merchandise on behalf of the enterprise.	exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.
			6. Notwithstanding the preceding provisions of this Article but subject to the provisions of paragraph 7, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State	7. Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an

			or insures risks situated therein through a person.	independent status to whom paragraph 6 applies. *[Note that this is paragraph 7 in the ATAF MTC.]*
6. Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.	6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.	6. Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.	7. Paragraphs 5 and 6 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.	6. (a) Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise. (b) For the purposes of this Article, a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an

				enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise. *[Note that this is paragraph 6 in ATAF MTC]*
7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.	7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.	7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.	8. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.	8. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

8. For the purposes of this Article, a person or enterprise is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person or enterprise shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person or enterprise possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise or in the two enterprises.		8. For the purposes of this Article, a person or enterprise is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person or enterprise shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person or enterprise possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise or in the two enterprises.	9. For the purposes of this Article, a person or enterprise is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person or enterprise shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person or enterprise possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise or in the two enterprises.	