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Africa and the Taxation of Permanent Establishments:

Is the definition of "permanent establishment" as used in the double tax agreements of selected 'fishing rich' African countries sufficient to protect the taxing rights on those diminishing natural resources?

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ABSTRACT

This dissertation tests the sufficiency of the definition of permanent establishments (PE), as contained in the Double Tax Agreements (DTAs) of selected "fishing rich" African countries, in protecting their taxing rights over profits made by non-residents from fishing in the waters of the relevant African State.

The interpretation of a DTA is governed by the general rules of interpretation together with specific principles of interpretation relating to DTAs. The Organisation for Economic Co-operation and Development (OECD) and United Nations (UN) Model Tax Conventions, judicial and academic views provide the core commentary to inform the interpretation of the DTAs. Supplementary means of interpretation would include judicial and academic views with respect to United Nations Convention on the Law of the Sea (UNCLOS) and the Exclusive Economic Zone (EEZ) in relation to the interplay between the EEZ and DTAs.

The concept and meaning of "fixed place of residence" and "any other place of extraction" of natural resources is analysed in the context of establishing a PE in the Source State, taking the above rules of interpretation, the commentaries, judicial and academic views into consideration. The conclusion reached is that although there are strong arguments in support of the view that a fishing vessel can be considered a fixed place of business, a prudent approach should be adopted, which is in line with the OECD and UN commentaries. A fishing vessel is not a PE, unless specifically included in the specific DTA of Contracting States.

With this understanding each country is analysed in turn: Mauritania, Senegal, Madagascar and finally the Seychelles. Before the specific DTAs are analysed, it is established that the state of fishing in Africa and each individual country is in crisis and in great need of reform. Having a sufficient definition of PE so as to have the right to tax profits made from non-residents fishing in the Source State is one of the tools to aid this reform.

The analysis of each of the states' DTAs reveals firstly that there is generally an insufficient definition of PE in each respective DTA as it relates to the creation of a

fishing vessel PE and secondly, to some degree or another, there is a lack of DTAs in place with each of these African States.

The respective DTAs should be renegotiated and amended to include reference to a fishing vessel in the prima facie positive list of examples of what constitutes a PE and the selected states should seek to increase their number of DTAs. Furthermore the commentaries should be amended to come in line with more modern theories based on a business centred model.

University of Cape Town

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ABBREVIATIONS AND GLOSSARY

CIA	Central Intelligence Agency of the United States of America
DTA/treaty	Double Tax Agreement/Double Tax Convention
ECOWAS	Economic Community of West African States
EEZ	Exclusive Economic Zone
EU/EC	European Union/European Commission
FAO	Food and Agriculture Organisation of the United Nations
GDP	Gross Domestic Product
ICJ	International Court of Justice
MTC	Model Tax Convention on Income and on Capital
Natural Resources paragraph	Article 5(2)(f) of the OECD/UN MTC or the equivalent provision in a specific DTA
PE	Permanent establishment/s
OECD	Organisation for Economic Co-operation and Development
OECD Commentary	2010 Commentary on the OECD Model Tax Convention on Income and on Capital (unless specifically stated otherwise)
OECD MTC	OECD Model Tax Convention on Income and on Capital (2010), unless specifically stated otherwise in the text
UAM	Arab Maghreb Union
UNCLOS	United Nations Convention on the Law of the Sea
UN	United Nations Organisation
UN MTC	UN Model Double Taxation Convention between Developed and Developing Countries (2001), unless specifically stated otherwise in the text
UN Commentary	2001 Commentary on the UN Model Double Taxation Convention between Developed and Developing Countries (unless specifically stated otherwise in the text)
State	Country or Contracting State in a bilateral DTA
The Source State	The State (country) of Source
The Resident State	The State (country) of Residence
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

CHAPTER 1

INTRODUCTION

1.1. Permanent Establishments

The permanent establishment (PE) principle is one of the most important legal concepts in international tax treaty law.¹ This principle enables a Source State to tax certain business profits of a non-resident entity, should that entity do business through a PE in that country. In the absence of a PE, that country may not, in terms of the treaty, tax business profits of the PE of that non-resident entity.

Africa is a continent rich in natural resources. Often African states do not have the technology or necessary resources to extract their own natural resources and they are therefore potentially the victims of exploitation by foreign entities or individuals coming into Africa from the wealthier, more developed states, wishing to extract these resources for their own gain.

One way of ensuring that these states are protected from such "resource stripping" is to ensure that the Source State (i.e. the vulnerable African state) has the right to tax the profits made by the non-resident in the extraction of those natural resources. A double tax treaty (DTA) entered into between the residence and Source States with a sufficient definition of PE will enable such a right to be enforced. It will then be up to the domestic policy of the Source State to either relax or enforce the taxation of these profits. In other words, having a sufficiently broad PE definition in a DTA gives the Source State the greatest opportunity to tax the profits made by the non-resident through a PE in that country. Whether in fact this opportunity is enforced is up to the Source State.

¹ Skaar (2005:1)

This dissertation focuses on the diminishing resource of fish and aims to analyse the definition of a PE in the DTAs of selected 'fishing rich'² African countries with the view to determining whether the DTAs in place have a sufficiently broad definition of a PE to protect that countries taxing rights to profits made by non-residents in the fishing waters of the African state.

1.2. Purpose and value of the research

There is a dearth of research in respect of DTAs of African states generally and the definition of PEs in those DTAs specifically. It is submitted that such research is necessary as Africa is a continent which, on the one hand is rich in natural resources, and on the other has economies which are struggling to survive due to *inter alia* mismanagement, civil war, corruption and international interference. Africa is therefore at risk of their natural resources being exploited. One way of preventing such exploitation is to ensure that the relevant country has taxing rights over business profits made by foreign entities (through a PE in that country) from the "extraction" of those natural resources. This dissertation aims to determine whether or not the selected countries have such taxing rights in place, with respect to the fishing industry, through their respective DTAs.

The fishing industry in Africa is in crisis. Fish stocks are declining and demand is rising as a result of poorly managed and unregulated fisheries. This is causing deterioration in the economies of many African states.³ This is alarming due to the fact that millions of Africans depend on fishing for their livelihoods. Kimani (2009:10) states that some 5.6 million jobs in Africa are fishing related and the fishing industry contributes an annual export value of \$2,7 million dollars. This highlights the need to safeguard Africa's fishing waters. One of the issues raised in combating this crisis is the need for strengthening in governance.⁴ One way of strengthening such governance is by determining whether the relevant country has sufficient taxing rights over business

² 'Fishing rich' African countries are countries where the fishing industry is a major contributor to the economy of the country, either to the GDP, employment or to foreign exchange earnings. An analysis of each selected country's fishing industry is contained in Chapter 4 below.

³ Kimani (2009:10)

⁴ Kimani (2009:10)

profits made by a foreign entity from fishing in the waters of the Source State in terms of the tax treaty. It is then the responsibility of the domestic legislation to have laws in place to either exercise or relax these rights according to their specific needs.

Governments in the developing states have to perform a delicate balancing act. On the one hand they need to protect their natural resources from extinction while on the other hand they need to encourage foreign investment to bolster their economies. To encourage foreign investment, a state will create domestic tax policies or incentives, either by lowering tax rates or applying tax credits to the profits made by the foreign investor in the relevant industry, in this case fishing.

However, it is important to re-iterate that this dissertation is testing the sufficiency of the definition of PEs in the DTAs of the selected countries, and whether or not the definition is broad enough to tax the profits made by a foreign entity in the fishing waters of the African state. It is not testing whether or not the domestic law of the relevant state actually taxes the relevant industry. The PE article in the DTA is an enabling provision. It is a basis upon which the Source State has the right to tax the foreign entity. In the absence of such a provision, the Source State cannot tax these profits. A sufficient definition of PE provides the Source State with the greatest opportunity to tax the profits made by the entity through the PE.

This research will have many practical consequences, namely it will:

1. Establish the existence or lack of DTAs in place within the selected African states. This will enable the relevant state to take the appropriate action to establish DTAs with at least their major trading partners. Furthermore it will encourage those nations intending to invest in those countries to establish DTAs if one has not yet been established.⁵
2. Highlight the need for renegotiation of DTAs where the definition of PE is not sufficient in protecting the countries taxing rights over natural resources.

⁵ For example, Madagascar, according to the information sourced on the IBFD database, has only two DTAs; one with Mozambique and one with Mauritius. This is a startling statistic in the light of the fact that Madagascar is a struggling African economy in need of foreign investment, on the one-hand and needs protection from exploitation of natural resources on the other.

3. Provide a source for the international tax practitioner researching PE in an African context.
4. Provide a tool to those African states seeking to strengthen their governance in respect of their fishing industries.

1.3. Selection, Structure and Research Questions

This dissertation investigates the definition of PE in the DTAs of four African states that have a rich resource of fish and as such rely heavily on their fishing trade to support their economy.

The selection includes one North-West African coastal state, Mauritania, and one West African coastal state, Senegal. Both these states have traditionally had an extremely rich resource of fish and have been economically reliant on their fishing trade. These states have also experienced a collapse in their fishing trade due to exploitation of their fishing resources by foreign entities.⁶ The selection also includes two African island states, Madagascar and the Seychelles, which have recently been identified as possibly being the next states vulnerable to exploitation of their fishing trade.⁷

The aim of this dissertation is to analyse the DTAs of each of these African States in order to determine the sufficiency of the PE definition in guarding the taxing rights over their fishing stocks. If found insufficient, then to provide the necessary recommendation to improve the protection of this natural resource from a DTA perspective.

An observation that this dissertation will make is, firstly, whether or not the two states that have experienced a collapse in their fishing trade have taken the necessary action to protect against the extinction of their fish stocks by implementing the necessary changes to their DTAs. Secondly, whether or not the two states that are vulnerable to possible exploitation of their fishing trade have anticipated the problem and

⁶ Hann (2001:5)

⁷ Afrol News. (2010). *Global fisheries collapse to hit Africa first*. [Online]. Available: <http://www.afrol.com/articles/22397>. [8 February 2011]

implemented the necessary measures in their DTAs to protect the taxing rights over their fishing stocks.

Each chapter of this dissertation seeks to answer questions to the central theme of the sufficiency of the PE Article in the DTAs of selected African states in protecting the taxing rights over their fishing stocks.

Chapter 2 has a three-fold purpose. Firstly, it examines the nature of a natural resource and whether or not fish can be considered a natural resource. The answer to that question is integral to the basis of this dissertation. If fish are not considered a natural resource then this research is of no value. Secondly, it considers the principles of interpretation of international instruments, considering the general rules of interpretation and then specific rules of interpretation of double tax treaties. This provides in the first instance a basis for the analysis of the PE Article in the Model Tax Conventions (MTCs) in Chapter 3, and in the second instance a basis for analysis of each selected state's respective DTAs in Chapter 4. Thirdly, Chapter 2 considers the interplay between the United Nations Convention of the Sea (UNCLOS) and DTAs in the context of the fishing industry. This establishes the extent of the taxing rights of the Source State over their fishing stocks in the Exclusive Economic Zone (EEZ).

The definition of PE is examined in Chapter 3. This chapter focuses mainly on the provisions in the PE article that are of relevance to the fishing industry. As such it involves an in-depth analysis of the principle of fixed place of residence in the basic rule PE. It also considers the meaning of "any other place of extraction of natural resources" in the context of what is termed in this dissertation as "the natural resources paragraph". This chapter will seek to answer the following questions:

1. Does fishing belong in the PE Article?
2. Can the fishing industry generate a PE?
3. Are there any other inserted treaty definitions to assist?

This chapter ultimately concludes whether the arguments in favour of a fishing vessel satisfying the basic rule PE should be supported or whether the traditional approach as adopted by the MTC commentaries should be adopted.

There are four components to chapter 4: The first component considers the state of fishing in Africa. This is to establish the importance of an adequate PE definition as one way of protecting the further decline of the fishing trade in Africa. The second component considers the economy and fishing industry of each selected state with the purpose of identifying the importance and reliance of each state on their fishing industries. The third component is a brief overview of the domestic legislation of each selected state, with the aim of determining the basis of taxation of each state, their treatment of non-resident entities, and their investment incentives so as to establish the need to have adequate DTAs in place. The final component is the analysis of each of the selected states' DTAs to determine the sufficiency of the PE article in the context of protecting the taxing rights over the fish stocks of the selected state. This component will answer the following questions:

1. Do the selected African states have the necessary tax DTAs in place?
2. Is there a PE definition in place in the specific DTAs and on what basis (i.e. which MTC) does the DTA follow?
3. Does the definition of the term "permanent establishment" in those treaties enable them to tax those fishing industry entities on their business profits?
4. What deviations from the MTCs exist in the definition to assist protection of fishing as a natural resource?

This chapter is the culmination of the research and concludes whether the DTAs analysed include a sufficient definition of PE to protect the Source State's taxing rights over its fishing stocks.

Chapter 5 provides the conclusions and recommendations derived from the study.

1.4. Limitations to the study

This research focuses mainly on the interpretation and analysis of the Organisation for Economic Co-operation and Development (OECD) and United Nations (UN) MTCs and does not seek to interpret the USA MTC. The USA MTC is too dissimilar to the models of the OECD and UN. Most African countries either subscribe to the OECD or the UN MTCs, or a hybrid of both.

This dissertation primarily examines the DTAs in respect of income and capital. It does not seek to provide an in-depth analysis of any other DTA.⁸ It is concerned with taxing rights on business profits as it relates to the definition of PEs and not any other taxing rights. However, due to the fact that this paper deals with fishing as a natural resource, reference will be made to exclusive economic zones. It is therefore necessary to refer to the UNCLOS and any other relevant treaty as relates to the fishing industry of the respective African states and as compares and relates to DTAs.

Furthermore, in examining the concept of PE within the context of the fishing trade, this dissertation focuses only on foreign fishing vessels (such as ships, boats and trawlers) that catch fish in the waters of the Source State and then either process the fish on the vessel or return to the Resident State to process the fish. It does not examine the foreign entity processing the fish through a processing plant or factory within the Source State. Furthermore, the term "waters" of the Source State, or "sea" of the Source State, refers to the territorial waters and/or the EEZ off the coast of the Source State and not its internal waters.

Although this dissertation will briefly consider the domestic legislation of each of the selected African countries, it is not a study of the domestic legislation of those countries. This paper is primarily concerned with whether the definition of the DTAs of the selected states is sufficient in protecting the taxing rights in respect of the fishing industry in terms of the DTA and not with any conflict between the DTA's and the relevant states domestic law.

⁸ Examples of other double tax treaties that will not be covered in this dissertation are: Transport Tax Treaties, Social Security Tax Treaties, Inheritance Tax Treaties, Registration and Stamp Duty Tax Treaties.

CHAPTER 2

THE DEFINITION OF NATURAL RESOURCES AND THE INTERPRETATION OF DOUBLE TAX AGREEMENTS

This dissertation is concerned with the definition of PE to enable a Contracting State to tax profits arising from that PE through the extraction of natural resources. This chapter will firstly consider the definition of a natural resource and specifically whether fish can be considered a natural resource. Secondly, it will consider the nature of DTAs and the general interpretation thereof.

2.1 What is a Natural Resource?

2.1.1. Definition of a natural resource:

A natural resource is difficult to define. In most cases, people have an intuitive or “common sense” understanding of what a natural resource is, but, according to the 2010 World Trade Report (“the report”) these “common sense” definitions are not reliable and will eventually lead to problems when dealing with ambiguous cases.⁹ The report uses the example of crude oil and wood, which are clearly natural resources, but it is less clear how goods produced from these products should be classified.¹⁰

The difficulty is that all goods either contain natural resources or require resources for their production, such as automobiles (which contain iron ore) and food crops (which require land and water to grow) respectively. Therefore all goods can conceivably be classified as a natural resource; however, this understanding of a natural resource is unhelpful in the context of trade in natural resources.¹¹ In the other extreme, a person could choose to define natural resource strictly and only deal with natural resources in their natural state. Such a definition of natural resources would be difficult to classify as

⁹ WTO. (2010:B46). *World Trade Report*. [Online]. Available: http://www.wto.org/english/res_e/publications_e/wtr10_e.htm. [22 October 2010]

¹⁰ Ibid

¹¹ Ibid

most natural resources require some form of processing before they can be traded or consumed.¹²

Taking into consideration these difficulties and ambiguities in defining natural resources, the World Trade Report (2010: B46) has established the following helpful definition in the context of international trade:

Stocks of materials that exist in the natural environment that are both scarce and economically useful in production or consumption, either in their raw state or after a minimal amount of processing.

The qualifier "economically useful" is extremely important as not all natural resources are of economic use, such as sea water and air, which are not commodities that can be traded in markets.¹³ The resource must also be scarce in the economic sense to qualify otherwise people could consume as much thereof as they like without cost to themselves or others.

2.1.2. Are fish considered a natural resource?

The World Trade Report considers fish as a natural resource.¹⁴ The report does acknowledge that the incorporation of fish (and forestry products) is an exception to the general definition in that both fish and forestry products can be cultivated by human activity. Traditionally fish have been taken from existing natural stocks and in that sense they fall firmly within the definition of natural resources.¹⁵ Furthermore, natural resources can be thought of as natural capital assets, distinct from physical and human capital in that they are not created by human intervention.¹⁶ Natural fish stocks, therefore, fall within the realm of natural capital assets. This dissertation is concerned with the fishing of natural fish stocks by foreign entities in the waters of the Source State and is not concerned with cultivated fish stocks.

¹² Ibid

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

It is interesting to note that in terms of Article 77(4) of UNCLOS, natural resources are defined as consisting of:

the mineral and other non-living resources of the seabed and the sub-soil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or sub-soil,

This definition notably excludes fish. However it is submitted that this definition is given in the context of describing the Continental Shelf and is therefore not concerned with the area immediately above the Continental Shelf. In fact Article 56 UNCLOS, describing the rights and duties of the coastal state in the EEZ (Exclusive Economic Zone), mentions living or non-living resources within the waters of the EEZ, superjacent to the seabed. Furthermore Articles 61 and 62 deal with the conservation and utilisation of living resources respectively and refers specifically to fish and the fishing trade.

It is therefore submitted that fish are considered a natural resource as exists in the natural environment; it is both scarce and economically useful in production or consumption either in their raw state (e.g. whole tuna) or after a minimal amount of processing (e.g. tinned tuna).

2.2 Interpretation of Double Tax Treaties

This dissertation is concerned with the sufficiency of the definition of PE in the DTAs of selected African countries. It is therefore important to consider the nature of a DTA in an International Law context, the rules of interpretation thereof in general and also the specific rules of interpretation and complexities involved in interpreting DTAs.

Furthermore, as this dissertation analyses the sufficiency of the definition of PE in the context of the selected African states protecting its taxing rights over the natural resource of fish, it will examine the interaction between UNCLOS, more specifically the EEZ, and DTAs.

2.2.1 Treaties as a source of International Law

Treaties have increasingly become a major source of international law.¹⁷ Treaties are generally preferred over customary international law by a vast majority of the international community. The primary reason for this preference, according to Engelen (2004:19), is the fact that international law is becoming more and more complex resulting in the need for a greater level of detail. Treaties provide this need for detail whereas customary international law is mostly in unwritten form, takes a long time to develop, and thus engenders a degree of uncertainty.¹⁸

Treaties are known by a number of different names such as "convention", "protocol", "declaration", "charter", and "agreement". Whether a document or agreement between international states is a treaty does not necessarily depend on the name given to the agreement. The name actually given to the agreement can be a possible indication of the intention of the parties to the agreement.¹⁹ The necessary question would then arise: when is an agreement considered a treaty under international law?

Engelen (2004: 19-20), in citing a number of authors on the subject, concludes that a treaty would exist if the agreement concluded between two or more states reveals that the states involved have "reached consensus geared towards creating a legal relationship from which international rights and obligations ensue that are governed by international law".

To determine whether the agreement creates a legal relationship from which international rights and obligations flow, one needs to consider the intention of the parties at the time of entering into the agreement. In a ruling by the International Court of Justice (ICJ) considering a dispute between Qatar and Bahrain over whether the minutes of a meeting of foreign ministers of the respective countries could be regarded as a treaty, the court drew the following pertinent conclusions:²⁰

1. The parties' intention to create international rights and obligations must be determined from the contents of the agreement and the circumstances under

¹⁷ Engelen (2004:19)

¹⁸ Ibid

¹⁹ Ibid at 19-20

²⁰ Ibid at 21-22

which the agreement came about. The form of the agreement is not necessarily a decisive factor.

2. If it becomes clear from the agreement that the parties have undertaken to perform certain 'commitments', rights and obligations have therefore been created and the agreement must be regarded as a treaty.
3. The objective intention of the parties is of importance and not their subjective intention. Even if it can be argued that their subjective intention was to create a political understanding, and not a binding agreement, a party cannot escape the consequences of the agreement if it has been objectively established that a binding agreement has been entered into, taking into account the contents of the agreement and the surrounding circumstances. As a result there is a greater likelihood of states becoming legally bound by international agreements, whether or not this has been anticipated by the country concerned.
4. The court held that the fact that the countries domestic laws have not been followed is, in principle, not inconsistent with an agreement being binding from an international law perspective if it can be shown from the agreement or otherwise that the parties intended to let either the entire agreement or part thereof take immediate effect.

Once it has been established that a treaty is in fact in place between two Contracting States, it must then be determined how to interpret the treaty itself. The bedrock of interpretation of treaties is governed by the Vienna Convention on the Law of Treaties ('VCLT'), and specifically articles 31, 32 and 33 of that Convention.

2.2.2 The Vienna Convention on the Law of Treaties

Treaties are international agreements and like any agreement or domestic law, the need for interpretation can arise from a difference of opinion between the Contracting States.

The creation and consequences of DTAs are interpreted according to the rules contained in the VCLT.²¹ Before the advent of the VCLT there were differences of opinion as to how to interpret treaties. Whether a literal or purposive interpretation should govern the interpretation of an international agreement was highly debated in the older literature on international law.²²

These earlier differences of opinion with regard to treaty interpretation have generally been rendered redundant due to the adoption of the VCLT.²³ Although the VCLT governs general rules of interpretation and cannot necessarily make allowances for the peculiarities relating to specific tax treaties, it has nevertheless resolved some of the uncertainties in prior international practice.²⁴ As a result the current interpretation of DTAs in case law is based on the rules of the VCLT even though not all states have ratified the Convention. This has been confirmed by the International Fiscal Association, which has resolved that the VCLT constitutes customary international law.²⁵

1. The General Rule of Interpretation (Art 31 VCLT)

According to Art 31 of the VCLT the *text* of the treaty is of foremost importance in interpreting international agreements. In other words one must consider, "the 'ordinary meaning' of the terms, and the wording not of the **individual** provision, but that of the entire agreement in **context**."²⁶ This rule rejects the notion of the subjective intention of the parties as a primary consideration in interpreting an international agreement. It is important to note that subjective elements are considered in determining the purpose of the treaty. In determining the purpose one must consider the aim of the treaty as determined objectively from the treaty as a whole. In other words, "purpose" is subordinate to the wording of the treaty; it is aimed to give 'light' to the terms of the treaty and not meant to be an independent means of interpretation.²⁷

²¹ Vogel (1997:21)

²² Vogel (1997:35)

²³ Ibid

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid at 37

²⁷ Ibid

It is important to note that the intention of the parties is only significant to the degree to which it is expressed in the body of the agreement.²⁸ Vogel notably points out that the view that the basic aim of treaty interpretation to determine the intention of the parties is contrary to current international law as established in the VCLT and other texts.²⁹ However, the intention of the parties is not wholly excluded from the VCLT. Article 31(4) does refer to the intention of the parties in ascribing a special meaning to a term in the agreement. The intention of the parties must be clearly supported by the wording of the treaty.³⁰

2. Supplementary means of Interpretation (Art 32 VCLT)

Article 32 of the VCLT deals with supporting documentation or material to the treaty created during the negotiations leading to the execution of the treaty.³¹ These documents would include elaborations on the treaty, supporting documents, position papers etc.³² The article states that these “accompanying materials” may only be referred to as a supplementary source if they confirm the interpretation as per article 31 or in cases of doubt as to the interpretation.³³

The supporting documentation does not include explanatory memoranda or technical explanations published at the time the treaty is concluded or subsequently. The documentation must relate to a period from the time the treaty negotiations were initiated and final conclusion of the treaty. Documents which do not meet these criteria are neither part of the context of the treaty nor materials and may not be used in treaty interpretation.³⁴

3. Bilingual or Multilateral Agreements (Art 33 VCLT)

²⁸ Ibid

²⁹ Ibid

³⁰ Vogel at 37. Vogel rejects the interpretation which corresponds with the intention of the parties, but is in no way supported by the wording of the treaty. He states that it is even less desirable for a court to use as a basis of interpretation a presumption as to the intention of the parties, even if the interpretation according to the wording of the treaty may lead to a non-logical result.

³¹ Vogel 38

³² Ibid

³³ Ibid

³⁴ Ibid

Article 33 states that the original versions in each language are equally authoritative and binding.³⁵ Tax treaties are usually entered into with the languages of both Contracting States if they do not share the same language. On some occasions States will agree to adopt the treaty in a third language (e.g. French or English) and consider it binding should differences exist between the two versions.³⁶ Art 33(4) states that where discrepancies arise between the two versions, the interpretation which best reconciles both texts should to be chosen, taking into account such factors as the influence of the states domestic law on the wording of the treaty. Failing any reconcilable interpretation, the interpretation must be guided by articles 31 and 33 of the VCLT.³⁷

2.2.3 The interpretation of DTAs

The aim of a DTA is to allocate tax claims equally between contracting States. To achieve this aim it requires that the treaty is applied consistently by the authorities and courts in both Contracting States. The directive in terms of Art 31(1) VCLT to interpret a tax treaty 'in the light of its object and purpose' creates an obligation on the Contracting States to seek a DTA interpretation which is most likely to be accepted in both Contracting States, which would be an interpretation that is consistent with international customary law.³⁸ Vogel (1997:39) calls this the goal of “common interpretation” and states the following with regard thereto:

The most important pre-condition is that courts and administrative bodies charged with applying a double tax treaty take into consideration and evaluate the merits of relevant decisions made by comparable institutions in the other contracting State and, if necessary, by those of third states.

The common interpretation principle has been explicitly accepted by the judiciary in jurisdictions such as Britain, USA, Australia and New Zealand.³⁹

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid at 39

³⁹ Ibid at 40

The judiciaries in most states follow the common interpretation principle without openly referring thereto. As an example, when interpreting tax treaties between United States and Canada, Canadian courts have referred to the persuasive, although not binding, decisions of authorities and courts in the United States.⁴⁰

2.2.3.1 Double Tax Treaties and Domestic Law

Domestic legislative terms are often referred to in DTAs.⁴¹ In fact article 3(2) of the OECD MTC is an interpretational provision which requires that if there is an undefined term in the DTA or the context of the term does not provide the necessary definition the term shall have the meaning ascribed to it by the domestic legislation of the Contracting State.⁴²

However, problems may arise when there are changes to the domestic law of a Contracting State. DTA negotiations are often a difficult and lengthy process and as such DTAs are intended to endure, at least, for the medium term and outlast reforms to domestic law so as to avoid continual renegotiations and amendments thereto.⁴³ Art 2(4) OECD MTC supports this view. It states that treaties shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of the treaty and are in addition, or in place of, the existing taxes.⁴⁴

Vogel identifies three problems that may arise with a change in domestic law, namely, a) where the treaty refers to terms or rules of domestic law and these terms are amended, b) the domestic law carries the same meaning but with a different goal or objective and c) the new domestic law contradicts the treaty.⁴⁵

The answer to the first problem is to determine whether the Contracting State adopts a static⁴⁶ or an ambulatory⁴⁷ approach to DTA interpretation.⁴⁸ It is submitted that Contracting States should adopt an ambulatory approach for the following reasons:⁴⁹

⁴⁰ Vogel (1997:40)

⁴¹ West (2009:26)

⁴² Ibid

⁴³ Vogel (1997:63)

⁴⁴ Ibid

⁴⁵ Ibid and see also West (2009:27)

⁴⁶ With reference to the law of the Contracting States at the time when the treaty was concluded

⁴⁷ With reference to the law at the time when the treaty is applied

1. Practically a DTA is set to endure for a number of years whereas domestic legislation is often amended on a more regular basis.
2. A DTAs purpose is to prevent the same amount being taxed in both states for the same person. Due to the fact that tax liability is established in terms of the relevant tax domestic legislation, the DTA relied on would have to take into account any amendments to that legislation.
3. A number of DTA provisions modelled on the OECD MTC support the ambulatory approach. Article 2 of the OECD MTC (which deals with taxes covered) contains a number of ambulatory provisions, such as the requirement that Contracting States are notified in the event of the change in the domestic law of the other Contracting State together with a paragraph relating to future taxes.

The second question is answered by considering the purpose of a DTA, which is to prevent taxpayers being taxed by both contracting States on the same amount. In light of this objective, unless the legislation has the express intention of contradicting the DTA,⁵⁰ the least oppressive interpretation should be followed.⁵¹ The question is also answered by considering the Contracting State's view on international law. For example, in South Africa, the Constitution states that where there is a conflict between domestic and international interpretations, the latter is preferred.⁵²

Thirdly, if the intention of the Contracting State is to deliberately contradict the DTA by amending its domestic legislation, it is in contravention of the customary international law principle of good faith as embodied in the VCLT. This could result in the other Contracting State terminating the DTA or demanding a renegotiation thereof.⁵³

⁴⁸ Vogel (1997:63)

⁴⁹ See West (2009:27)

⁵⁰ This is termed a "treaty override". See footnote 52 below for a definition of treaty override.

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid. See also Vogel (1997:67). Vogel states that the definition of Treaty Override by the OECD ('the enactment of domestic legislation intended by the legislature to have effects in clear contradiction to international treaty obligations') does not conceive a situation where there has been an innocent or unintentional treaty over-ride. One would assume that in such a situation the parties would either agree to renegotiate or cancel the treaty.

Another complexity in using domestic legislation to interpret DTA provisions is whether or not the OECD or other model commentaries; explanatory memoranda or other supplementary sources should be used in interpreting the DTA before resorting to the domestic legislation. West (2009:28) submits that although such sources are not part of the context of the DTA they do have a bearing in determining the common intention of the states, which is consistent in determining the "ordinary meaning" of terms in an international context and in terms of the VCLT. However, it is important to note that such reliance is dependent on the acceptance of that source by the courts of the Contracting State when interpreting the DTA.⁵⁴

2.2.3.2 Multilateral Tax Treaties

Due to the fact that a number of countries selected for analysis in this dissertation are signatories to multilateral tax treaties, it is important to discuss the nature, advantages and disadvantages of Multilateral Tax Treaties.

Multilateral tax treaties are entered into between groups of countries usually connected regionally and/or economically. The most famous and successfully implemented multilateral tax treaty is the Nordic Multilateral Tax Treaty.⁵⁵ Other examples (that will be considered in this dissertation) are the Multilateral Tax Treaties entered into between African states in the Arab Maghreb Union (AMU) and Economic Commission of West African States (ECOWAS).⁵⁶ Van Raad (2002: 248) submits that multilateral tax treaties are usually only feasible for a small group of countries with similar tax systems (e.g. the Nordic Countries).

Some of the advantages of a multilateral tax treaty are detailed below:

1. It gives multinational companies greater opportunity to strategise their operations in a larger economic area. There is only one treaty to consider, which results in decisions as to the placement of subsidiaries and branches not primarily being

⁵⁴ West (2009: 28)

⁵⁵ Hengle (2002: 371). The members of the Nordic Multilateral Tax Treaty are Denmark, Finland, Iceland, Norway and Sweden. The treaty is the only comprehensive multilateral tax among the OECD countries and substituted all previous bilateral tax treaty between the Nordic States.

⁵⁶ See footnotes 160 and 161 respectively for a description of these organisations.

governed by the treaty but more by practical and economic factors.⁵⁷ Smaller companies and individuals also favour a multilateral tax treaty situation as it makes cross border activities simpler.⁵⁸

2. In expanding the above advantage, the uniformity of treaty rules that apply to states with respect to cross-border taxation is preferred over the variety of rules contained in existing bilateral tax treaties.⁵⁹ In practice, special rules that many Contracting States include in their bilateral tax treaties have not been tested and often give rise to interpretation and/or application difficulties.⁶⁰
3. With strict application of bilateral treaties, triangular treaty issues may arise. These triangular issues are more effectively resolved or avoided in a multilateral tax treaty situation.⁶¹

There are also various disadvantages to the multilateral tax treaty situation, namely:

1. The difficulty in creating customised solutions between two countries that are part of the multilateral tax treaty. Although compromises are always necessary these become more difficult to negotiate when the group of states grows in number.⁶²
2. By its nature a multilateral tax treaty seems to be more inflexible than a bilateral tax treaty. A situation may arise where a minority group wishes to make an amendment to the treaty which is not favourable to the majority. This may result in changes felt necessary by a minority not being given effect.⁶³
3. Another problem that may arise is the enforceability and status of mutual agreements reached between two countries within a multilateral tax treaty situation. In other words, can these mutual agreements be made independently of the other countries within the region or must all parties agree? The answer to the question would need to be addressed in the relevant multilateral tax treaty.

⁵⁷ Hengsle (2002: 372)

⁵⁸ Ibid

⁵⁹ Van Raad (2002: 248)

⁶⁰ Ibid

⁶¹ Ibid

⁶² Hengsle (2002: 372)

⁶³ Ibid

The Nordic Treaty requires that all states be advised of the proposed agreement before such agreement is reached. Should a member state request that consultations take place, such consultations must take place without delay. In practice no such consultations have ever taken place as all states have agreed to the agreement. However, what is not addressed is how to deal with the situation where there is a major disagreement between the member states as to a proposed bilateral agreement between two states.⁶⁴

4. In connection with point 3 above, Van Raad (2002:249) states the following as a disadvantage to multilateral tax treaties:

The more special rules countries add on a bilateral basis to the text of a multilateral tax treaty, the more complex the multilateral tax treaty becomes in comparison to a set of bilateral tax treaties.

2.2.3.3 The nature of commentaries on MTCs

The essential issue for consideration is the binding nature of commentaries on MTCs in interpreting DTAs. In other words, can these commentaries be considered supplementary means of interpretation in terms of Article 32 VCLT to confirm the meaning resulting from the application of article 32 VCLT? Jurists and scholars are divided on the issue.⁶⁵

Van Raad is doubtful that the OECD commentary is a supplementary means of interpretation.⁶⁶ His first observation is the MTC is not a treaty in itself and the commentaries thereto are not binding on member states. Furthermore, in terms of Article 31(2) "context" includes only documents and agreements existing at the time the Treaty was concluded and it is only with difficulty that the commentary can be considered one of those. The next consideration, apart from the context, would be

⁶⁴ Ibid

⁶⁵ Engelen (2004: 439). These jurists and scholars are mainly concerned with the OECD MTC commentaries. It is submitted that the principles and arguments would apply to other commentaries such as the UN MTC commentaries.

⁶⁶ As discussed in Engelen (2004:439)

whether the commentaries shed light on the treaty's object and purpose in accordance with the requirement in article 31 VCLT.⁶⁷

Vogel has also considered the complexities governing the legal status Commentaries in interpreting tax treaties.⁶⁸ He concludes that the Commentaries cannot be considered an instrument related to the treaty within the context of article 31(2)(b) VCLT. However, on the other hand, he states that it would be inappropriate to categorise the commentaries as a mere supplementary means of interpretation under article 32 of the VCLT.

Vogel initially suggested that insofar as the provisions of a particular treaty are identical or substantially similar to those in the OECD MTC, it should be presumed that the parties intended to interpret those provisions in the light of the Commentaries unless one or both parties entered a reservation or observation on the Commentaries.⁶⁹

However, due to the regular amendments to the Commentaries on the OECD MTC since 1992, Vogel has revised his position somewhat. His conclusion is that the Commentaries must be applied with severe reservations. As a result he formulated a 4 step process in using Commentaries to interpret tax treaties, which is outlined as follows by Engelen (2004:444-445):

" Step 1

Terms originating from the 1963 Draft Double Taxation Convention may now be regarded as forming part of the 'international tax language' and the meaning attributed to them in the original Commentaries is the ordinary meaning given to them in accordance with Article 31(1) VCLT.

Step 2

The same reasoning applied mutatis mutandis to terms originating from the 1977 model, or first explained in the Commentaries thereon, unless the treaty to be interpreted has been concluded in the first years following the adoption of that

⁶⁷ Idid at 441

⁶⁸ See the discussion in Engelen (2004:441-443)

⁶⁹ Engelen (2004:443)

Model, in which case the legal status of the interpretation adopted in the Commentaries must be determined on a case-by-case basis.

Step 3

The meaning attributed to a term in later versions of the Commentaries, which cannot yet be regarded as forming part of the "international tax language", may nevertheless be regarded as a special meaning as may be given to a term pursuant to Article 31(4) VCLT, also if it has been established that the parties so intended, provided that sufficient time has elapsed between the adoption of that meaning in the Commentaries and the conclusion of the treaty. In this respect Vogel suggests a period of 10 years.

Step 4

If insufficient time has elapsed between the adoption of changes or additions to the Commentaries and the conclusion of the treaty, the Commentaries are at most supplementary means of interpretation, to which recourse may only be had under the conditions and for the purposes laid down in Article 32 VCLT"

On the other hand Avery Jones submits that Commentaries either form part of the context of the treaty as per Article 31(1) VCLT or reflect a special meaning to be ascribed to a term in relation to Article 31(4) VCLT.⁷⁰ He states further that it is unlikely that Commentaries should be regarded as mere supplementary means of interpretation because, without any contrary indication, the assumption is that the parties to a treaty that mirrors the OECD MTC intended the treaty to be interpreted in the light of the Commentaries thereon. However, there is a caveat: changes or additions made to the Commentaries subsequent to the conclusion of the treaty are not in the same category.⁷¹

Lang's position to some extent echoes that of Avery Jones.⁷² He concurs that there is a legitimate assumption that the negotiators of the treaty had the then Commentary in mind when the treaty provisions were agreed. He mentions that in situations where the writers of the treaty conformed to the OECD MTC, one may conclude that their intention

⁷⁰ As discussed in Engelen (2004::447)

⁷¹ Ibid at 446-447

⁷² As discussed in Engelen (2005:447)

was to create a provision with the same meaning the Commentary gives to the corresponding provisions of the MTC. Lang, however, takes a more strict approach when it comes to subsequent Commentaries adopted after the conclusion of the treaty to be interpreted. He submits that such commentaries are neither part of the general rule of interpretation (Article 31 VCLT) nor a supplementary means of interpretation (Article 32 VCLT). He does not completely disregard such later versions for the purposes interpretation. He suggests that these later versions assume no importance in interpreting earlier tax treaties. Whether their use is of probative value depends on the quality of the arguments advanced in favour of such an interpretation.⁷³

In summary, there seems to be little conformity as to the legal status of Commentaries to the MTC amongst the scholars. However, there seems to be unanimity on one aspect: whether the Commentaries form part of the context, are mere supplementary means of interpretations, or inform the ordinary meaning of the text, the Commentary at the time of entering into the DTA should be used to interpret the treaty and not necessarily the subsequent, amended Commentaries.⁷⁴

2.2.4 The UNCLOS and DTAs

There are two questions to consider in respect of the interplay between UNCLOS (United Nations Convention on the Law of the Sea) and DTAs. Firstly what is the legal status of the UNCLOS and EEZ (Exclusive Economic Zone) established thereby? In other words what authority does a Source State have over non-resident entities fishing in the EEZ of the Source State? Secondly, when considering offshore provisions in DTAs, does one consider operations by foreign entities in the territorial waters of the Source State or those activities within the broader EEZ?

Before considering these questions, it is necessary to provide a brief summary of the EEZ.

⁷³ Ibid at 447

⁷⁴ In analysing the various academic views relating to the value of using later commentaries in the interpretation of DTAs, West (2009:186) concludes the following: "...later OECD commentaries do have interpretational value for DTAs concluded earlier, but only where such later commentaries provide clarity to an earlier issue or reflect advances in business that would have been in the minds of the negotiators (and can be contemplated within the original text of the DTA article). This seems to support a more ambulatory approach in using commentaries in interpreting DTAs.

The EEZ can be described as the transitional area, beyond and adjacent to the territorial and high seas.⁷⁵ It extends 200 nautical miles from the coastal baseline of the territorial sea. In this zone the coastal state enjoys certain exclusive rights mainly for economic and regulatory purposes. The EEZ is determined and legally defined in articles 55 to 75 of UNCLOS, which was opened for signature at Montego Bay, Jamaica, on 10 December 1982.⁷⁶

According to the UNCLOS the coastal state has authority in the EEZ, which authority can be classified into three objectives:⁷⁷

1. Exclusive rights for the goal of exploring, exploiting, conserving and managing natural resources, whether living or non-living, of the superjacent waters and of the seabed and its sub-soil and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds.
2. Jurisdiction with regard to the creation and use of artificial islands, installations and structures, marine science research, and the conservation of the marine environment.
- 3 Other rights and duties provided in the Convention (Article 56).

The sovereignty of the coastal state over fishery rights comes with certain obligations regarding the conservation and optimum utilisation of fishery resources.⁷⁸ Firstly, the coastal state is obligated not only to determine the allowable catch of fish in its zone but also to ensure, through proper conservation and management that the resource of fish is not over-exploited. Secondly, the coastal state must establish its own ability to harvest the fish in its zone relative to the allowable catch. If the coastal state lacks the resources to harvest the entire allowable catch, it is obligated, through agreements or other arrangements, to grant access to the surplus allowable catch to other states.⁷⁹

⁷⁵ Akintoba (1996: 87)

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid at 88

⁷⁹ Ibid

The international legal status of the EEZ

Akintoba in his study, *African States and Contemporary International Law: A case study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone*, states the following with respect to the EEZ:

*Few other concepts have achieved such rapid acceptance in international law as the 200-mile exclusive economic zone, which was unknown as a notion in the 1960s but had become unchallengeable as a legal construct by the mid-1980s.*⁸⁰

In support of this statement, Akintoba confirms that as of 1994, 21 African Atlantic and Indian Ocean states (AAIO) have adopted and implemented the provisions of the EEZ concept, mostly as it relates to fishing in their areas of jurisdiction.⁸¹ Akintoba confirms that this wide acceptance and implementation of the EEZ, especially by African Coastal States, is what has contributed to its adoption as a norm of international law. In the ICJ *North Sea Continental Shelf Cases* of 1969, the court identified certain factors that must exist before a norm contained in a treaty can be considered a principle of international law. Akintoba believes that these factors are well satisfied in the case of the EEZ concept. These factors include:

1. The provision must be of a fundamental norm-creating character to form the basis;
2. The passage of a considerable period of time during which the provision is consistently and uniformly practiced;
3. Widespread and representative participation of states whose interests are especially affected;
4. Opinion of Jurists and uniform application by governments in support of the provision.

In further support of the contention that the EEZ principle has transformed into a norm of customary international law, Akintoba cites a number of ICJ cases on the matter. In

⁸⁰ Ibid at 87

⁸¹ Ibid at 143

the 1982 *Tunisia-Libyan Arab Jamahiriya Continental Shelf Case*, Judge D'Arechaga (in a separate opinion) stated the following:⁸²

The provisions of the negotiating texts and of the Draft Convention elaborated by the Third United Nations Conference on the Law of the Sea and the consensus which emerged at the Conference, have in this respect, a constitutive or generative legal effect, serving as the focal point for and as the authoritative guide to a consistent and uniform practice of states. The proclamation by the Coastal States of economic zones, fishery zones or fishery texts of the conference, constitutes a wide a widespread practice of States which has hardened into a customary rule, an irreversible part of today's Law of the Sea.

Another case quoted is that of the 1985 *Libyan Arab Jamahira-Malta Case Concerning the Continental Shelf*. In that case the court held that “the institution of the EEZ is shown by the practice of States to have become part of customary international law”.⁸³

The EEZ is therefore a recognised principle of international customary law and binding on states from an international law perspective. Therefore the Source State has certain exclusive economic and regulatory rights over their EEZ in preference to a Contracting State entering their zone. However, do these rights extend to tax treaties in relation to offshore income earning activities, such as fishing in the EEZ of a Source State? This leads to the next question.

Offshore Provisions in Tax Treaties: Territorial Waters or EEZ?

Territorial waters differ from state to state, within the limits set out in customary international law, which is 12 nautical miles from the coastline.⁸⁴ This is a much smaller zone as compared to the EEZ. It would therefore be in the interests of the Contracting State to argue that the Source State only has the right to tax profits from offshore activities within the Source states territorial waters and not the EEZ.

However, it is submitted that this argument fails on two grounds:

⁸² Ibid at p 144

⁸³ Ibid

⁸⁴ Niken (2008:186)

- Firstly, due to the fact that coastal states territorial waters may differ from State to State, this will result in differences in tax treatment and taxation would not be neutral.⁸⁵ The application of the EEZ is uniform and would result in tax equality between States.
- Secondly, the acceptance of the EEZ as a customary international norm, confirms international law practice that coastal States have economic jurisdiction over their EEZ and not only their territorial waters.

In summary, the EEZ is an accepted norm of international customary law. A coastal state therefore has economic jurisdiction over its EEZ. Any offshore activity referred to in a tax treaty would therefore, it is submitted, not only include activities within the territorial waters of the Source State but also those income earning activities within the EEZ of the Source State.

2.3 Concluding Remarks

It is submitted that fish is a natural resource as in its natural environment it is both "scarce and economically useful in production or consumption, either in its raw state or after a minimal amount of processing."

In interpreting DTAs a literal approach should be adopted as reflected in the VCLT. Furthermore where there are issues of interpretation between Contracting States to a DTA the common interpretation principle should be followed. When a state is to apply its domestic law in interpreting a DTA, the ambulatory method of interpretation should be followed. In other words domestic legislation at the time the treaty is implemented must be considered in interpreting the DTA rather than the domestic law at the time of the DTA being concluded. Although commentaries on MTCs can be used in interpreting DTAs their weight of force is limited depending on the nature of and the circumstances leading up to the negotiations of the specific DTAs being interpreted. However, the consensus seems to be that only the commentaries at the time of the DTA being entered into should be used in the interpretation process.

⁸⁵ Ibid

Lastly, it is submitted that the EEZ has the force of customary international law and is as such binding on states from an international law perspective. As such the jurisdiction of the Source State shall extend to its EEZ. Therefore when this dissertation makes reference to a fishing vessel "in the waters" of the coastal state, it implies not only its territorial waters but also its EEZ.

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CHAPTER 3

ANALYSIS OF THE DEFINITION OF PERMANENT ESTABLISHMENT IN SELECTED MODEL TAX TREATIES

3.1 Introduction

This dissertation is concerned with the sufficiency of the definition of PE in the DTAs of selected African Countries in the protection of their fishing stocks. It is therefore imperative to analyse the PE Article as it appears in selected MTCs especially as it relates to a fishing vessel as a PE.

The PE article in the OECD and UN MTCs are similar in many respects. Both MTCs contain the definition of PEs in Article 5 of their MTCs and more importantly the paragraph relating to the "mining and natural resources" mirror each other exactly.⁸⁶ There are a number of differences between the two MTCs in respect of Article 5.⁸⁷ However these differences have no bearing on this study and will not be discussed in this dissertation.⁸⁸

Article 5 essentially contains seven elements, namely:⁸⁹

1. The basic-rule PE - Article 5(1);
2. Examples of PEs (positive definitions) – Article 5(2);
3. Construction projects – Article 5(3);
4. Exceptions to PEs – Article 5(4);
5. Dependent agents – Article 5(5);
6. Independent Agents – Article 5(6); and
7. Subsidiary companies – Article 5(7)

⁸⁶ Article 5(2)(f) OECD and UN Model Tax Treaties: a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

⁸⁷ See Appendix 1 and 2 for an extract of article 5 of OECD and UN MTC respectively

⁸⁸ For a discussion on these differences see Lennard (2009:4-7)

⁸⁹ Holmes (2007: 150)

As this dissertation deals with the fishing industry, it will only be necessary to focus on element 1, the basic rule PE and element 2 examples of PEs as it relates to natural resources to determine whether or not a fishing vessel is in fact a PE.

Basic Rule PE

The commentary to the 2010 OECD MTC states that the basic rule PE contains the following conditions:

1. There must be the existence of a "place of business", i.e. a facility such as premises or, in certain instances, machinery or equipment;
2. The relevant place of business must be "fixed", i.e. it must be established at a distinct place (geographical) with a certain degree of permanence (permanence);
3. the carrying on of the business of the enterprise through this fixed place of business. This means usually that persons who, in one way or another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the state in which the fixed place is situated.

The questions for consideration are firstly whether or not a fishing vessel is a "place of business" and secondly if it is considered a place of business, whether or not it can be considered a "fixed" place of business. Should it be argued that a fishing vessel is a fixed place of business, the third condition, it is submitted, would automatically be satisfied as the business of the enterprise (i.e. fishing) would be carried on through the place of business (i.e. the fishing vessel). Therefore, what follows is a discussion on whether a fishing vessel belongs in the PE Article.

3.2 Fixed Place of Business: Does a fishing vessel belong in the Permanent Establishment Article?

The nature of a fishing vessel is that it is firstly mobile (i.e. not fixed in the sense of mobility) and, secondly, it does not necessarily operate within a fixed geographical area.

It therefore, at first glance, seems to fail the fixed place of business test. It is important, therefore, to analyse the concepts of "place of business" and "fixed" place of business specifically as it relates to a fishing vessel.

3.2.1 Place of Business Test

"Place of Business" is not defined in either the MTC or their commentaries.⁹⁰ According to Skaar (2005:2.2.1) it seems that "the tenor of judicial practice and legal doctrine is that all objects that are commercially suitable to serve as the basis of a business activity may be a place of business."

The place of business is therefore a physical space or object that serves the business activity of the enterprise.⁹¹ Accordingly, ownership of a physical object is not in itself sufficient for a PE to be established. Moreover, objects that are subjects of a business activity, such as goods for sale, cannot be a place of business, but the premises where the goods are sold may be.⁹²

It has been suggested that a place of business should be the centre point or headquarters of the foreign enterprises' business, however this view, is submitted to be too narrow a view on the concept of place of business.⁹³ It is apparent that the concept is broader than a mere focal point or headquarters from the fact that a foreign corporation or enterprise may maintain several PEs in the same state.⁹⁴ Furthermore the inclusion in Article 5(2) of the "Positive List" of prima facie examples of what constitutes a PE⁹⁵ is evidence of this broader view of what constitutes a place of business.⁹⁶

It is important to note that the places of business indicated in the Positive List do not necessarily constitute a PE; it is a prerequisite that the conditions for a PE as set out in

⁹⁰ Skaar (2005:2.2.1)

⁹¹ Ibid. See also Larking (1998: 266)

⁹² Skaar (2005:2.1.1)

⁹³ Larking (1998:266)

⁹⁴ Ibid

⁹⁵ These examples are: a place of business, a branch, an office, a factory, a workshop and a mine, a gas or oil well, a quarry or any other place of extraction of natural resources.

⁹⁶ Larking (1998:266)

Article 5(1) (the basic rule PE) be satisfied first.⁹⁷ The superiority of the basic rule is emphasised in Article 5(4) which contains a list of activities which do not constitute a PE (negative list). Such activities do not constitute a PE even if the activity is conducted through a place of business mentioned in the positive list.⁹⁸

Skaar (2005:2.2.2) states that the positive list is not exhaustive and is not subject to the *ejusdem generis* rule.⁹⁹ As such, any physical object of substance may be considered a place of business, regardless of whether it is of the same kind or class as those indicated in Article 5(2). Further examples of places of business not specifically mentioned in the positive list include real estate, buildings, plants, (substantial) machinery and equipment, ships, aircraft, drilling rigs and computers.

In light of the above, it is submitted that a fishing vessel does constitute a place of business as it is an object that is commercially suitable to serve as a basis to the business activity (i.e. fishing). The next consideration is whether a fishing vessel can be considered a "fixed" place of business.

3.2.2 Fixed Place of Business Test

Skaar divides the term "fixed" into two elements, namely spatial (the Location Test¹⁰⁰) and temporal (the Permanence Test).¹⁰¹ Each element will be discussed in turn:

3.2.2.1 The Location or Physical Permanence Test

It is a requirement of the location test that a link exists between the place of business and a specific geographical point.¹⁰² In other words the place of business is to be located at a specific place within the taxing jurisdiction of the Source State. This interpretation does not pose problems with traditional places of business such as a

⁹⁷ Skaar (2005:2.2.2)

⁹⁸ Ibid

⁹⁹ The requirement that the place of business should be of the same kind or class as those specifically mentioned.

¹⁰⁰ Larking calls this "Physical Permanence". See Larking (1998:267)

¹⁰¹ Skaar (2005:2.3.1)

¹⁰² OECD Commentary on Art. 5 para 5.

plant, factory or an office, however becomes more complex when one is dealing with a mobile place of business such as a fishing vessel.¹⁰³

The idea behind the location test is that the enterprise has a distinct place of business in the Source State that can be called its "home".¹⁰⁴ Where a business activity simply relocates to a new place of business, the issue becomes one of timing (this is dealt with under the Permanence Test). The greater problem with the location test exists where the place of business itself moves.

There has been some support to the view that a place of business that does not move but is capable of moving should be regarded as physically permanent.¹⁰⁵ By implication, the statement in the OECD Commentary that machinery and equipment do not necessarily have to be fixed to the ground to constitute permanence, is in support of this view.¹⁰⁶ Although it has been suggested that this statement should be confined specifically to machinery and equipment, both scholars and practice dictate that it may be of more general application.¹⁰⁷

On the supposition that the ability to move does not necessarily prevent a place of business from being permanent, the question remains whether or not and in what circumstances a business can move while still remaining permanent. Firstly, movement at the termination of a business activity is irrelevant to establish permanence as there would no longer be business activities being carried on through the PE.¹⁰⁸ Secondly, it may also be argued that movement between different assignments is not a bar to permanence. The movement from assignment to assignment is irrelevant as no business is being carried on during those periods of movement, as mentioned above. A third situation is, if the place of business returns to the same location after temporary interruptions caused by interim movement, it can be argued that such interim movement is to be ignored.¹⁰⁹

¹⁰³ Skaar (2005:2.3.1)

¹⁰⁴ Ibid

¹⁰⁵ Larking (1998:267)

¹⁰⁶ OECD Commentaries on Art. 5 para 5

¹⁰⁷ Larking (1998:267)

¹⁰⁸ Ibid

¹⁰⁹ Ibid. Larking states that this position is analogous of OECD view on temporary interruptions (Commentary on Art.5 para 11). He states further that there has been some support for this position in practice by the Canadian Courts who held in one case that a US (non-resident) tax payer who used a collapsible booth to attend a trade fair in Canada for a two week period per year for 15 years, was

3.2.2.2 The Spatial Delimitation Approach

The above views are concerned with movement between or interim interruptions of business activities; however, when it comes to a place of business which moves while carrying on business activities (such as a ship or a truck) the traditional view is that these would not satisfy the location test.¹¹⁰

This position has been challenged by the development of the "spatial delimitation approach" as identified by Skaar.¹¹¹ The core of the "spatial delimitation approach" is that a movable place of business which operates within a certain area, despite the fact that it does not stay in a specific place for long periods of time, may generate a PE.¹¹² In conformity to this theory, many countries have generally accepted that a drilling rig may constitute a PE even though it frequently moves from one position to another.¹¹³

The "spatial delimitation approach" should be distinguished from the situation where the place of business itself consists of a large space or area in which the business activity is carried out. In the latter situation the area or space constitutes the place of business whereas with the "spatial delimitation approach" the business moves within a specific area or moves between different places of business within the area.¹¹⁴

3.2.2.3 The Relativity Theory

A final argument in support of a moving business being considered a fixed place of business is the "relativity theory", which states that physical permanence or location has a variable meaning depending on the nature of the business.¹¹⁵ Paragraph 5.1 of the OECD Commentary to Article 5 states the following:

operating through a permanent establishment. Furthermore the German Minister of Finance has stated, in the context of German domestic law, that mobile places of business which are temporarily stationary may constitute permanent establishments. However, contrary to these views the English Courts, in an unpublished English case, held that a semi-submersible drilling rig did not have a distinct *situs* when moving between drilling sites and was therefore not a permanent establishment.

¹¹⁰ Ibid

¹¹¹ Skaar (2005:2.3.4). Skaar confirms that this approach has been adopted by the tax authorities of an increasing number of countries especially with regard to offshore business activities.

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ Larking (1998:268)

¹¹⁵ Ibid

Where the nature of the business activities carried on by an enterprise is such that these activities are often moved between neighbouring locations, there may be difficulties in determining whether there is a single "place of business" (if two places of business are occupied and the other requirements of Article 5 are met, the enterprise will, of course, have two permanent establishments). As recognised in paragraphs 18 and 20 below a single place of business will generally be considered to exist where, in light of the nature of the business, a particular location within which the activities are moved may be identified as constituting a coherent whole commercially and geographically with respect to that business. (emphasis added)

This position is further supported by Paragraph 6 of the OECD commentary to Article 5, which states,

A place of business may, however, constitute a permanent establishment even though it exists, in practice, only for a very short period of time because the nature of the business is such that it will only be carried on for that short period of time. It is sometimes difficult to determine whether this is the case. (emphasis added)

Geographical and commercial coherence is not defined in the Commentaries, but is rather explained through a number of examples as to when geographical and commercial coherence will or will not exist.¹¹⁶ There is no example dealing with offshore activities by a fishing vessel.¹¹⁷

Skaar submits that the essence of the tests established by the Commentary is that the taxpayer's commercial activity must be considered from their client's perspective. If it is one single business from the client's point of view, commercial coherence would exist. With respect to geographical coherence, the activity must be conducted within an area that the client legally and fully placed at the taxpayer's disposal by the client or some other person or entity. Under these circumstances, geographic and commercial

¹¹⁶ OECD Commentary to Article 5, paragraphs 5.2 – 5.5

¹¹⁷ See 3.2.3 below for an examination of judicial and country practice with in relation to fishing vessels.

coherence exist and a PE may be constituted (subject to time and other requirements).¹¹⁸

It has been argued that the conventional location test as a requirement of a fixed place of business is largely replaced by the more modern geographical and commercial coherent test.¹¹⁹ The lack of being present at one specific location "can be compensated partly by a commercial coherence test (in addition to the geographical coherence test)".¹²⁰

It is submitted that the nature of the business of a fishing vessel is that business activities are moved from location to location depending on where the best "catch" may be. This would satisfy the geographical and commercial coherence tests.¹²¹ Furthermore, it is submitted that a fishing vessel will also satisfy the "spatial delimitation approach" as fishing vessels are moving places of business which operate within a certain area. Alternatively, it could even be argued that a fishing vessel remains stationary at each location while conducting its fishing activities and once the fishing is complete it moves to the next location and so forth. As such there is no business activity during periods of movement. This is in conformity with the temporary interruption position postulated by paragraph 11 of the OECD commentary to Article 5, as discussed above.

3.2.2.4 The Permanence Test

The normal function of the temporal permanence test is to establish a sufficient connection between the taxpayer and the earth's surface.¹²² It is of great importance that the permanence test should not relate to the place of business, but rather to the use of the place of business. The reasoning for this view is that the actual, physical place of business (such as a building or a ship) may remain for a considerable period of

¹¹⁸ Skaar (2005: 2.3.4)

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ This view is contrary to certain case law which is discussed more fully in 3.2.3 below

¹²² Skaar (2005:2.5.1)

time, whereas the business activity linked to the place may not necessarily last for same amount of time.¹²³

The OECD commentaries are consistent with the view that permanence should not be interpreted to mean "perpetual", but rather as meaning an activity of an "indefinite duration" or an indeterminate period of time.¹²⁴ Furthermore, in terms of the Commentaries and MTCs, in the context of PEs, a temporary right of use to a place of business refers to a rather short duration; and the term "permanence" does not necessarily mean "unending right of use", but rather refers to a relatively long period of time. Skaar submits, accordingly, that the language of OECD MTC is not precise on that point.¹²⁵

In relation to the duration of the business activity it is uncertain whether or not it is the intended or actual duration that is relevant.¹²⁶ The primary question to satisfy the basic rule PE is the intended permanence of the taxpayer. Whether or not the taxpayer in fact remains permanent is immaterial. Change of plans or the situation of the taxpayer does not deprive a place of business of its PE status.¹²⁷

In practice, the objective test of "actual duration" seems to be the deciding factor in determining the establishment of a PE.¹²⁸ Proponents of the "intention test" have argued that actual duration may provide evidence as to intention.¹²⁹ For example, a short-term lease indicates temporary use, while premises actually owned by the enterprise suggest a more permanent use. The average time to determine the establishment of a PE in the permanence test is 6 months, although there are exceptions.¹³⁰

On the other hand, the Commentaries state that short periods of duration will be acceptable in establishing a PE if it is within the nature of that business to carry out its

¹²³ Ibid

¹²⁴ Ibid at para 2.5.2. See also OECD Commentary to Art 5, para 6.

¹²⁵ Skaar (2005:2.5.2)

¹²⁶ Larking (1998:268)

¹²⁷ Skaar (2005: 2.5.2). See also Larking (1998:268) who states that most commentators tend to support the intended duration test, but in practice the deciding factor is the actual duration test.

¹²⁸ Skaar (2005:2.5.3)

¹²⁹ Larking (1998:268)

¹³⁰ Skaar (2005:2.5.4). The exceptions are US and German practice is 2 years whereas in Norway there have been reports that periods as short as 3 weeks have established a PE.

business activities for that short period of time.¹³¹ There is a caveat though; the business activities must be carried out exclusively in the Source State. This means that these activities cannot be carried out in any other state or in the Resident State. An example would be special and exclusive once off events such as a large sporting event broadcast over a period of weeks.¹³² It is submitted that, in terms of this interpretation, a fishing vessel that carries out fishing activities over a relatively short period of time would not satisfy the permanence test, unless it could be argued that the fish off the coast of the Source State is unique to that state and cannot be fished anywhere else in the world.

In relation to seasonal activities it has been suggested that a taxpayer who repeatedly obtains the right to use a place of business during particular seasons may qualify for PE status, even though each season considered independently does not satisfy the permanence test. To acquire such a status requires a certain degree of regularity and a minimum time period for each season. It has been suggested that each season in aggregate should last for at least the average time period of 6 months. This could be calculated over a number of years.¹³³

This practice has been explicitly accepted by the OECD commentaries, which states:¹³⁴

One exception has been where the activities were of a recurrent nature; in such cases, each period of time during which the place is used needs to be considered in combination with the number of times during which that place is used (which may extend over a number of years).

It is averred that a fishing vessel may fall with this seasonal requirement, as fishing is a seasonal activity. It is suggested that evidential support as to actual duration of the seasonal activities requirement would be the fishing licence or contract with the Source State. If the contract in total lasts for longer than 6 months it is submitted that a PE may be established in relation to the permanence test.

¹³¹ OECD Commentary Art 5, para 6

¹³² Skaar (2005:2.5.5)

¹³³ Ibid at 2.5.6

¹³⁴ OECD Commentary Art 5. para. 6

3.2.3 Analysis of Commentaries and Country Practice as it specifically relates to Fishing and Fishing Vessels:

What follows is an analysis of the commentaries as they specifically relate to fishing and fishing vessels together with an examination as to the treatment of a fishing vessel in practice, considering applicable treaties and case law.

3.2.3.1 Commentaries

The conclusion reached in the 2001 Commentary on the UN MTC is that for a fishing vessel to be considered a PE it must be specifically included in the Treaty concluded between the Contracting States (see paragraph 6 on the UN Commentary to Article 5, which is considered in more detail under 3.3 below).

The 2010 commentary on the OECD MTC in relation to article 5 makes a passing reference to the possibility of fishing activities being considered a PE (paragraph 42.29 on the commentary to article 5 relating to the taxation of services). The paragraph states as follows:

The suggested paragraph only applies to services. Other types of activities that do not constitute services are therefore excluded from its scope. Thus, for instance, the paragraph would not apply to a foreign enterprise that carries on fishing activities in the territorial waters of a State and derives revenues from selling its catches (in some treaties, however, activities such as fishing and oil extraction may be covered by specific provisions).

The exclusion from services implies that fishing activities are either covered by the basic rule PE or, as suggested, by specific reference thereto in the provisions of the treaty.

Although the conclusion that can be drawn from both the commentaries is that, without specific inclusion in the PE article in the DTA, a fishing vessel would be excluded from the definition of PE, it is submitted that the commentaries have not given sufficient thought and consideration to the concepts of "location" and "permanence" in the context of the fishing industry or to other seemingly "mobile" places of business, as argued in

3.2.2 above. It is suggested that the commentaries be amended to come in line with more modern trends in the interpretation of a fixed place of business.

3.2.3.2 Examples in Practice

Treaties

The only DTAs that specifically include fishing in their PE article are the Argentina/Denmark and Argentina/Sweden treaties.¹³⁵ In respect of the exploration and exploitation of Natural Resources paragraph of the Argentina's/Denmark treaty, fishing activities are included if they last for more than 3 months within a 12 month period. The same paragraph under the Argentina/Sweden states a PE will be established if the fishing activities last more than 30 days within a 12 month period.¹³⁶ This treatment seems to be consistent with the seasonal activities approach in terms of the OECD commentary as mentioned above.

The DTAs of certain countries refer to fishing or fishing activities in other articles of their respective treaties. For example, the Lithuania/USA Income Tax Treaty (1998) describes business profits (Article 7) to include profits from fishing (Article 7(7)).¹³⁷ However, a fishing vessel is not mentioned in the PE article of the treaty, therefore it is unsure whether profits made through a fishing vessel would in fact be taxable.

Other treaties, such as the Belgium/Norway Treaty, refer to fishing in Article 8 of the treaty (or its equivalent) relating to shipping and air transport.¹³⁸ These treaties specifically include a provision relating to fishing, sealing or whaling in the High Seas. However, this type of provision does not aid the Source State unless the enterprises place of effective management is in the Source State. According to the article, the profits are taxable in the Contracting State where the Enterprise has its place of

¹³⁵ IBFD. 2010. *IBFD Research Platform: Treaty Database* [Online]. Available (by subscription): <http://ip-online2.ibfd.org/kbase/> [10 February 2011]

¹³⁶ Meloni (2010: 2.1.5B)

¹³⁷ IBFD. 2010. *IBFD Research Platform: Treaty Database*. [Online]. Available (by subscription): <http://ip-online2.ibfd.org/kbase/> [10 February 2011]. See also Article 5(6) of the Norway/USA Income Tax Treaty (1971).

¹³⁸ *Ibid.* See also the Iceland/USA (1975) Income Tax Treaty and the Ireland/Norway Income Tax Treaty.

effective management. The provision also refers to the High Seas and not the territorial sea or EEZ of the Source State.

Case Law

The *locus classicus* with regard to whether a fishing vessel can be considered a PE is the Norwegian case of *Jan O Medhaug and others v The Government of Norway*.¹³⁹ The facts concerned three Norwegian fishermen who took part in seasonal fishing of crab and salmon off the coast of Alaska. The vessels point of departure was Seattle. Their arrangement with the master of the vessel was that their income would be based on a share of the vessel's total catch.

Although the fisherman were lawful permanent residents of the United States and paid tax there, the Norwegian authorities held them liable for tax in Norway on the basis that they had their residence in Norway. However, they argued that they were only taxable in the United States as they were self-employed and were operating through a PE in the United States. They argued that the following created a PE in the United States:

1. the quay in Seattle where the ship was equipped and engaged; or
2. the storing of their fish pots in Dutch Harbour, Alaska between seasons; or
3. the fishing vessel itself, from which arrangements for deliveries were made through radiotelephone.

The issue the Court had to decide was whether the taxpayers did in fact have a PE in the United States. The Court held that the taxpayers did not have a PE. In support of their decision the Court stated firstly that a quay in Seattle could under no circumstances be considered a "fixed" place of business and secondly the storage of the fishing equipment at Dutch Harbour could not be considered a fixed place of business in terms of paragraph 11 of the 1963 OECD commentary to Article 5(3). The commentary confirms that stock shall not be treated as a PE provided it is maintained for the purpose of storage, display or delivery. The Court held that in this case the stock was being maintained solely for the purpose of storage.

¹³⁹ Case 15B/1984

Finally, the court held that the fishing vessel itself was not a fixed place of business because a ship that is not permanently harboured presupposed by the term "fixed". In reliance with this view the court considered the 1977 OECD Commentary on Article 5 which states that the place of business has to be a "fixed" one and in that sense there has to be a link between the place of business and a specific geographical point.

It is submitted that this case may be decided differently today with the development of the OECD commentary, its acceptance of the relativity theory, the emergence of the "spatial delimitation approach" and the business tests, as discussed above.

A second case that is of relevance is a case concerning a tax treaty between the Netherlands and United Kingdom, referred to as *Case No.35.769*.¹⁴⁰ The name of the taxpayer was not disclosed and he is described as "X" in the summary. X, an individual resident in the Netherlands, owned an enterprise actively involved in fishing operations. He conducted his activities from aboard a ship which was registered in the United Kingdom and owned by a company registered in the United Kingdom. In 1989 the vessel fished outside the territorial waters of the United Kingdom, using the fishing quota granted to the United Kingdom. All of X's administration with respect to his fishing activities was dealt with in the United Kingdom. X therefore claimed that part of his income was taxable in the United Kingdom mainly on the basis that the fishing vessel was part of British territory as it was registered in the United Kingdom and as such he was acting through a PE in the United Kingdom.

The issue for consideration was whether or not the taxpayer conducted his business through a PE in the United Kingdom. The Court of Appeal decided against the taxpayer for the following reasons:

1. The fact that the vessel was registered in the United Kingdom did not lead to the conclusion that the vessel was British territory;
2. The description of activities on the continental shelf as contained in article 3(1)(a) of the treaty does not include fishing activities; and

¹⁴⁰ The summary of the case can be found on IBFD. (2010). *IBFD Research Platform: Case Law*. [Online]. Available (by subscription): <http://ip-online2.ibfd.org/kbase/> . [1 February 2011]

3. The territorial waters belonging to the United Kingdom only includes the coastal waters over which the United Kingdom has sovereign powers, and does not include the waters more than 12 miles from the coast, where the United Kingdom can only claim certain sovereign rights, such as exclusive fishing rights.

This decision was upheld on appeal to the Supreme Court of Appeal. The Supreme Court of Appeal added that the residence of a company owning a fishing vessel was irrelevant in determining the existence of a PE.

With respect to the courts decision regarding the PE aspect thereof, it is uncertain whether or not this case would be decided any differently considering the developments with the fixed place of business principle, as aforementioned. However, it submitted that the Court was correct in its decision, the country of registration of the vessel and the company owning the vessel is irrelevant in determining the existence of a PE.

3.3 Analysis of the "Natural Resources" paragraph in the PE Article

The "Natural Resources" article is contained in paragraph 2(f) of Article 5 in both the OECD and UN MTCs. The paragraph states, "(2) The term 'permanent establishment' includes especially [...] (f) a mine, an oil, or gas well, a quarry, or any other place of extraction of natural resources." The question for consideration is whether or not a fishing vessel can be considered as a place of extraction of natural resources.

Before dealing with the question at hand, it is important to consider the concept "any other place of extraction of natural resources". As aforementioned, the *eiusdem generis* does not apply to sub-paragraph 2(f), therefore any other place of extraction is not in any way limited to the same or similar class within the preceding list contained in sub-paragraph 2(f).¹⁴¹ In other words it does not have to relate to a mine, an oil, or gas well, or a quarry. The OECD Commentary on Article 5 supports this view. According to paragraph 14 of the OECD Commentary, the term "any other place of extraction of natural resources" should be interpreted broadly. Paragraph 15 of the OECD

¹⁴¹ Skaar (2005:2.2.4)

Commentary states also that subparagraph f) refers to "extraction" and not "exploration" of natural resources and should a taxpayer wish to establish a PE in relation to the exploration it would have to satisfy the basic rule PE, alternatively the tax treaty should specifically include reference to exploration.

According to paragraph 6 of the UN Commentary to Article 5, members of the developing countries argued that due to the broad interpretation of the words, "any other place of extraction of natural resources", contained in subparagraph (f) of the specific inclusions in paragraph 2, a PE should include a fishing vessel, as these vessels are used for the extraction of fish (which is considered a natural resource). The fishing vessel is likened to the movable drilling platform used in offshore drilling operations.

However, it was argued, that this view fails the permanence test contained in the basic rule contained in paragraph 1 and which is also a characteristic prevalent in the preceding specific inclusions in subparagraph (a) to (e) contained in paragraph 2. Other members argued that this view took too broad an interpretation of the term "permanent establishment" and that one should look at the plain meaning of the language in the treaty.

However, due to these conflicting arguments the following conclusion was reached: to avoid any doubt the Contracting States should negotiate to specifically include a provision relating to fishing vessels, otherwise, on the plain meaning of the text in terms of the interpretation of DTAs, a fishing vessel would fail the test of permanence required in the basic rule PE.

In the light of the arguments in 3.2.2 above, it is submitted that the position against a fishing vessel being a place of extraction of natural resources, insofar as it relates to issues of permanence, is incorrect and as such the conclusion reached is erroneous. It is suggested that the issue is not one of permanence in both senses of the word, but rather the meaning of the word "extraction". In other words, can one describe fish as being "extracted" from the sea?

What is interesting to note is that the term "extraction" is not defined in the MTC's or in their commentaries. Therefore the ordinary meaning of the word "extraction" would have to be considered. Extraction, in relation to mineral resources, is not defined in Blacks Law Dictionary. However the verb, to "extract", is defined. It states the following: "to draw out or forth; to pull out from a fixed position".¹⁴² Although fish are not pulled out from a fixed position, they are most certainly drawn out of the water by fishing nets or lines and as such satisfy the first part of the definition.

The Oxford Advanced Learners Dictionary (2006:518) defines extraction as, "the act or process of removing something from something else". It gives the example of oil/mineral/coal extraction and extraction of salt from the sea. The process of fishing involves extraction of something (i.e. fish) from something else (i.e. the sea). It is therefore submitted that fish can be extracted from the sea; the place of extraction being the fishing vessel. Therefore, it is argued, that a fishing vessel can be another place of extraction of natural resources.

The natural resources paragraph in some of the specific DTAs that are analysed herein also refer to the term, "or exploitation" of natural resources in addition to the standard wording contained in the MTCs. The question is whether a fishing vessel can be considered "a place of exploitation of natural resources". The word "exploitation" is defined in Blacks Law Dictionary (2009:661) as "the act of taking advantage of something; esp. the act of taking unjust advantage of another for one's own benefit". The act of removing fish from the sea through fishing could be seen as taking advantage of the fish stocks in the sea, especially due to the fact that the African fish stocks are in danger of extinction. On the other hand, the Oxford Advanced Learner's Dictionary (2006: 514) describes "exploitation" as "the use of land, oil or minerals, etc.: *commercial exploitation of the mineral resources in Antarctica*". This definition refers to non-living resources, which seems to be a rather limiting definition of the term. It is apparent that all natural resources, whether living or non-living are capable of being exploited. Therefore it is submitted that fish are capable of exploitation through the fishing industry.

¹⁴² Blacks Law Dictionary (2009:664)

3.4 The Relevance of Article 8 MTC

Article 8 deals with the taxation of profits from shipping, inland waterways transport and air transport.¹⁴³ As this dissertation is concerned *inter alia* with the nature of a fishing vessel (or ship) in the context of PEs, the question is whether the process of fishing can, alternatively, be brought within the bounds of article 8.

Vogel (1997:482) suggests that the rationale behind the introduction of Article 8 by the OECD and UN MTCs was to prevent the complexities and difficulties that would result should ships or aircraft engaged in international traffic be regarded as PEs in terms of Article 5. The nature of a ship and aircraft engaged in international traffic is that their operations are conducted over a large number of states in which PEs are set up for trading purposes. The difficulty would be how to attribute the profits to each PE. This could also result in fragmented taxation.¹⁴⁴ The introduction of Article 8 was therefore a successful attempt at preventing these absurd results.

The scope of article 8, as a special provision, takes priority over article 7, which applies to all other business income.¹⁴⁵ It is important to note that this priority applies solely to profits from the operation of ships or aircraft in international traffic or from the operation of boats engaged in inland waterways traffic. A fishing vessel conducting fishing activities can therefore not be considered as falling within this provision. The OECD Commentary on Article 8 provides certain examples of activities that may be carried on by an enterprise engaged in the operation of ships and aircraft in international traffic. At no point do these examples mention fishing activities.

The Court in *Netherlands Case 35* pronounced in support of this view.¹⁴⁶ The taxpayer in that case also argued that the place of effective management of the ship was in the United Kingdom and therefore, in terms of Article 8, the profits should have been taxed within the United Kingdom. The court held that Article 8 of the treaty did not apply to the facts of the case as Article 8 is solely concerned with operation of ships and aircraft in international traffic, and not to income earned from fishing.

¹⁴³ Article 8 of the OECD and UN MTC mirror each other exactly

¹⁴⁴ Vogel (1997:482)

¹⁴⁵ Ibid at 483

¹⁴⁶ See note 139 above

In conclusion, Article 8 is of no relevance to ships or fishing vessels engaged in fishing activities.

3.5 Concluding remarks

It submitted that convincing arguments have been offered in support of the view that a fishing vessel, as a mobile place of business, satisfies the basic rule PE and furthermore would also constitute "another place of extraction of natural resources" in terms of paragraph 2(f) of the OECD/UN MTC. There needs to be a move away from the focus on the notion of a "fixed" place of business to a more business centred approach, taking into account the nature and context of the business.

What is interesting to note is an apparent misalignment in the OECD and UN Commentaries between their position on mobile places of business and their treatment of fishing vessels. As suggested above, the commentaries seem to have developed an acceptance of the idea that a mobile place of business could establish a PE in the Source State, taking into consideration the nature of the business. However, these developments do not seem to have been applied to fishing vessels, which it is submitted, can be viewed as mobile places of business.

The arguments, especially in relation to a fishing vessel, have not been tested in an international court of law and have not found overwhelming support amongst academics. The only judicial pronouncement on the matter of a fishing vessel is that it cannot be a PE. Furthermore the majority view in the commentaries, especially the UN Commentary, is that in the absence of specific reference thereto in a DTA, a fishing vessel cannot be considered a PE. The hope is that the courts and commentaries will develop the arguments in favour of a business centred approach, but until such time it is recommended that treaties follow a cautious approach as pronounced above and reiterated below:

To avoid any doubt the Contracting States should negotiate to specifically include a provision relating to fishing vessels; otherwise, on the plain meaning of the text in terms

of the interpretation of Tax Treaties, a fishing vessel would fail the test of permanence required in the basic rule PE. It is submitted that it would not be sufficient to merely include reference to a fishing vessel in the *prima facie* positive list of examples of PEs (Article 5(2) OECD/UN MTC) due to the fact that a fishing vessel, in terms of the current position, may not necessarily satisfy the basic rule PE. It is therefore recommended that a separate, special provision (similar in nature to Article 8 MTC) be included in the treaty, stating that the Source State shall have the right to tax the profits made from the operation of fishing vessels in its territory.

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CHAPTER 4

COUNTRY STUDIES AND ANALYSIS OF DOUBLE TAX TREATIES

This chapter will first consider the state of Africa's Fishing industry as a whole, and then briefly analyse the economy and fishing industry of each selected African state. This is followed by a brief overview of the Domestic Tax Legislation of the relevant country before engaging in an analysis of each of the country's DTAs insofar as they relate to the definition of PE with particular reference to the fishing trade.

The purpose of first analysing the African fishing trade as a whole and then the specific economies and fishing industries of each country is to establish the current state of the African fishing trade, the history of the fishing industry of each country, the importance and reliance on the fishing industry and the current challenges that face the industry of each country. The brief overview of the domestic tax legislation of each country is aimed at providing a basic understanding of the domestic tax legislation of each country in order to understand how they treat foreign entities operating in their territory. Furthermore, it will determine whether their system of tax encourages foreign investment.

Against this backdrop an analysis of each of the countries DTAs follow to determine whether or not the definition of PE in each DTA is sufficient to protect the taxing rights on its diminishing natural resource: fish. The analysis of the DTAs will focus mainly on the natural resources paragraph (paragraph 2(f) of the OECD/UN MTC) and any other paragraph that may relate to the establishment of a fishing vessel PE. It does not involve an analysis of the basic rule PE (unless there is a major deviation therefrom) due to the conclusion reached in chapter 3, which is summarised as follows:

Although there is support for the argument that mobile places of business can be a PE, current case law, commentaries on the MTC and the view of certain academics is that a fishing vessel cannot be considered a PE. In the light of this uncertainty, it is suggested

that a cautious approach be adopted and that special provision be made to a fishing vessel in the DTA unless the context provides otherwise.

4.1 The State of Fishing in Africa

In his article, "Too many boats for too few fish", Hann (2001:5) states that the fishing waters off the West-coast of Africa are being threatened by overfishing by foreign organisations such as the European Commission (EU). The EU have entered into fishing partnerships with many states, including Mauritania and Senegal. These West African Countries heavily rely on these fishing partnerships with the EU as a source of revenue; however, they also need to safeguard their fishing stocks from being exploited. Despite attempts by the EU to assist African countries in regularising their fishing industries, enforcement is difficult as there are too many fishing vessels in the waters and bribery is rife. Compounding the problem is that the Japanese, Korean, Russian and Chinese fishing industries are all after the same fish.¹⁴⁷

Mackenzie (2002:5) echoes Hann's sentiments in her article, "African Fisheries on Brink of Collapse". She states that fishing stocks off the West Coast of Africa has deteriorated by 80% and the area is now as depleted as the North Atlantic. She suggests that if something drastic is not done; the fishing trade in Africa will collapse.

A recent Afrolnews article¹⁴⁸ confirmed that studies and scientists are in agreement that African fisheries are on the brink of collapse. More specifically when referring to specific regions of concern around the coast of Africa, the article states the following:

With depleting resources along the West African coast, EU vessels have since moved further with full strength southwards and even into the Indian Ocean. Already now, the rich waters off Namibia and Angola are beginning to note reductions in fish stocks. Waters off the Seychelles and Madagascar are set to be next.

¹⁴⁷ Hann (2001:5)

¹⁴⁸ Afrolnews. (2010). *Global fisheries collapse to hit Africa First*. [Online]. Available: <http://www.afrol.com/articles/22397>. [4 February 2011]

From the above it is clear that the state of the fishing industry in Africa is in crisis and there is great need for the industry to be regularised and effectively managed so as to prevent further decline of the fishing stocks in African waters. A specific way of effectively managing the industry is to ensure the right of the African state to tax the business profits made from fishing in the waters of the African state. This right to tax is created by a sufficient definition of PE in the DTAs of the African state. These revenues can then be used to strengthen regulations through, for example, education and strengthening of the coast guard.

4.2. Mauritania

4.2.1 Introduction

You will find Mauritania in the North-Western corner of Africa, above Senegal and below Western Sahara. It is a Moslem state and has a population of approximately 3.2 million people.¹⁴⁹ The percentage of contributions to the GDP is Agriculture -12.5%, industry - 46.7% and services - 40.7%.

The main industries are fish processing, oil production, mining of iron ore, gold, and copper. More than half of the population is still dependent on agriculture and livestock for their livelihood despite the fact that many subsistence farmers and nomads were forced into the cities because of continuous droughts plaguing the country. Mauritania has extensive deposits of iron ore, which accounts for more than 40% of the nation's exports. Furthermore, Mauritania has one of the richest fishing areas in the world. This essential resource is under threat due to overexploitation by foreigners.¹⁵⁰

4.2.2 Fishing Industry

Although Mauritania has one of the richest resources of fish in the world the Government, before 1979, exercised limited control over the country's fishing industry. At that stage, fish and fishing accounted for only 5% of the GDP.¹⁵¹ In the 1980's the government introduced certain reforms to the fishing industry, which included

¹⁴⁹ CIA. (2010). *CIA - World Fact Book: Africa: Mauritania*. [Online]. Available: <https://www.cia.gov/library/publications/the-world-factbook/geos/mr.html>. [18 December 2010]

¹⁵⁰ Ibid

¹⁵¹ The revenues from fishing were only obtained from royalties on fishing licenses paid by foreign fishing companies to the Mauritanian Government.

establishing a *New Fisheries Policy* and an Exclusive Economic Zone (200 Nautical Miles). The new policy involved foreign fishing companies forming joint ventures with Mauritanian companies, which resulted in the development of a national fishing fleet.¹⁵²

These policy changes resulted in fishing contributing 10% to the GDP in 1984 and the volume of fish exports increased dramatically. By 1983, fishing contributed 54% to total exports, was the primary foreign exchange earner and together with mining, employed about 9 percent of the economically active population¹⁵³

In terms of Table 3.1 (see Appendix 3), Mauritania's total capture production in 1998 of fish, crustaceans, molluscs etc., was 98 043 tons compared to 201 588 tons in 2007. This shows a marked increase in the capture production of fish over that period. What is interesting to note is that although there has been a steady incline of capture production since 1998, there has been a sharp decline in the later years. The total capture production in 2005 was 304 877 tons, compared to a marked decline in 2006 (165 312 tons, just over half the capture production of 2005) and then a slight increase again in 2007.¹⁵⁴ However, in comparison, the total exports for Mauritania has increased from about US\$ 122 million in 2004 to about US\$ 169 million in 2007.¹⁵⁵ This highlights the fact that demand for fish is increasing despite depleting stocks.

The European Commission¹⁵⁶ states the following in describing its fisheries partnership agreement with Mauritania,

The new fisheries partnership agreement concluded between the Community and Mauritania covers the period 1st August 2006 -31 July 2012 with a financial contribution fixed at 86 million € for the first year out of which 11 million € is dedicated to the support of the fisheries policy of the third country.

¹⁵² County Studies. (1998). *Mauritania*. [Online]. Available: <http://countrystudies.us/>. [18 December 2010]

¹⁵³ Ibid

¹⁵⁴ See Table 3.1, Appendix 3

¹⁵⁵ See Table 4.1, Appendix 4

¹⁵⁶ European Commission Fisheries. (2010). *Mauritania*. [Online]. Available: http://ec.europa.eu/fisheries/cfp/international/agreements/mauritania/index_en.htm. [16 December 2010]

This fisheries agreement allows community vessels from 12 Member States to fish in Mauritanian waters and is the most important fisheries agreement for the EC, both in financial and economical point of views.

With such large contributions to the country's economy it is understandable why these contracts are continuously renegotiated and renewed and seems to be an indicator as to the decline in capture fish production by Mauritania over the last number of years.

4.2.3 Brief Overview of Domestic Tax Legislation¹⁵⁷

The General Tax Code governs the Mauritanian tax system, which is based on a scheduler system, where each category of income is taxed under a different schedule. However individuals are also subject to a general income tax. The schedule for industrial and commercial profits determines the tax rates for legal entities. In general residents will be taxed on their world-wide income and non-residents only on income derived from a Mauritanian source. Companies, whether resident or non-resident, are only taxed on Mauritanian- source income.

The law considers the following income to be from a source within Mauritania:

1. Profits realized by a company from the habitual exercise of an industrial, commercial or agricultural activity within the territory of Mauritania;
2. Profits derived by an enterprise through an agent with no professional standing separate from the enterprise; and
3. Profits derived by an enterprise which has no PE or designated agent there but which nevertheless carries on activities which can be regarded as a complete commercial cycle.

Where an enterprise carries on activities in both Mauritania and abroad, such enterprise is liable to tax in Mauritania on a pro rata basis on the profits derived from production and sales operations in Mauritania. However if the corporation keeps regular and

¹⁵⁷ The following overview is taken from: IBFD. (2007). *IBFD Research Platform: Country Surveys: Mauritania* [online]. Available (by subscription): <http://ip-online2.ibfd.org/kbase/>. [1 February 2011]

separate accounts for domestic and foreign activities the entity will be taxed on Mauritanian-source income as stated in its accounts.

Mauritania does encourage foreign investment through tax incentives. These incentives are covered by the Investment Code. Essentially the investor must submit an investment declaration to the Ministry of Economic Affairs and Development, and if successful the investor will be issued with an Investment Certificate. The administrative body will then actively follow the investment until completion.

The incentive covers investment in all economic sectors, however excluding the banking, insurance, and mining and hydro-carbons sectors. Some of the incentives include:

1. No capital gains tax from the sale of shares in the capital in the companies operating under the investment code if those shares are sold to a Mauritanian national.
2. To encourage exports, whether direct or indirect, the authorities generate a number of advantages to exporting entities.¹⁵⁸

Mauritania domestic tax law seems to have an understanding of the concept of PE. However, whether or not an entity is operating through a PE, if the source of the income is within Mauritania, such income is taxed in Mauritania. The incentives for foreign investment may encourage entities fishing in the waters of Mauritania to export their stock of fish from Mauritania rather than returning to the state of residence with the stock.

¹⁵⁸ These are called " Free Points" These advantages make the enterprise eligible for the following incentives:

Exemption from all duties and taxes due on exports; exemption from customs duties and similar taxes on the import of equipment, machinery, material, engines, etc. as well as on the import of raw materials, semi-finished goods, etc. required for the purposes of setting up or running the business; exemption from registration and stamp duties of the transfers and similar deeds required for the setting-up and the organization of the business; exemption from the business licence duty and any similar taxes as well as any tax on real property. application of a reduced flat rate minimum tax of 2%.possibility of employing up to four foreign employees in executive positions without prior agreement. The tax liability of these employees may not exceed 20% of the total payroll.

4.2.4 Analysis of Double Tax Treaties

Appendix 5.1 contains the list of all the Mauritanian DTAs available as at 1 February 2011. The table also shows whether or not the DTA contains a PE Article. Appendix 6.1 details whether or not the specific DTA contains a "natural resource" paragraph following the OECD/UN MTCs; whether or not there is any deviation to that paragraph; and whether or not there is any specific reference to fishing in the DTA.

Mauritania has 5 DTAs¹⁵⁹ of which two are multilateral (one with Arab Maghreb Union (UAM)¹⁶⁰ and one with Economic Community of West African State (ECOWAS)¹⁶¹). The remaining 3 DTAs are with France, Senegal and Tunisia. The Tunisia DTA has been terminated due to the implementation of the Maghreb multilateral tax treaty. As from 1 January 1994, Algeria, Libya, Mauritania, Morocco and Tunisia apply the Maghreb multilateral tax treaty for the avoidance of double taxation on income. Bilateral treaties between each of these countries are suspended and replaced by the Maghreb multilateral tax treaty. Therefore, through the Maghreb multilateral tax treaty, Mauritania has DTAs with Algeria, Libya, Morocco and Tunisia.

UAM

The Maghreb treaty is in Arabic (with an unofficial French translation available on the IBFD database¹⁶²). There was no official English translation available as at 1 February

¹⁵⁹ According to IBFD. (2010). *IBFD Research Platform: Treaty Database* [Online]. Available (by subscription): <http://ip-online2.ibfd.org/kbase>. [4 February 2011]. The IBFD rely on co-operation from participating countries as to the correctness of this information. It may be that Senegal does in fact have more DTAs in place, however this information was not accessible from the relevant government departments as at 4 February 2011.

¹⁶⁰ On 17 February 1989 the treaty creating the Union of the Arab Maghreb (UAM) was signed in Marrakesh, Morocco, by the leaders of Algeria, Libya, Mauritania, Morocco and Tunisia. Modeled on the EC (now EU) treaty, the UAM was formed to encourage trade and economic co-operation by allowing freedom of movement across their borders. The goal of the Union to eventually unify all Arab states. In June 1989 the five nations (Algeria, Libya, Mauritania, Morocco and Tunisia) formed a joint Parliament, and a defense clause prohibited aggression between the states. Source: *Arab Maghreb Union*. [Online]. Available: <http://www.maghrebarabe.org/en/> [24 November 2010]

¹⁶¹ ECOWAS was established in 1975 by the signing of a treaty by 16 West African States, including Mauritania. Mauritania withdrew as a member due to disagreement with certain decision made by the organization at their 1999 Summit. The aim of the organization is to promote co-operation and integration in economic and monetary union through the total integration of the national economies of member states. Source: *ECOWAS* [Online]. Available: http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en [24 November 2010]

¹⁶² IBFD. (2010). *IBFD Research Platform: Treaty Database*. [Online]. Available (by subscription): <http://ip-online2.ibfd.org/kbase>. [4 February 2011]

2011. In terms of the unofficial French text, the treaty does contain a PE article (*Etablissement stable*) and is contained in Article 6 of the Treaty. The article is based mostly on the UN MTC with both the construction and services clauses contained within the specific inclusion paragraph 2, under subparagraphs (g) and (j) respectively, instead of in a separate paragraph as in the UN MTC. The construction clause states that a building site would be considered a PE if it lasts for more than 3 months, which is less time than provided for in the UN MTC, which provides that the project is to last for more than 6 months.

The PE article does include a "natural resources" paragraph under paragraph 2(i) and follows the wording of the OECD and UN MTCs exactly (*une mine, un puits de pétrole ou de gaz, une carrière ou tout autre lieu d'extraction de ressources naturelles*). The PE article does not contain any reference to a fishing vessel constituting a PE and there is no other provision relating to fishing in the remainder of treaty.

The reason for this oversight may have been intentional as the purpose of the AMU is to facilitate free trade amongst the member countries and encourage cross-investment.¹⁶³ Including a provision whereby a fishing vessel constitutes a PE may be seen as counter-productive to the aims of the organization. However, as has been reiterated in this dissertation on numerous occasions, the PE article provides the Source State with the right to tax profits made from a PE, it is then up to the country's domestic legislation to provide the appropriate relief. The fish stocks off the coast of Mauritania are depreciating and it seems that demand is increasing. It is suggested that a prudent approach is adopted and that a special provision be included in the Arab Maghreb Union DTA dealing with the taxation of profits made by a fishing vessel. It is then up to the domestic policy of Mauritania or the regional policy of the AMU to relax these taxing rights as economic reform dictates. At least the right is then in place.

ECOWAS

Mauritania was originally a signatory state to ECOWAS, however withdrew from the organization in 1999/2000.¹⁶⁴ It is important to note that Mauritania has concluded a multilateral treaty with ECOWAS, which, at the date of this dissertation, is still in force.

¹⁶³ Arab Maghreb Union. (2010). [Online]. Available: <http://www.maghrebarabe.org/en/> [24 November 2010]

¹⁶⁴ Africa Union Website [online]. Available: <http://www.africa-union.org/Recs/ECOWASProfile.pdf>

Whether Mauritania's withdrawal from ECOWAS automatically terminates any other treaty in place between the withdrawing member and ECOWAS is unclear. Article 91 of the ECOWAS Convention¹⁶⁵ governs the withdrawal of member states from the Community. It states that should a member withdraw, they are no longer bound by the provisions of the Treaty. It is silent on the treatment of any other Treaty entered into between member states. It is therefore uncertain whether the provisions of the treaty between Mauritania and ECOWAS are binding on member states and Mauritania (now as a non-member state). Despite this uncertainty it is important to note the following factors in respect of the Treaty as it relates to the definition of PE:

1. The treaty contains a PE Article (Article 3)
2. The Article contains a specific inclusion paragraph relating to mining (paragraph 2(f)).
3. However paragraph 2(f) is more restrictive than the OECD and UN MTCs, it does not mention "an oil or gas well" and merely mentions, "or other place of extraction" and does not refer to, "of natural resources". Therefore even if one can successfully argue that a fishing vessel is an "other place of extraction" of a natural resource, it will not be satisfied in this treaty as no mention is made of natural resource. On a reading of the article, one would have to take the plain meaning of the text and relate "other place of extraction" to the mining industry.

Even if the Mauritanian/ECOWAS treaty is no longer binding, it is recommended that ECOWAS reconsider their double tax agreements with member states (should they be similar to the Mauritanian double tax agreement). Firstly, the mining clause contained in paragraph 2(f) should come in line with the OECD/UN MTCs and secondly specific provision should be made for the taxing of fishing profits in the DTA.

France

A slight deviation exists in the "natural resources" paragraph in the PE Article of the Mauritania/French DTA as compared to the OECD/UN MTCs. As with the ECOWAS treaty, the deviation is less wide than the MTCs. It does not refer to "oil or gas well" but does refer to "other place of extraction of *natural resources*". Therefore if one can

¹⁶⁵ ECOWAS. (2010). *ECOWAS Treaty*. [Online]. Available: <http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en> [24 November 2010]

successfully argue that a fishing vessel is an "other place of extraction of natural resources" the profits made from foreign fishing vessels in the waters of Mauritania could be taxed in the hands of the Source State in terms of the treaty. However, as indicated by the UN Commentary (and to a limited extent the OECD Commentary), it is recommended that special provision be made for the fishing industry in the DTA to avoid any doubt.

Senegal

The Senegal/Mauritania DTA contains a PE article (article 3) with the inclusion of the natural resources paragraph under paragraph 3(a). The situation mirrors exactly the Mauritania/French "natural resources" paragraph and the same concerns and recommendations will apply to the Senegal DTA. It may be of interest to refer to clause 19 of the DTA, which refers to Royalties. There is specific reference to royalties paid for the working of mines, quarries or other natural resources. It states that the royalties are taxed in the state in which the mine, quarry or natural resource is situated. Therefore, one could argue that any royalties paid for the "working" or catching of fishing is taxable in the state in which the fish are situated. The only question one would need to answer is what constitutes a royalty payment for the "working of fish"? However, the elements constituting a "royalty" are beyond the scope of this dissertation.

Concluding Remarks

What is notable is the lack of DTAs in place with Mauritania, specifically those countries that have a vested interest in the fishing waters of Mauritania. For example, the EU countries referred to in the EU fisheries partnership agreement such as Spain, Italy, Portugal and Greece. Countries such as Japan, Taiwan and China are also noteworthy omissions. It is suggested that Mauritania seek out DTAs with at least these countries and other countries that may have interest in their fishing stocks.

In concluding the analysis of the DTAs with Mauritania, it is submitted that the definition of PE in each of the DTAs analysed is not sufficient to protect the rights to tax profits made by the catch of fish by foreign owned vessels. It is recommended that the existing DTAs are renegotiated to insert a special provision in the DTA to refer to a fishing

vessel as a PE. Furthermore, Mauritania is extremely vulnerable to continued over-fishing in their waters by countries with which they have no DTAs in place. The government should seek out and conclude DTAs with these countries in a bid to protect their right to tax the profits made by entities from these countries from fishing in the waters of Mauritania. This revenue could then be returned to the fishing industry to strengthen governance of the fishing industry through education, employing more personnel to police and monitor compliance with fishing regulations.

4.3 Senegal

4.3.1 Introduction

Senegal is located in Western Africa, bordering the North Atlantic Ocean, between Guinea-Bissau and Mauritania. Agriculture contributes 15% to the GDP, while industry and services contribute 21.4% and 63.6% respectively. Senegal's main exports are fish, groundnuts (peanuts), petroleum products, phosphates, cotton.¹⁶⁶

The agricultural sector¹⁶⁷ is the basis of the Senegalese economy, primarily its peanut production. It has a modest industrial sector and a growing services sector. Agriculture employs up to 70% of its population and accounts for two-thirds of export revenues. However this sector is vulnerable to declining rainfall, desertification and changes in world commodity prices. The economy experienced a major setback in the late 1960's when a series of droughts hit the country. As of mid-2003 the economy remains fragile and to survive requires continuous foreign aid and investment.¹⁶⁸

¹⁶⁶ CIA. (2010). *CIA - World Fact Book: Africa: Senegal* [Online]. Available: <https://www.cia.gov/library/publications/the-world-factbook/geos/sg.htm>. [18 December 2010]

¹⁶⁷ Senegal's Agriculture products include peanuts, millet, corn, sorghum, rice, cotton, tomatoes, green vegetables; cattle, poultry, pigs; fish.

¹⁶⁸ Encyclopedia of the Nations .(2010). *Africa: Senegal* [Online]. Available: <http://www.nationsencyclopedia.com/Africa/Senegal.html>. [18 December 2010]

France, in 1994, devalued the CFA Franc¹⁶⁹ to such an extent that the value of the CFA Franc was halved, which immediately resulted in prices for imported goods rising significantly and the rate of inflation reaching 32%. The reasoning behind this devaluation was to encourage new investment, mostly in the export sectors of the economy and to discourage the use of hard currency reserves to buy products that could be grown and produced locally. The initial reaction by the population to these rising prices was to demonstrate against the government. The government reacted by imposing temporary price controls in an effort to prevent local traders from over-pricing their goods and to halt the rise in inflation. However, this devaluation eventually achieved the desired effects.¹⁷⁰

Senegal has also been assisted by debt-rescheduling and financial aid from the World Bank and other foreign donors. By 1995, foreign aid contributed 40% of the governments' budget. This influx of foreign aid helped the economy to grow at a rate of 4.5% in 1995 and 1996. From 1995 to 2008 the real growth in GDP was averaging over 5% per annum. The rate of inflation, which was at 32% in 1994, fell to 3.2% by 2003.¹⁷¹

Senegal is a member of the West African Economic and Monetary Union (WAEMU) and is working towards greater regional integration with a unified external tariff and a consistent monetary policy. Unfortunately the high rate of unemployment continues to see migrants leave Senegal in search of better opportunities in Europe. The country was also plagued by an energy crisis that caused far-reaching blackouts in 2006 and 2007.¹⁷²

¹⁶⁹ The CFA Franc is the common currency of 14 African countries which are members of the Franc Zone, namely :

- Benin, Burkina, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo which form the West African Economic and Monetary Union (WAEMU), whose common central bank is the Central Bank of West African States (BCEAO) ;
- Cameroon, Central African Republic, Congo, Gabon, Equatorial Guinea and Chad which form the Central Africa Economic and Monetary Community (CEMAC), whose common central bank is the Bank of Central African States (BEAC).

The currency is guaranteed in France by the French Treasury. See Central Bank of West African States (2010). *History of the CFA Franc*. [Online]. Available:

<http://www.bceao.int/internet/bcweb.nsf/pages/umuse1>. [4 February 2011]

¹⁷⁰ Encyclopedia of the Nations .(2010). *Africa: Senegal*. [Online]. Available:

<http://www.nationsencyclopedia.com/Africa/Senegal.html>. [18 December 2010]; See also CIA. (2010). *CIA - World Fact Book: Africa: Senegal* [online]. Available: <https://www.cia.gov/library/publications/the-world-factbook/geos/sg.htm>. [18 December 2010]

¹⁷¹ Encyclopedia of the Nations .(2010). *Africa: Senegal*. [Online]. Available:

<http://www.nationsencyclopedia.com/Africa/Senegal.html>. [18 December 2010];

¹⁷² CIA. (2010). *CIA - World Fact Book: Africa: Senegal*. [Online]. Available:

<https://www.cia.gov/library/publications/the-world-factbook/geos/sg.htm>. [18 December 2010]

Senegal continues to rely heavily on external aid. In 2007, Senegal and the International Monetary Fund (IMF) agreed to a new, non-disbursing, Policy Support Initiative program and in September 2009, Senegal concluded a Compact with the U.S. Millennium Challenge Corporation.¹⁷³

The fishing sector remains Senegal's chief earner of foreign exchange.¹⁷⁴ Corporate entities from Dubai have agreed to manage and modernize Dakar's maritime port and create a new special economic zone.¹⁷⁵

4.3.2 Fishing Industry

The fishing industry is one of Senegal's most important areas of primary sector activity.

In 1994, the fishing industry contributed 8.5 percent of the GDP, employed 200,000 people, provided 27.3% of total exports, and earned US\$240 million. The currency devaluation policy as mentioned in 4.2.1 above together with favourable world prices boosted fishing exports.¹⁷⁶ In 2007 fishery products contributed 22% of Senegal's export earnings and employed about 15% of the population. As such the fishing industry remains Senegal's export leader.¹⁷⁷

The output of fishing, or "fish-catch," reached 486,800 metric tons in 1997. Compared to the total output in 1991, which was only 387,800 metric tons, this demonstrates the exceptional growth of the fishing industry during that period.¹⁷⁸ However, research in recent years is revealing an alarming change to these statistics. According to Table 3.1 (see Appendix 3), the capture production of fish, crustaceans and molluscs for Senegal

¹⁷³ Ibid. The Compact states that the U.S. Millennium Challenge Corporation will provide \$540 million in infrastructure development, primarily in road construction along Senegal's northern and southern borders in conjunction with adjacent irrigation and agriculture projects. In 2007, Senegal concluded agreements with foreign organisations for major new mining concessions for iron, zircon, and gold.

¹⁷³ Encyclopedia of the Nations .(2010). *Africa: Senegal*. [Online]. Available: <http://www.nationsencyclopedia.com/Africa/Senegal.html>. [18 December 2010];

¹⁷⁴ Ibid

¹⁷⁵ CIA. (2010). *CIA - World Fact Book: Africa: Senegal*. [Online]. Available: <https://www.cia.gov/library/publications/the-world-factbook/geos/sg.htm>. [18 December 2010]

¹⁷⁶ Encyclopedia of the Nations .(2010). *Africa: Senegal*. [Online]. Available: <http://www.nationsencyclopedia.com/Africa/Senegal.html>. [18 December 2010];

¹⁷⁷ U.S Department of State. (2010). *Senegal* [online]. Available: <http://www.state.gov/p/af/ci/sg/> [18 December 2010]

¹⁷⁸ Encyclopedia of the Nations .(2010). *Africa: Senegal*. [Online]. Available: <http://www.nationsencyclopedia.com/Africa/Senegal.html>. [18 December 2010];

in 2003 was 478,284 metric tons compared to 425,844 metric tons in 1998, which continues to show a steady increase in capture production over that period. However, the period from 2003 to 2007 shows a steady decline (with a slight incline again in 2007) of the capture production. In 2005, 2006 and 2007, the capture production was 412,131, 378,927 and 421,317 metric tons respectively.¹⁷⁹

Despite the steady decline in the capture production of fish and similar species, the research is revealing an increase in the value of total exports. In terms of Table 4.1 of Appendix 4, the total value of exports of fishery commodities for Senegal has increased from approximately US \$ 25 million in 2005 to approximately US \$ 31 million in 2007. It seems therefore that there is a steady increase in the demand for fish on the one hand and a steady decline in the capture production of fish on the other. If this trend continues there will no longer be any fish left in Senegalese waters. It is therefore of great importance that Senegal has control over the taxing rights from profits made by foreign entities from fishing in its waters, as a method of curbing the demise of the Senegalese fishing stocks. It is submitted that this control would be generated by a sufficient and effective definition of PE in DTA's entered in with Senegal.

4.3.3 Brief Overview of Domestic Tax Legislation¹⁸⁰

Senegal applies a fairly traditional tax system in terms of which companies' tax is charged at the corporate level (25%) and dividends are subject to a 10% withholding tax. The tax system is governed by the General Tax Code (GTC).

The GTC does not define the concept of residence. Entities do not necessarily have to be incorporated to be considered resident and taxed in Senegal. A non-resident operating a business in Senegal would be deemed to be a resident of Senegal. Therefore both resident and non-resident companies that realise income from business activities within Senegal will be subject to the corporate tax rate. In fact, the laws do not define a non-resident company. Additionally, a resident who earns passive foreign income is also subject to tax.

¹⁷⁹ See Appendix 3, Table 3.1

¹⁸⁰ The following overview is taken from: Barry, I. (2009). *IBFD Research Platform: Country Surveys: Senegal* [Online]. Available (by subscription): <http://ip-online2.ibfd.org/kbase/> [1 February 2011]

Senegal has a number of tax incentives governed by various codes. The code that relates to fishing is the Investment Code. In terms of this code, activities that qualify for incentives where the minimum investment is F.CFA 15 million are:

- primary sector and related activities: agriculture, fishing and cattle breeding;
- social sector: health, education and training; and
- services: assembly, maintenance of industrial equipments and tele-services.

When initiating these activities, there are a number of incentives that may be claimed.¹⁸¹

There is no unilateral double taxation relief contained in the domestic tax legislation of Senegal. Bilateral relief is provided for under the DTAs entered into with Senegal. Senegal generally adopts the credit method of double taxation relief, where the taxpayer is allowed to deduct the tax paid in the other Contracting State from his tax payable in Senegal.

In summary, Senegal seems to have primarily adopted a source based system of tax. The domestic laws do not deal with the concept of resident or non-resident companies. Taxation is purely based on whether the enterprise is conducting income-earning activities in Senegalese territory. This poses a problem for non-resident companies operating income-earning activities in Senegal. If the non-resident company's country of origin has a residence based system of tax and does not have a DTA in place with Senegal, there is a strong possibility of double taxation without any relief.

4.3.4 Analysis of Double Tax Treaties

The list of the DTAs entered into with Senegal, as at 1 February 2011 is contained in Appendix 5.2 below.¹⁸² Altogether, Senegal has 15 DTAs of which four are not yet in

¹⁸¹ Firstly, exemption from customs on imported machinery and equipment for a period of 3 years. Secondly, a suspension of payment for 3 years of the VAT charged on the purchase of goods and services. A third incentive is a reduction of 50% of the taxable income for 5 years up to 40% of the investment. Fourthly, exemption from payroll tax for 5 years and 8 years if the entity employs at least 200 employees or if 90% of them are based out of the capital city Dakar. Finally, a possibility of concluding limited contracts for employees for a period of 5 years. There are additional incentives for companies that expand their activities further. These are subject to certain conditions.

force. Appendix 5.2 examines whether the DTA contains a PE article whereas Appendix 6.2 is a summary of the analysis of each article: does the article contain a natural resources paragraph? If so does it in any way deviate from OECD/UN MTC? Furthermore, is there any specific reference to fishing in the PE Article or is there any reference thereto in any other Article in the DTA? The results of the analysis and any observations thereto will be discussed below. As at 1 February 2011, there are no official (or even unofficial) English translations to the Senegal DTAs with Italy, Kuwait, Lebanon, Mauritius, Qatar and Spain. These DTAs have therefore not been analysed in this dissertation.

Denmark

Article 5 of the Senegal DTA with Denmark essentially follows the UN MTC. Paragraph 2 contains three additional sub-paragraphs one relates to a sales outlet, the other to fixed places of business for the storage of stock and merchandise and another relates to stock of goods and merchandise for the purpose of delivery. The Natural Resources paragraph mirrors the UN and OECD MTC exactly. There is no specific mention of a fishing vessel anywhere in paragraph 2¹⁸³, neither in the remainder Article 5 nor in any other Article of the treaty. Therefore the conclusions reached regarding fixed places of business and the meaning of "any other place of extraction of natural resources should apply". It is therefore suggested that, depending on the nature of the trade between the two countries, that the treaty be amended to specifically include a fishing vessel as a PE.

Canada

The Canadian DTA seems to echo more the UN MTC than the OECD MTC. The construction paragraph is contained within the specific inclusion paragraph, and does not mention a time limit. However, an assembly project is also included, which states

¹⁸² The list of the DTAs are those sourced from: IBFD. (2010). *IBFD Tax Research Platform: Tax Treaty Database*. [Online]. Available (by subscription): <http://ip-online2.ibfd.org/kbase/> [4 February 2011]. The IBFD rely on co-operation from participating countries as to the correctness of this information. It may be that Senegal does in fact have more DTAs in place, however this information was not accessible from the relevant Senegalese government departments as at 4 February 2011.

¹⁸³ It is arguable that, even if there was reference to a fishing vessel in the article, it would not be considered a PE, as it would fail the basic rule PE.

that a PE is created after 3 months, which is much less time than provided for in both the UN and OECD MTC.

The Natural Resources sub-paragraph deviates slightly from the MTC in that it includes reference to the exploration for or the exploitation of natural resources. The exact wording of the deviation is, "including that relating to the exploration for or the exploitation of natural resources". It could be argued that fishing is the exploitation of a natural resource. However, it is submitted that this phrase is somewhat misleading and confusing. It is not clear exactly what is being referred to by the term "including that". If it refers to any other place of extraction of natural resources, does that mean it must be a place of extraction and exploration or a place of extraction and exploitation – the common factor being the place of extraction of a natural resource. It is suggested that this wording be made clearer.

It is unlikely, considering the above view of the commentaries and commentators, that a fishing vessel will be viewed either as a place of extraction or exploitation of a natural resource. It is therefore recommended that the treaty be amended to include specific provisions to deem a fishing vessel as a PE.

ECOWAS

See the comments and recommendations under 4.2.4, the analysis of Mauritania's DTA's.

France

The Senegalese/French PE article does not conform to either the OECD or UN MTC, although it contains most of the elements thereof. Firstly, it is contained in Article 3 of the DTA and it contains more inclusions than the MTC. However, the Natural Resources article mirrors the MTC exactly. As such the recommendation referred to in other like treaties discussed above would also be applicable in this instance. The definition of PE is not sufficient to protect the taxing rights of Senegal over its diminishing resource of fish and the DTA should be amended to include specific reference to a fishing vessel.

It is interesting to note that Article 20 refers to royalties paid for the working of mines, quarries or other natural resources, as in the Mauritania/Senegal DTA discussed above. Royalties are taxed in the state in which the mine, quarry or natural resources is situated. Therefore, one could argue that any royalties paid for the "working" or catching of fishing is taxable in the state in which the fish are situated. As aforementioned the question one would need to consider is what constitutes a royalty payment for the "working of fish"? However, as mentioned previously, the elements constituting a "royalty" are beyond the scope of this dissertation.

Malaysia

The Senegal/Malaysia DTA was entered into in January 2010 and is not yet in force. Article 5 is modelled almost exactly on the OECD MTC. As such the Natural Resources sub-paragraph mentions "any other place of extraction of natural resources". There is no particular reference to a fishing vessel in paragraph 2 and neither in the remainder of the Article nor in any other provision of the DTA. It is suggested that the DTA be amended to include reference to a fishing vessel as a deemed PE.

Mauritania

See discussion under 4.2.4 above in respect of the Mauritania/Senegal DTA

Morocco

There is also no official English translation available for the Moroccan DTA, however, the IBFD provides a summary of the DTA. The pertinent aspects thereof are as follows:

1. It conforms mainly to the UN MTC with some deviations thereto;
2. The deviation to Article 5 is that the Article has an additional Para. 5.3.(c) which indicates that a company is considered as having a PE in a Contracting State, where it renders services or supplies equipment and hire vehicles used for prospecting, extraction or exploitation of minerals and oil in the other state.

There are no other relevant deviations to consider. Therefore, by implication, there is no reference to a fishing vessel and an amendment to the DTA to include a fishing vessel as a PE is recommended.

Norway

Article 5 of the Senegal/Norway DTA follows a hybrid of the OECD and UN MTCs. The construction clause is contained within the specific exclusions in paragraph 2 in terms of which a construction site is considered a PE within 3 months. Furthermore there are additional inclusions such as a sales outlet, a fixed place of business used for storage, display or delivery of goods and a stock of goods or merchandise used for storage, display or delivery. The natural resources article follows the traditional format and no reference is made therein to a fishing vessel or in the remainder of Article 5.

However, Article 22 dealing with offshore activities may be of assistance to establish a fishing vessel PE. The article 22(1) states the following:

A person who is a resident of one of the Contracting States 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 2 and 3 of this Article, be deemed to be carrying on business in that other State through a permanent establishment or fixed base situated therein.

Paragraph 2 relates *inter alia* to timing: the activity must in aggregate, over a 12 month period, last longer than 30 days to constitute a PE. Paragraph 3 states that profits from transporting supplies to the location of exploitation may be taxed in the state where the place of effective management of the boat transporting the supplies is registered.

Although it can be successfully argued that exploitation of natural resources would include fishing it is unsure, considering the plain language of the DTA, whether it was the drafter's intention to include profits from a fishing vessel under this article. The words exploration or exploitation "of the seabed and subsoil and their natural resources"

seems to be linking the natural resource to the seabed and subsoil, which in turn relates to minerals, oil and hydro-carbons and not fish.

Taiwan

The Senegal/Taiwan DTA is modelled on the UN MTC, it deviates slightly in that the construction clause is contained within the specific inclusions paragraph. Furthermore a construction PE is created within 8 months, which is slightly higher than the 6 month requirement in the UN MTC and slightly less than the 12 month requirement in the OECD MTC. There is no specific mention of fishing vessel PE in Article 5 or in any other provision of the DTA and therefore the usual recommendations would apply.

Concluding Remarks

Senegal's fishing waters are under threat. The PE definition in each of Senegal's DTAs analysed is wholly insufficient to protect the country's taxing rights over the diminishing resource of fish. It is recommended that the treaties be amended to include a special provision creating a fishing vessel PE.

There are also certain notable omissions in respect of DTAs with Senegal. These include countries such as Portugal (in the EU), China and Japan. It is recommended that DTAs be negotiated or renegotiated with all of Senegal's major trade partners, especially those with fishing vessels.

4.4 Madagascar

4.4.1 Introduction

A large island state off the South East coast of Africa, Madagascar was once an independent kingdom before becoming a French colony in 1896. Madagascar regained independence in 1960 and has generally been a one party state. However, in recent times strong opposition has culminated in a power-sharing agreement being established

in 2009. This has placed the country in a political crisis due to the fact that the power-sharing agreement has not yet been implemented.¹⁸⁴

Madagascar is one of the poorest nations in the world. 71% of the population was below the poverty line in 1999. This decreased to 49% in 2005 due to economic reform.¹⁸⁵ In the mid-1990's the government discarded its socialist economic policies and has since followed World Bank and IMF led policies of liberalisation and privatisation. This has resulted in the steady growth of the economy from an extremely low base. However, this growth has been hampered due to continuous political instability. Growth in GDP averaged only 2.1% per annum between 1990 and 2003. The 2001 presidential elections resulted in much political upheaval and eventually culminated in the election of Mark Ravalomanana as president. When he came into power he worked aggressively to revive the economy after the 2002 political crisis that had resulted in a 12% drop in GDP in that year. The GDP growth rebounded in 2003 to 6%. In that same year, exports grew by 121% and averaged US \$ 852 million. These efforts have been somewhat halted due to the current power-sharing political crisis, which resulted in tourism dropping by 50% in 2009.¹⁸⁶

Agriculture, including fishing and forestry, is the foundation of the Malagasy¹⁸⁷ economy which constitutes more than one-fourth of GDP and employs approximately 80% of the population.¹⁸⁸

4.4.2 Fishing Industry

In recent times the Fishing and Aquaculture Industry has become one of the three main economic sectors in Madagascar. In 2001 fish and livestock contributed 8.1% of the GDP. There is a wealth of fishing ground in Madagascar with a rich and diverse selection of fish.¹⁸⁹ Within the fishing industry, the shrimp fisheries have been the main growth sector in the economy. Shrimps are a major export product and constitute one

¹⁸⁴ CIA. (2010). *CIA –The World Fact Book: Africa: Madagascar*. [Online]. Available: <https://www.cia.gov/library/publications/the-world-factbook/geos/ma.html>. [16 December 2010]

¹⁸⁵ Poverty Environment. (2010). *Shrimp Fisheries in Madagascar*. [Online]. Available: www.povertyenvironment.net/files/CASE%20Madagascar%20shrimps.pdf [16 December 2010]

¹⁸⁶ CIA. (2010). *CIA –The World Fact Book: Africa: Madagascar*. [Online]. Available: <https://www.cia.gov/library/publications/the-world-factbook/geos/ma.html>. [16 December 2010]

¹⁸⁷ Of or relating to Madagascar or its people or language

¹⁸⁸ Ibid note 186 above

¹⁸⁹ Poverty Environment. (2010). *Shrimp Fisheries in Madagascar*. [Online]. Available: www.povertyenvironment.net/files/CASE%20Madagascar%20shrimps.pdf [16 December 2010]

of the principal sources of foreign currency for Madagascar with total output yields around 15 000 tons and US\$ 75 million of foreign exchange earnings.¹⁹⁰

Before 1994, management of Madagascar's fishing industry was limited. The fishing rights were granted only to a handful of firms and the government was unable to efficiently and effectively monitor and control the industry due to major budgetary constraints. Bribery and corruption was also rife. This, together with a lack of clear policy, transparency in fishing rights and monopoly situations, resulted in an industry that was both unstable and economically unsuccessful. Since 1994, and with the co-operation of foreign aid and investment groups such as the French Development Agency (AFD), the government has changed fishing policies and introduced a successful state/fishing partnership programme, which has been a positive step forward for the Malagasy fishing industry.¹⁹¹

Although considerable progress has been made within the Malagasy fishing industry, it is a growing industry and challenges, other than political instability, still remain. Some of these challenges were highlighted in the Poverty Environment case study, "Shrimp Fisheries in Madagascar":¹⁹²

" State intervention, through taxes and fishing rights allocation, is necessary to sustainably manage the fishing industry. However, the Malagasy government still lacks the skills and financial resources to intervene effectively. Development of selective policy instruments are necessary to ensure that collective, long-term interests are taken into account regarding sustainability and equitable economic returns of the fishery. Increased information-sharing is needed to keep record on e.g. fishing efforts and to avoid resource depletion."

In 2001 the total capture production of fish, crustaceans and molluscs for Madagascar was 123,583 metric tons as opposed to 134,916 metric tons in 2004 and 147,778 metric tons in 2007.¹⁹³ This reveals a significant increase in the capture production of fish from 2001 to 2007. Furthermore, the total value of exports has increased from approximately

¹⁹⁰ Ibid

¹⁹¹ Ibid

¹⁹² Ibid

¹⁹³ See Appendix 3, Table 3.1

US \$ 73 million in 2004 to approximately US \$ 186 million in 2007; another significant increase.¹⁹⁴ Both these statistics are an indication of the growing fishing industry in Madagascar and highlight the potential threat of exploitation of fishing stocks by foreign entities.

The European Commission have already entered into a new Fishing Partnership Agreement with Madagascar.¹⁹⁵ The agreement contains a contribution of 1 197 000 € by the EU of which 80% is to be used to support the fisheries policy of Madagascar. The agreement allows community vessels mainly from Spain, Portugal, Italy and France to fish in the Malagasy waters and is part of the tuna network fisheries agreements in the Indian Ocean.¹⁹⁶

If the EU is interested in the fishing waters of Madagascar there are sure to be entities from other countries interested in the same fishing rights. There is a clear need to ensure that policies are in place to protect the waters of Madagascar from over-fishing and prevent Madagascar experiencing decline like Mauritania and Senegal. Having the necessary DTAs in place with the relevant countries and ensuring that these DTAs have a sufficient definition of PE is an important step in implementing these protective policies. It provides the Source State with the greatest opportunity to tax the profits made from the sale of the fish captured by foreign fishing vessels.

4.4.3 Brief Overview of Domestic Tax Legislation¹⁹⁷

Madagascar has a dual system of taxation of corporate income. Firstly, the company is taxed on profits made in the year that they were earned and secondly they are taxed again when distributed to shareholders. There is no withholding tax on these distributions; they are merely taxed in the hands of the individual as ordinary income.

¹⁹⁴ See Appendix 4, Table 4.1

¹⁹⁵ EC. (2010). *European Commission Fisheries. Madagascar*. [Online]. Available: http://ec.europa.eu/fisheries/cfp/international/agreements/madagascar/index_en.htm. The Agreement was concluded on 1 January 2007 and comes to an end on 31 December 2012..

¹⁹⁶ Ibid

¹⁹⁷ The following overview is taken from: Benchekroun et al. (2010). *IBFD Research Platform: Country Studies: Madagascar* [online]. Available (by subscription): <http://ip-online2.ibfd.org/kbase/>. [1 February 2011]

A company is resident if it is registered or has its seat in Madagascar. On the contrary a company is deemed to be a non-resident if it is not registered or does not have its seat in Madagascar. Resident companies are taxed on income from a source within Madagascar.¹⁹⁸

Resident companies that receive foreign dividends, royalties, interest and capital gains are liable to tax thereon in Madagascar.

There is no unilateral double taxation relief contained in Madagascar's domestic legislation however there is bilateral tax relief provided for in its DTAs. Generally non-resident companies will be subject to tax on all profits or income relating to ownership of property, profit-making activities and transactions even when these are of an occasional nature. In this way non-resident companies are taxed in the same way as resident companies

Non-resident companies without a PE in Madagascar are subject to a final withholding tax at the rate of 10% on Malagasy-source income from services supplied or actually used in Madagascar.

Malagasy PEs of non-resident companies are assessed to tax on income attributable to the PE and are subject to corporate income tax in Madagascar at the standard rate of 23% on net income.¹⁹⁹

The government does provide investment incentives mostly in the export area. In 1996 a special regime was introduced providing investment incentives to operations in export free zones. To benefit from this regime the business activities of the enterprise must be exclusively geared towards export. A major benefit under this regime is a complete

¹⁹⁸ The following are considered to be from a source within Madagascar: all income, from whichever source, of companies with their seat in Madagascar or companies established in Madagascar will be taxed in Madagascar on profits derived from foreign transactions; and income derived from the ownership of property or profit-making activities in Madagascar.

¹⁹⁹ For purposes of assessing tax due in Madagascar, a permanent establishment of a non-resident company, may deduct from their taxable income a portion of head office expenses. The tax authorities have determined that such expenses should be motivated and not be more than 1% of the turnover of the permanent establishment.

exemption from corporate income tax from between 2 and 15 years depending on the category of activities that qualify for incentive.²⁰⁰

In summary Madagascar tax policy seems to be relatively stable. It has a good understanding of the resident and non-resident status of company's and the PE principles. Its incentives for offshore investments are attractive. However, in attracting foreign investment what is of concern is its lack of DTAs coupled with no unilateral double tax relief. Foreign investors with no DTAs may be subject to double tax if their country of origin operates within a residence based system of tax.

4.4.4 Analysis of Double Tax Treaties

Madagascar has only 2 DTAs, which are both currently in force.²⁰¹ One is with France (concluded in July 1983 and came to force in October 1984) and the other with Mauritius (concluded in August 1994 and came into force in December 1995). Each DTA will be examined in turn:

France

The Malagasy treaty with France is mostly aligned with the UN MTC. A significant deviation is noted with respect to the construction clause. Firstly, the construction clause is contained within paragraph 2 (specific inclusions) and secondly there is no time limit as to when a construction site will generate a PE.

²⁰⁰ The various categories that qualify for incentives are: enterprises operating in the fields of construction and establishment of Industrial free zones including management and promotion of such activities; manufacturing and processing industries; service enterprises; intensive dairy cattle farming, cattle rearing including processing of livestock products, beekeeping, poultry farming and/or the processing of such products, silkworm breeding for the production of dry cocoons, breeding and/or processing of shellfish, oysters and seaweed.

²⁰¹ This is the information as obtained from: IBFD Research Platform: Treaty Database [online]. Available (by subscription): <http://ip-online2.ibfd.org/kbase>. [4 February 2011]. The IBFD rely on co-operation from participating countries as to the correctness of this information. It may be that Madagascar does in fact have more Treaties; however this information was not accessible from the relevant government website/s as at 4 February 2011. However, in terms of the South African Revenue Service. (2011). *Legal and Policy: Double Tax Agreements*. [Online], available: <http://www.sars.gov.za>. [4 February 2011], South Africa has entered into negotiations with Madagascar for the implementation of a DTA. This is also the case with Canada; see Department of Finance Canada. (2011). *Publications and Reports*. [Online]. Available: http://www.fin.gc.ca/treaties-conventions/notices/madanam_-eng.asp. [4 February 2011]

The Natural Resources paragraph follows the standard wording in the MTCs, although it does not mention "an oil or gas well".²⁰² There is no specific reference to a fishing vessel in Article 5 or anywhere else in the DTA. It is therefore urged that the treaty be amended to include reference to the creation of a fishing vessel PE. France is a major trading partner and such an amendment would ensure protection of Madagascar's taxing rights over its fish stocks.

Mauritius

The Madagascar/Mauritius DTA is consistent with UN MTC. The special inclusion paragraph contains the following deviations:

- (2)(f) a warehouse, in relation to a person providing storage facilities to others;
- (2)(h) an installation or structure used for the exploitation of natural resources; and
- (2)(i) a farm or plantation.

There is no specific mention of a fishing vessel in Article 5 or in any other Article in the DTA. However, what is of interest is reference to a "structure used for the exploitation of natural resources. Fishing or fishing activities can be viewed as the exploitation of a natural resource. The question is whether a fishing vessel can fall under the definition of a structure (it is clearly not an installation in the ordinary meaning of the word). A structure is defined as "a thing that is made of several parts, especially a building"²⁰³ It is submitted that a fishing vessel is something that is constructed of several parts and therefore could satisfy the terms of sub-paragraph (2)(h). Therefore it could be argued that a Mauritian fishing vessel fishing in Malagasy territory could, it is submitted, constitute a PE in Madagascar under paragraph (2)(h), however this argument will only succeed if a fishing vessel satisfies the basic rule PE and currently the view is that it does not satisfy the basic rule PE. As such, for the avoidance of any doubt, it is suggested that the DTA be amended to include special reference to a fishing vessel.

²⁰² The reason for this may be that the OECD/UN MTC at the time of the DTA being concluded did not have any reference to oil or gas well; this was added in later MTC's.

²⁰³ Oxford Advanced Learners Dictionary (2006)

Concluding remarks

It is recommended that both DTAs be renegotiated to include a special provision relating to establishing a fishing vessel PE. However what is most alarming is the lack of DTAs in place with Madagascar. This is not only a hindrance to foreign investment, but also leaves Madagascar open to potential abuse. Madagascar must at least seek out DTAs with the EU countries fishing in its waters such as Portugal, Spain and Italy together with countries from the east such as China, Japan and Taiwan.

4.5 The Seychelles

4.5.1 Introduction

The Republic of Seychelles is a small tropical island-state and comprises 115 tropical islands spread over 1.372 million square kilometres in the Western Indian Ocean, with a total land area of 455.3 square kilometres. Of the 115 islands, only 10 are inhabited and of the 10 islands inhabited, about 90% of the population live on the largest island, Mahé, where the capital, Victoria, and the main fishing port are located.²⁰⁴

The World Bank Country Brief states the following in respect of the Seychelles economy,

*Seychelles faces constraints typical of a small island state; including, lack of economic diversification, vulnerability to external shocks, distance from markets, and risks of environmental degradation and weather-related disasters. Seychelles has extensive marine space and accessible coastlines.*²⁰⁵

Tourism is the major contributor to the Seychelles GDP, with 22%. It also employs 30% of the population and accounts for 70% of the country's foreign exchange. The second biggest sector is the fish canning industry, mainly tuna processing, which contributes 15% to GDP, employs 17% percent of the work force and exports 97% of its goods.²⁰⁶ Despite the dominance of the tourism sector, the government has attempted to reduce

²⁰⁴ The World Bank. (2010). *Counties & Regions: Africa: Seychelles*. [Online]. Available: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/SEYCHELLESEXTN/0,,menuPK:367513~pagePK:141159~piPK:141110~theSitePK:367495,00.html>. [18 December 2010]

²⁰⁵ Ibid

²⁰⁶ Ibid

the country's dependence on tourism by promoting the development of farming, fishing and small-scale manufacturing.²⁰⁷

The country's GDP grew between 7-8% per year in 2006/07, due mainly to tourism and tourism related building developments. The currency was allowed to depreciate in 2006 due to overvaluation, and as such fell by about 10% in the first 9 months of 2007. Despite these positive events, the economy has struggled to maintain its gains and in 2008 was knocked by food and oil price shocks, foreign exchange shortage, high inflation, large financing gaps and the global financial crisis. This resulted in the government in 2008 defaulting on a Euro amortising note to the value of approximately US \$ 80 million, which led to a downgrading of Seychelles' credit rating. In 2009 GDP fell by almost 9% due to declining tourism.²⁰⁸

4.5.2 Fishing Industry

The Seychelles Fishing Industry has three main components:²⁰⁹

1. Artisanal fisheries: These are conducted by local fisherman targeting mainly demersal and semi-pelagic species;
2. Semi-industrial fisheries, which consist of small locally owned long-liners targeting pelagic species (mainly tuna and swordfish);
3. Industrial Fisheries, which comprises foreign-owned purse seiners and large long-liners targeting mostly tuna species (yellowfin and skipjack). There is a fish processing industry, with two fish processing plants producing for both the local and export market. There is also a large canning factory processing an average of 350 tons of tuna a day (as at 2004), mostly for the export market.

The industrial fishery (which is of interest to this study) has two main categories. Firstly the purse seine fishery (primarily French and Spanish vessels under the EU

²⁰⁷ CIA. (2010). *CIA – The World Fact Book: Africa: Seychelles*. [Online]. Available: <https://www.cia.gov/library/publications/the-world-factbook/geos/se.html>. [18 December 2010]

²⁰⁸ Ibid

²⁰⁹ FAO. 2010. *Fishery and Aquaculture: Country Profiles: Seychelles*. [Online]. Available: http://www.fao.org/fishery/countrysector/FI-CP_SC/en. [18 December 2010]

agreement²¹⁰), which fish for mostly surface swimming tuna (skipjack and yellowfin). Secondly, the long-line fishery (primarily Japanese and Taiwanese vessels), which targets deep-sea dwelling big eye and yellowfin tuna. As at 2004 approximately 85% of the tuna catch from purse seiners was transhipped to the capital, Victoria. About 90 000 tons of tuna was processed locally by the India Ocean Tuna factory.²¹¹

The Seychelles government's long-term policy in respect of the fishing industry is to promote the sustainable development of fisheries and to optimise benefits from the fisheries sector for the present and future generations.²¹² To achieve this, the government is focusing primarily on the following objectives:

- To promote the conservation and management of marine resources to ensure the long-term viability of the industry.
- To generate the maximum amount of employment.
- To maximize revenue from fisheries and related activities.
- To maximize foreign exchange earnings.
- To promote the maximum linkage with the sectors.
- To promote safety at sea.
- To maintain Port Victoria as the major tuna landing and trans-shipment port in the Western Indian Ocean.

At a recent forum of government ministers from the ACP countries²¹³ to discuss issues facing the organisations' fishing industries, held in the Seychelles in November 2010, the (then) Seychelles foreign affairs technical advisor, Phillipe Michaud, stated that the Seychelles has managed to develop Port Victoria into the most important tuna fishing port of the Indian Ocean. He added that although the Seychelles fishing industry can be regarded as a success story, challenges still remain, such as striving to keep the

²¹⁰EC. (2010). *European Commission Fisheries: Seychelles*. [Online]. Available: http://ec.europa.eu/fisheries/cfp/international/agreements/madagascar/index_en.htm. [18 December 2010]. The current EU Fisheries Partnership agreement came to an end on 17 January 2011; however the agreement contains an automatic renewal period of 6 years. The agreement allows for a financial contribution of 5.355.000€ out of which 56% is dedicated to the support of the fisheries policy of Seychelles. The agreement also allows community vessels mainly from Spain, Portugal, France and Italy to fish in the Seychelles waters and is part of the tuna network fisheries agreements in the Indian Ocean.

²¹¹ Ibid. See also Appendix 4, Table 4.1 for Total Value of Export Statistics for the Seychelles. These statistics reveal a steady increase in the value of exports for Seychelles from 2004 to 2007.

²¹² Ibid

²¹³ African, Caribbean and Pacific countries

industry competitive, meeting the requirements of the demanding fishing industry and combating illegal, unregulated and unreported fishing. Furthermore, he stressed the importance of negotiating with the World Trade Organisation for fisheries subsidies and mitigating the effects of tariff erosion in order for the industry to remain competitive on the international market.²¹⁴

In conclusion, the Seychelles fishing industry is a growing industry with many successes and challenges. It has one of the richest resources of tuna in the Indian Ocean and is therefore of great interest to the international markets. On the one hand it is seeking to remain competitive, maximize profits and foreign exchange earnings. On the other hand it is facing the challenge of illegal, unregulated and unreported fishing, with the consequent threat of over-exploitation of its fishing stocks.

By having the necessary DTAs in place, with an adequate PE definition, with the relevant country will put Seychelles in a stronger position. It will provide Seychelles with the greatest opportunity to tax profits made by foreign organization from the catch of fish within its territorial waters and therefore better manage and control this vital resource. It will then be up to its domestic policy to relax or enforce this right to tax these profits.

4.5.3 Brief Overview of Domestic Tax Legislation²¹⁵

According to the Business Tax Act, all businesses, whether they are incorporated, sole proprietorships or partnerships are subject to the same rules and rates of business taxation. Business tax is levied on all businesses taxable income that originates from a source or deemed source within the Seychelles. The Seychelles system of tax therefore is a sourced base system of tax.

Non-resident companies are taxed on income if its source or deemed source is in the Seychelles. The source of the income will be deemed to be that of the Seychelles under various circumstances.²¹⁶

²¹⁴ Seychelles Nation. (2010). *Agriculture & Marine Resources: ACP to look at their fishery challenges* (23.11.2010). [Online]. Available: <http://www.nation.sc/index.php?art=21553>. [18 December 2010]

²¹⁵ The following overview is taken from: Jivan. (2010). *IBFD Research Platform: Country Studies: Seychelles* [online]. Available (by subscription): <http://ip-online2.ibfd.org/kbase/>. [1 February 2011]

²¹⁶ These include: a contract made by a person in the Seychelles for the sale of goods, whether the goods have been or are to be delivered in or outside the Seychelles; anything done by a person in the

Income will also be deemed to have been derived by a business although it is not actually brought to account of the business but is reinvested, accumulated, capitalised, carried to any reserve, sinking fund or insurance fund, however the reserve or fund be designated, or otherwise dealt with on behalf of the business or as directed by the owner of the business.

As it is a source-based system of tax the legislation does not seem to have a concept of PE. Furthermore there is no unilateral DTA relief in terms of the domestic legislation.

The Investment Promotion Act provides investment incentives for investment in certain sectors. One such sector, of relevance to this dissertation, is the "Agricultural and marine resources investment" sector.²¹⁷ One of the incentives granted is a reduced rate of business tax payable which would be of great interest to foreign investors.²¹⁸

The rates of tax vary according to whether an investment under a particular category is in an export-oriented unit (in categories other than tourism), is in a special growth area or is of a general nature. The rates for the Agriculture and Marine Resources sector are as follows:

Year	Rate (%)
1	45
2	40
3	20
4	15
5	5

Seychelles whether the payment there for is made by a resident of the Seychelles or a non-resident and wherever payment is made; anything done by a person who is a resident as owner or charterer of any vessel, wherever the ship or aircraft may be operated; any activities carried on by, or any investment made by, a financial institution as defined in the Financial Institutions Act, in the course of the operation of the financial institution in the Seychelles.

²¹⁷ Excluding enterprises engaged in processing Agriculture and Marine Resources

²¹⁸ The other incentive would include: duty-free importation of capital equipment and replacement thereof; reduction in rates of gainful occupation permits payable annually for employment of non-Seychellois; guaranteed minimum number of gainful occupation permits for employment of non-Seychellois; reduced rates of social security contribution payable by the employer on employment of both Seychellois and non-Seychellois; reduced maximum rate of business tax payable; special deductions from taxable income for expenses incurred from research, marketing, export promotion, travelling and entertainment; and accelerated depreciation of assets employed in the business.

This table encourages long-term investment in this sector.

Some observations: the Seychelles has a source-based system of tax. The concerns raised with the other States analysed herein are also a concern with the Seychelles. The potential in a source-based system of tax is that the investor may be taxed in both the Source and Resident State if no treaty exists between the two states. There is also no unilateral double tax relief in its domestic tax legislation. This may deter future investors or future investors may insist that there is a DTA in place with their country of residence before they would be prepared to invest.

4.5.4 Analysis of Double Tax Treaties

Of the four countries analysed in this dissertation, the Seychelles has the largest number of DTAs. The Seychelles has 20 DTAs of which 3 have been terminated and 7 are not yet in force.²¹⁹ See appendix 5.4 for a list of the DTAs and whether they have a PE article in place (all in fact do have one in place). Appendix 6.4 tables the research insofar as it relates to the natural resources paragraph and reference to a fishing vessel in the DTA. The findings and observations of this research will now follow. There is however no official (or unofficial) English translation for the Seychelles DTA with Monaco. This treaty will therefore not be examined in this dissertation.

DTA's following paragraph 2(f) of the OECD/UN MTC:

The natural resources sub-paragraph contained in paragraph 2 of Article 5 of the Seychelles treaties with Bahrain,²²⁰ Belgium,²²¹ China, Cyprus, Mauritius,²²² Oman, Thailand and UAE follow the exact wording of paragraph 2(f) of Article 5 of the OECD/UN MC: *"a mine, an oil or gas well, a quarry or any other place of extraction of*

²¹⁹ The list of the DTAs are those sourced from: IBFD. (2010). *IBFD Tax Research Platform: Tax Treaty Database*. Available (by subscription): <http://ip-online2.ibfd.org/kbase/> [4 February 2011]. The IBFD rely on co-operation from participating countries as to the correctness of this information. It may be that the Seychelles does in fact have more DTAs in place, however this information was not accessible from the relevant government website/s as at 4 February 2011.

²²⁰ Not yet in force

²²¹ Not yet in force

²²² The Mauritian Treaty also contains a provision (5(2)(h)) relating to "a drilling rig or any installation or structure used in the exploration of natural resources". This dissertation is not concerned with the exploration of natural resources and as such this provision is not analysed any further in this dissertation.

natural resources". Furthermore there is no specific reference or mention of a fishing vessel as a PE in the DTAs mentioned in the preceding paragraph.

Although it has been argued that a fishing vessel may satisfy the basic rule PE and could also fall within the concept of "any other place of extraction of natural resources", it is submitted a cautious approach should be adopted. It is therefore recommended that these DTAs be renegotiated and amended to include special provision in their DTAs deeming a fishing vessel as a PE. With the strength of China as a trading partner and with their interest in the fishing waters of Africa, it is strongly recommended that at least this DTA be renegotiated and amended to include a fishing vessel as a PE.

*Botswana, Qatar,*²²³ *Malaysia and Vietnam*²²⁴

The above DTAs with Seychelles mostly follow the wording of paragraph 2(f) of Article 5 OECD/UN MTCs. They also either contain a separate provision or make specific reference in the special inclusions paragraph to the words "exploitation" and/or "exploration" of natural resources in addition to extraction. There is no reference to a fishing vessel or the fishing trade in the remainder of Article 5 or in the remaining provisions of the respective DTAs.

The Botswana DTA mentions both exploitation and exploration although in separate paragraphs. Paragraph 2(f) states "extraction and exploitation of natural resources" whereas paragraph 2(g) mentions "an installation or structure used for the exploration of natural resources...". The Qatar DTA mentions both exploitation and exploration in paragraph 2(h) of its treaty whereas the Vietnam DTA only refers to exploitation (paragraph 2(f)). The Malaysian DTA is similar to the Qatar DTA although in terms of its paragraph 2(f) it also contains reference to a drilling rig. A drilling rig can clearly not be equated with a fishing vessel; however it does reveal a willingness to accept a mobile place of business as a PE.

It is submitted that the issue of exploration is not relevant to the discussion at hand as this dissertation is concerned with the taxation of profits made from commercial fishing

²²³ Not yet in force

²²⁴ Not yet in force

and not with the exploration of natural resources. On the other hand with respect to the word "exploitation", it could be argued that a fishing vessel can be used for the exploitation of fish. However, even though it can be successfully argued that a place used for the exploitation of natural resources would include a fishing vessel, it is recommended that Seychelles be prudent and renegotiate these treaties to make explicit reference to the PE nature of a fishing vessel.

Barbados, Indonesia, South Africa and Zimbabwe

The common factor that differentiates the above DTAs from the other DTAs with Seychelles is reference to offshore vessels (such as a drilling rig or a ship) that may or may not be used in support of the argument for the establishment of a fishing vessel PE. Each DTA is considered in turn:

The Barbados/Seychelles DTA contains the traditional natural resources paragraph, which mirrors the wording of the OECD/UN MTC exactly (paragraph 2(f) of Article 5 of the treaty. However, paragraph 3 of Article 5 states that the following would be considered a PE:

A building site or construction or installation project, or an installation or drilling rig or ship used for the exploration or exploitation of natural resources, constitutes a permanent establishment only if it lasts for a period of more than six months.

In terms of the submissions made earlier regarding the meaning of "exploitation", a fishing vessel can be equated with a ship used for the "exploitation of natural resources". The only concern, in terms of this DTA, is the length of time for a PE to be established. A fishing season may not necessarily last for 6 months. By implication, it may have been the drafter's intention to deal with exploitation of non-living natural resources rather than the exploitation of fish. This is at least a positive step towards the acceptance by DTA negotiators of mobile places of business as a PE in accordance with the space delimitation approach and the relativity theory as discussed in previous chapters. It is suggested a cautious approach be adopted and the DTA be amended to special provision for a fishing vessel PE.

The natural resources paragraph of the Seychelles/Indonesia DTA contains the following deviation from the OECD/UN MTCs under paragraph 2(h) of the DTA:

a mine, an oil or gas well, a quarry or any other place of extraction, exploration or exploitation of natural resources, a drilling rig or a working ship;

The Seychelles/South Africa and Seychelles/Zimbabwe DTAs have almost the exact same provision as the Indonesia DTA, with some minor grammatical changes. The provision is contained in paragraph 2(g) of both treaties and reads as follows:

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;

The issue of extraction and exploitation has been dealt with in the numerous DTAs analysed above, and the same principles would apply to these DTAs. Therefore no further analysis in respect thereof is required. What is of great interest though, is reference to a "working ship" in both DTAs. Before considering the meaning of what a working ship is it is important to reiterate that the *ejusdem generis* rule does not apply to the natural resources paragraph and as such each item stands on its own and does not need to be read in conjunction with the other items in the same paragraph. The significance of this is that a working ship does not have to, in any way, relate to the extraction, exploration or exploitation of natural resources. In that sense the term "natural resources paragraph" in relation to this DTA is a misnomer. A "working ship" is a very broad term and, it is submitted, would include any commercial activity involving a ship, other than ships engaged in international transport in terms of Article 8 OECD/UN MTCs. These commercial activities would include, but not be limited to, fishing and seismic surveys.

It is submitted that these DTAs (Indonesia concluded in 1999, South Africa 1998²²⁵ and Zimbabwe in 2002) have adopted a more modern approach to the concept of PE and

²²⁵ It is interesting to note that the Seychelles' previous treaty with South Africa which came into force on 5 October 1960 and was terminated on 1 January 2003 (when the new treaty became effective) does not contain any reference to a working ship in the PE Article of the Treaty. This shows the growing acceptance and development of the concept of a mobile place of business constituting a PE.

embraced the concept of a mobile place of business generating a PE. This, it is submitted, is in support of a more business orientated approach to the concept of a PE.

Therefore an Indonesian or South African fishing vessel²²⁶ conducting fishing activities in the waters of Seychelles could generate a PE in Seychelles and the profits made from the catch may be taxed in Seychelles in terms of the DTA. However, this argument may fail on the grounds that a working ship (in contradistinction to a ship stationed in a harbour) fails the basic rule PE as certain commentators and case law suggest. As such it may be prudent to deal with a working ship in a special provision in the DTA, similar to that of Article 8 MTC.

Concluding remarks

The majority of the Seychelles DTAs contain the standard natural resources paragraph which, it is submitted, is not sufficient to tax the profits made by fishing vessels in the waters of the Seychelles. Current judicial and academic opinions offer a more conservative approach to the concept of PE and as such it is recommended that those DTAs be renegotiated and the PE article amended to refer specifically to the PE nature of a fishing vessel.

Then there are those DTAs that deviate somewhat from the standard natural resources paragraph in that they refer to the exploitation of natural resources. It is submitted that the introduction of that word does not add support to the generation of a fishing vessel PE and as such the definition of PE in those treaties are not sufficient to protect the taxing rights on the diminishing resource of fish.

However, there are those DTAs which make reference to a working ship as a PE. It is submitted that that term is broad enough to include a fishing vessel and fishing activities. There is therefore a strong argument that the PE definition in those DTAs is sufficient in protecting the taxing rights of Seychelles over its fishing stocks. Nevertheless, with the possibility that a 'working' ship may fall foul of the basic rule PE, it suggested that special provision be made in the respective DTAs.

²²⁶ The Zimbabwean treaty with Seychelles is not yet effective and as such the relief would not yet be available in respect of that treaty.

4.6 Conclusion

Without repeating the conclusions reached in respect of the analysis of each country's DTAs, the general submission is that the PE definition in an overwhelming majority (if not all) of the DTAs analysed above is insufficient in protecting the taxing rights of the selected States over profits made from fishing. The definition of PE does not seem to adequately cater for a fishing vessel.

It is suggested that the problem does not necessarily lie with the Contracting States, but with the MTC and the commentaries thereto. These often guide the negotiation and conclusion of DTAs. There seem to be certain inconsistencies and a lack of development in the commentaries in dealing with the PE nature of ships and/or fishing vessels in relation to mobile places of business, especially taking into account the development of the spatial delimitation and relativity theories. As aforementioned it is suggest that the MTC and commentaries be amended to provide clear guidance as to the nature of a fishing vessel.

The other revealing factor seems to be the dearth of DTAs in place with the selected African States. It is paramount that these states negotiate and develop DTAs with at least their major trading partners. Without having a DTA in the first place leaves the Source State at a major disadvantage. Not only does it prejudice the state's rights to tax profits through a PE in the Source State, it could also deter future non-resident investors due to the possible threat of double taxation without relief.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The aim of this dissertation was to establish whether the definition of a PE in the DTAs of selected "fishing rich" African states is sufficient in the context of protecting the relevant states' taxing rights over its natural resource of fish. In determining the answer to this question, a series of further questions were considered.

Firstly, it was asked whether fish could be considered a natural resource, as a key factor of this dissertation is the protection of the selected States taxing rights over its natural resources.

Secondly, this dissertation considered the interpretational rules of DTAs and sought to answer the question as to the relevance and importance of the commentaries to the MTCs. Further interpretational conundrums were discussed: how far does the right to tax profits from fishing extend in terms of territory? Is the Source State limited to tax only fishing activities in its territorial waters or does it extend beyond into its Exclusive Economic Zone? These questions were addressed in analysing the interplay between DTAs and the United Nations Convention on the Law of the Sea.

Thirdly, the following significant question was raised: Does a fishing vessel belong in the PE article? An in-depth discussion followed regarding the meaning of "fixed place of business" and whether a fishing vessel satisfies the basic rule PE. If not, a further question was raised for discussion: Can a fishing vessel fall within the term "any other place of extraction of natural resources" in terms of the natural resources paragraph?

Fourthly, the state of fishing in Africa generally and then for each state individually, was examined to establish the importance of the fishing trade in these contexts respectively. In other words, whether there is in fact a necessity to protect the taxing rights over business profits made from foreign fishing vessels in the waters of the Source State.

Finally, an analysis of each of the individual state's DTAs followed, investigating the sufficiency of the PE article in each DTA, highlighting deficiencies, and providing recommendations for improvements thereto.

What follows are the issues, conclusions and recommendations reached in addressing the abovementioned questions.

5.2 Background and Interpretational Issues

Chapter 2 began with the supposition that a natural resource is something "that exists in the natural environment that is both rare and is of economic value in production or consumption, either in its raw state or after a minimal amount of processing". It concluded further that fish in their natural environment fall within this definition and are therefore natural resources.

After providing some background to the general and specific rules of interpretation of treaties as enunciated in the VLCT, Chapter 2 proceeded to analyse the interpretation of DTAs. The VCLT supports a literal interpretation of DTA text; the intention of the parties is only of importance insofar as it informs the ordinary meaning of the DTA text.

A key aspect in interpreting DTAs is the rule of "common interpretation". In other words an interpretation that is consistent with international customary law should be followed. This position is supported by countries such as South Africa, in which the Constitution states that an interpretation that is consistent with international customary law is preferred over an interpretation which is contrary thereto.

The conclusion reached in terms of interpreting DTAs in the light of the Contracting State's domestic law as is required by Article 2 OECD MTC is that an ambulatory approach should be adopted. That is that the domestic law at the time the DTA is applied should be used in interpreting the DTA rather than the domestic law at the time the DTA was concluded.

With respect to multilateral tax treaties, chapter 2 concluded that these types of treaties are only useful in smaller geographical and/or economic regions which have similar tax

systems. Moreover it is uncertain how bilateral agreements between Contracting States in multilateral tax treaties will be dealt with in situations where there are significant objections thereto by the other Contracting States.

Chapter 2 also considered the nature of commentaries to MTC's. The conclusion reached was that the commentaries do add value in interpreting DTAs, however opinions are divided as to whether they form part of the context of the DTA, are supplementary means of interpretation, or inform the ordinary meaning of the text. Each situation should be decided on merits and on a case-by-case basis. However, the opinions are unanimous that the commentaries at the time of the DTA being concluded should be used in preference to subsequent commentaries.

Chapter 2 concluded with a summary of the interaction between UNCLOS and DTAs. The conclusion reached was that the EEZ has become an entrenched principle of customary international law and is therefore binding on countries from an international law perspective. As such the coastal state has exclusive economic rights to the fish stocks in its EEZ and therefore from a DTA perspective the territory of the Source State shall include the EEZ.

With these interpretational issues established, the further core research questions were examined.

5.3 Examination of Article 5 of the OECD/UN MTC

Chapter 3 involved an in-depth analysis of the MTC PE article insofar as it relates to the fishing industry. Firstly, it is apparent that Article 5 of the OECD and UN MTC in respect of the basic rule PE and the specific inclusions, especially the natural resources paragraph (which is of relevance to the topic at hand), mirror each other exactly. It was therefore not necessary for Chapter 3 to engage in an in-depth analysis on the differences between the two models. Furthermore, due to this mirroring, it was also not necessary to determine which model the specific DTA was following, especially with respect to the natural resources paragraph.

After a brief description of the basic elements that constitute a PE, a critical analysis of the term "fixed place of business" ensued.

It was argued that a fishing vessel is a "place" of business as an object that is commercially suitable to serve as a basis to the business activity (i.e. fishing). The problem arose with the term "fixed" place of business. Current commentaries, case law and academic opinion are of the view that a fishing vessel is not a fixed place of business due to the fact that it does not have a fixed geographical location.

However, after analysing the location test and referring to the newly established spatial delimitation approach and the relativity theory, it was argued that a fishing vessel, as a mobile business, can be considered a fixed place of business in satisfaction of the basic rule PE for the following reasons:

1. The nature of the business of a fishing vessel is that its' activities move from location to location depending on where the best "catch" may be. This would satisfy the geographical and commercial coherence tests.
2. Alternatively, a fishing vessel will also satisfy the "spatial delimitation approach". Fishing vessels are mobile places of business which operate within a certain area.
2. As a second alternative, it could be stated that a fishing vessel remains stationary at each location while conducting its fishing activities and once the fishing is complete it moves to the next location and so forth. As such there are no business activities conducted during periods of movement.

Chapter 3 continued with an analysis of the natural resources article especially considering whether a fishing vessel could be "any other place of extraction of natural resources". After dismissing the argument that a fishing vessel cannot be "any other place" based on the conclusions reached above regarding permanence, it was considered whether or not fishing could be equated with "extraction". After examining the definition of extraction, which is *inter alia* "to draw out" or "to remove something from something else", it was concluded that fish can in fact be extracted and therefore, in

contradiction to the commentaries, a fishing vessel can be a place of extraction of natural resources. The chapter proceeded to apply the same analysis to the word "exploitation" which appears in certain DTA as a deviation to the standard natural resources wording. It was argued that fish can be exploited and therefore a fishing vessel can also be a "place of exploitation of natural resources".

What followed was a brief consideration of the relevance of Article 8 of the MTC (relating to profits from shipping and air transport) to the establishment of a fishing PE. It was concluded that that specific article is a special provision dealing uniquely with ships and aircraft engaged in international traffic and did not intend to include vessels engaged in fishing activities.

In chapter 3, despite the strong arguments in favour of a fishing vessel satisfying both the basic rule PE and the inclusion in the natural resources paragraph, it was concluded that, due to the lack of judicial and academic support for these views, a rather cautious approach should be adopted by the selected African States. This cautious approach would be to make special reference to fishing vessels as a PE as a separate provision in the DTA. The concern being that the failure to make specific reference to a fishing vessel as a PE would make any contention that a fishing vessel is a PE vulnerable to challenge, which challenge will, in all likelihood, be successful in the light of the current position on the nature of fishing vessels.

With this backdrop, an analysis of each selected African state in respect of their fishing trade and their respective DTA's was considered in Chapter 4.

5.4 Studies of Selected States and an Analysis of their DTAs

Chapter 4 began by considering the state of fishing in Africa and each African state respectively. The observations made were that many coastal African states rely heavily on their fishing industries for the growth of their economies, however the fishing industries are in crisis; stocks are low and over-fishing is threatening the collapse of the trade.

This general position was confirmed by the facts and statistics of each individual country selected for study. The problem identified with Mauritania and Senegal is that fish stocks are decreasing, but demand through continued partnerships with the EU and countries from the East is increasing rapidly. For Madagascar and the Seychelles, the problem is that their growing industries are at risk of following the same route as that of Mauritania and Senegal. It was established that for these countries fishing trades are growing and, although their stocks of fish are still relatively strong demand therefore is increasing. It was noted that the EU has already entered into fishery partnerships with these countries.

The conclusion reached is that protection of these countries' fish stocks is of paramount importance. Most of these states' fisheries are lacking good governance and the economic strength to police and monitor compliance with fishing standards and regulations. It was suggested that one way of improving such governance is by ensuring a stream of revenue through the taxation of profits made by foreign fishing vessels in the waters of the coastal state. It was established that to ensure that the state has the right to tax these profit it is imperative that the definition of PE be sufficient

After a brief description of each states' domestic legislation to establish, *inter alia*, whether there is the potential for double taxation without relief, Chapter 4 continued with an analysis of each of the selected African country's respective DTAs in an attempt to answer the main research question: *Is the definition of "permanent establishment" as used in the double tax agreements of selected 'fishing rich' African countries sufficient to protect the taxing rights on those diminishing natural resources?*

Due to the arguments against a fishing vessel generating a PE and the requirement that a fishing vessel be specifically referred to in the DTA to establish a PE, the analysis focused mainly on the natural resources paragraph of each DTA in an attempt to identify any specific or implied reference to a fishing vessel. The examination also considered whether there were any other DTA provisions in support of a fishing vessel PE.

Appendix 3 contains the list of each country's DTA and analysed whether or not that DTA has a PE article in place. Appendix 3 analysed whether the specific DTA has a natural resources paragraph, and if so whether or not there is any deviation from the

standard wording thereof and if so whether or not such deviation makes any reference to the fishing trade and finally whether or not there are any other references to fishing in the remainder of the DTA. The following were the conclusions reached for each country:

The majority of Mauritania DTAs do not contain a sufficient definition of PE to protect their taxing rights over profits made by foreign entities fishing in their waters. Most of the DTAs contain a natural resources paragraph which follows the standard wording, some with certain minor deviations. The ECOWAS and French DTA's omit the words, "of natural resources" which would, in terms of the standard wording, appear immediately after the word "any other place of extraction". This limits these DTAs even further. What was also noteworthy in the analysis is the lack of DTAs in place with Mauritania. It was suggested that Mauritania's DTAs be renegotiated to include specific reference to a fishing vessel and furthermore that they seek to negotiate and conclude DTAs with at least their trading partners, but specifically those countries that may have an interest in their fishing waters.

Chapter 4 continued with an analysis of the Senegalese DTAs. The research revealed that out of the 15 DTAs (of which 4 are not yet in force) not one made an explicit or implied reference to a fishing vessel. Most of the DTAs made reference to the standard natural resources paragraph. As such the conclusion reached is that the definition of the PE in the DTAs with Senegal are wholly insufficient in protecting their taxing rights over fishing profits made by foreigners in their waters. The lack of DTAs with significant trading partners was also identified. A renegotiation of all its DTAs was recommended and strong suggestion that DTAs be sought out with at least their major trading partners, such as the EU countries.

An analysis of Malagasy²²⁷ DTAs was next. An alarming statistic was the fact that Madagascar only has two active DTAs one with France and the other with Mauritius and it was obvious that the primary recommendation would be to start actively negotiating DTAs with at least all Madagascar's trading partners.

It was concluded that both DTAs definition of a PE are not sufficient in protecting Madagascar's right to tax profits made by non-resident entities in the fishing waters of

²²⁷ Of or relating to Madagascar or its people or language

Madagascar. However, it was noted that the Mauritius DTA does contain reference to a "structure used for the exploitation of natural resources", and it was suggested that one could argue that a fishing vessel could be a structure used for the exploitation of natural resources, however it was recommended that in the avoidance of doubt, specific reference be made to a fishing vessel in the DTA.

The final analysis in Chapter 4 was that of the Seychelles. The conclusion reached with the Seychelles is that the majority of its 20 DTAs do not have a sufficient definition of PE in the context of a fishing vessel. However, some significant exclusions were identified in the DTAs with Barbados, Indonesia, South Africa and Zimbabwe. In each DTA reference is made to a "working ship" in the respective DTAs equivalent to paragraph 2 of Article 5. It was argued that a fishing vessel is without a doubt a working ship and therefore profits made from a fishing vessel by any of those countries in the waters of the Seychelles, could be taxed in the Seychelles, subject to the basic rule PE being satisfied first.

Finally, Chapter 4 came to a close with a general conclusion that the overwhelming majority of the DTAs with the selected African States contain a definition of PE that is not sufficient in protecting the taxing rights over profits made by non-residents through fishing in the waters of that state. It suggested that the reason for this could be the lack of guidance on the subject from the MTCs and the commentaries thereto. Furthermore it concluded that the number of DTAs in place, especially with countries such as Madagascar and Mauritania, are too low and are leaving those countries vulnerable to potential exploitation. It should be a priority for these countries to negotiate and conclude further treaties with at least their major trading partners.

5.5 Recommendations

Taking into consideration the conclusions reached above the following recommendations are made:

1. That the drafters of the commentaries to the OECD/UN MTCs reconsider their position regarding the PE nature of fishing vessels so as to come in line with more modern trends (such as the spatial delimitation theory and the relativity

theory). This should in turn correct the apparent misalignment identified between the commentaries position regarding mobile places of business and fishing vessels.

2. That, until such time as there is judicial and/or academic support for the contrary view, the DTAs of the selected African States that do not make reference (either explicitly or implicitly) to the establishment of a fishing vessel PE, should be renegotiated and amended to include special provision therefor in the respective DTAs.
3. That the African States analysed herein seek to negotiate and conclude as many DTAs with as many countries as possible, especially their major trading partners, which DTAs should include reference to a fishing vessel PE. This will not only ensure protection of their taxing rights over profits made by non-residents through fishing in their waters, but also encourage greater foreign investment by non-resident entities.

APPENDIX 1

ARTICLE 5 OF THE OECD MODEL INCOME AND CAPITAL TAX TREATY (2010)

ARTICLE 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term "permanent establishment" includes especially:
 - a) a place of management;
 - b) a branch;
 - c) an office;
 - d) a factory;
 - e) a workshop, and
 - f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.
4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:
 - a. the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
 - b. the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

- c. the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
 - d. the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
 - e. the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
 - f. the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
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.
6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that state through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

7. 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.

University of Cape Town

APPENDIX 2

ARTICLE 5 OF THE UN MODEL TAX INCOME AND CAPITAL DOUBLE TAX TREATY (2001)

ARTICLE 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term "permanent establishment" includes especially:
 - a) a place of management;
 - b) a branch;
 - c) an office;
 - d) a factory;
 - e) a workshop, and
 - f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
3. 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 (for the same or a connected project) within a Contracting State for a period or periods aggregating more than six months within any twelve-month period.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:
- a. the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
 - b. the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage and display.
 - c. the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
 - d. the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
 - e. the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
 - f. the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
5. Notwithstanding the provisions of paragraphs 1 and 2, where a person -- other than an agent of an independent status to whom paragraph 7 applies -- is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person:
- (a) has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such

person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or

(b) has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.

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.

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.

APPENDIX 3

TABLE 3.1 - FISH CAPTURE PRODUCTION*

Fish, Crustaceans, molluscs, etc

Capture Production by Low Income food-deficit countries (LIFDCs)*

Country	Population in 2007 '000	2001 t	2002 t	2003 t	2004 t	2005 t	2006 t	2007 t
Mauritania	3124	140 142	156 131	199 650	270 733	304 877	165 312	201 588
Senegal	12379	429 021	401 435	478 284	445 338	412 131	378927	421 317
Madagascar	19683	123583	129345	129525	134916	133252	133842	147778
Seychelles	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

* As extracted and adapted from the FAO 2007 Yearbook: Fishery and Aquaculture Statistics. Source: FAO. 2010. *FAO 2007 yearbook: Fishery and Aquaculture Statistics* (13) [online]. Available: <ftp://ftp.fao.org/docrep/fao/012/i1013t/i1013t.pdf>. [9 October 2010]. The actual table includes LIFDCs from Africa, Americas, Asia and Europe. This table extracts only the information as relevant to the selected African States for this dissertation.

t = metric tons

N/A – information does not appear on the original report

APPENDIX 4

TABLE 4.1 - TOTAL VALUE OF EXPORTS*

Country	2004 Per US\$ 000	2005 Per US\$ 000	2006 Per US\$ 000	2007 Per US\$ 000
Mauritania	124 149	124305	129 381	169 039
Senegal	316 040	251 670	277 555	313 493
Madagascar	73 380	137 264	162 606	186 766
Seychelles	180 168	191 907	199423	197 820

* As extracted and adapted from the FAO 2007 Yearbook: Fishery and Aquaculture Statistics. Source: FAO. 2010. *FAO 2007 yearbook: Fishery and Aquaculture Statistics* (49) [online]. Available: <ftp://ftp.fao.org/docrep/fao/012/i1013t/i1013t.pdf>. [9 October 2010]. The actual table includes a number of other African countries and countries from the Americas. The actual table also considers imports and is labelled LIFDCs from Africa, Americas, Asia and Europe. This table extracts only the information as relevant to the selected African States for this dissertation.

US \$ = United States Dollar.

APPENDIX 5

DOUBLE TAX TREATIES ON INCOME AND CAPITAL OF SELECTED AFRICAN STATES:

5.1 MAURITANIA

Number	Country	Date Convention Concluded	Date of Entry into Force	Permanent Establishment Article
1.	Arab Maghreb Union (AMU)	23 July 1990	14 July 1993	Yes
2.	Economic Community of West African States (ECOWAS)	29 October 1984	1 January 1985	Yes
3.	France	15 November 1968	1 March 1969	Yes
4.	Senegal	9 January 1971	In force but date unknown	Yes
5.	Tunisia	12 March 1986	15 June 1999	Yes

5.2 SENEGAL

Number	Country	Date Convention Concluded	Date of Entry into Force	Permanent Establishment Article
1.	Belgium	29 September 1987	4 February 1993	Yes
2.	Canada	2 August 2001	7 October	Yes
3.	Economic Community of West African States	29 October 1984	1 January 1985	Yes
4.	France	29 March 1974	24 April 1976	Yes
5.	Italy	20 July 1998	24 October 2001	Yes
6.	Kuwait	10 April 2007	Not yet in force	Yes
7.	Lebanon	19 October 2002	22 September 2004	Yes
8.	Malaysia	17 February 2010	Not yet in force	Yes

9.	Mauritania	9 January 1971	In force (date unknown)	Yes
10.	Mauritius	17 April 2002	Not yet in force	Yes
11.	Morocco	1 March 2002	19 May 2006	Yes
12.	Norway	4 July 1994	28 February 1997	Yes
13.	Qatar	10 June 1998	Not yet in force	Yes
14.	Spain	5 December 2006	Not yet in force	Yes
15.	Taiwan	20 January 2000	10 September 2004	Yes

5.3 MADAGASCAR

Number	Country	Date Convention Concluded	Date of Entry into Force	Permanent Establishment Article
1.	France	22 July 1983	1 October 1984	Yes
2.	Mauritius	30 August 1994	4 December 1995	Yes

5.4 SEYCHELLES

Number	Country	Date Convention Concluded	Date of Entry into Force	Permanent Establishment Article
1.	Bahrain	24 April 2010	Not yet in force	Yes
2.	Barbados	19 October 2007	Not yet in force	Yes
3.	Belgium	27 April 2006	Not yet in force	Yes
4.	Botswana	26 August 2004	22 June 2005	Yes
5.	China	26 August 1999	18 January 2000	Yes
6.	Cyprus	28 June 2006	27 October 2006	Yes
7.	Indonesia	27 September 1999	20 April 2000	Yes
8.	Japan	25 September 1970	Terminated	n/a
9.	Malaysia	3 December 2003	10 January 2006	Yes

10.	Mauritius	11 March 2005	22 June 2005	Yes
11.	Monaco	4 January 2010	Not yet in force	Yes
12.	Norway	18 May 1955	Terminated	n/a
13.	Oman	13 September 2003	1 January 2005	Yes
14.	Qatar	1 July 2006	Not yet in force	Yes
15.	South Africa	26 August 1998	29 July 2002	Yes
16.	Switzerland	20/26 August 1963	Terminated	n/a
17.	Thailand	26 April 2001	13 March 2006	Yes
18.	UAE	19 September 2006	23 April 2008	Yes
19.	Vietnam	4 October 2005	Not yet in force	Yes
20.	Zimbabwe	6 August 2002	Not yet in force	Yes

APPENDIX 6

ARTICLE ANALYSIS: NATURAL RESOURCE PARAGRAPH

6.1 MAURITANIA

Country	Natural Resource paragraph?	Deviation to model?	Specific reference to fishing?*	Other article in treaty relating to fishing?**
AMU	Yes	Yes	No	No
ECOWAS	Yes	Yes	No	No
France	Yes	No	No	No
Senegal	Yes	No	No	Yes
Tunisia	N/A	N/A	N/A	N/A

* either explicit or implied reference

** either explicit or implied reference

6.2 SENEGAL

Country	Natural Resource paragraph?	Deviation to model?	Specific reference to fishing?*	Other article in treaty relating to fishing?**
Belgium	Yes	No	No	No
Canada	Yes	Yes	No	No
ECOWAS	Yes	Yes	No	Yes
France	Yes	No	No	Yes
Italy	N/A	N/A	N/A	N/A
Kuwait	N/A	N/A	N/A	N/A
Lebanon	N/A	N/A	N/A	N/A
Malaysia	Yes	No	No	No
Mauritania	Yes	No	No	Yes

Mauritius	N/A	N/A	N/A	N/A
Morocco	N/A	N/A	N/A	N/A
Norway	Yes	No	No	No
Qatar	N/A	N/A	N/A	N/A
Spain	N/A	N/A	N/A	N/A
Taiwan	Yes	No	No	No
Tunisia	N/A	N/A	N/A	N/A

* either explicit or implied reference

** either explicit or implied reference

6.3 MADAGASCAR

Country	Natural Resource paragraph?	Deviation to model?	Specific reference to fishing?*	Other article in treaty relating to fishing?**
France	Yes	Yes	No	No
Mauritius	Yes	Yes	No	No

* either explicit or implied reference

** either explicit or implied reference

6.4 THE SEYCHELLES

Country	Natural Resource paragraph?	Deviation to model?	Specific reference to fishing?*	Other article in treaty relating to fishing?**
Bahrain	Yes	No	No	No
Barbados	Yes	Yes	Yes	No
Belgium	Yes	No	No	No
Botswana	Yes	Yes	No	No
China	Yes	No	No	No
Cyprus	Yes	No	No	No
Indonesia	Yes	Yes	Yes	No
Malaysia	Yes	Yes	No	No
Mauritius	Yes	No	No	No

Monaco	N/A	N/A	N/A	N/A
Oman	Yes	No	No	No
Qatar	Yes	Yes	No	No
South Africa	Yes	Yes	Yes	No
Thailand	Yes	No	No	No
UAE	Yes	No	No	No
Vietnam	Yes	Yes	No	No
Zimbabwe	Yes	Yes	Yes	No

*either explicit or implied reference

** either explicit or implied reference

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