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Is the definition of "permanent establishment" ("PE"), as used in the Double Tax Agreements ("DTAs") of selected Southern African Development Community ("SADC") countries, sufficient to protect their taxing rights over their natural resources?

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in the Department of Accounting

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## **ABSTRACT**

In spite of the abundant resources and opportunity for wealth creation within the SADC community, the GDP per capita and income distribution within the region has remained poor. Apart from the internal strife which has crippled so many of the SADC countries over the last century, the possibility of the loss of wealth of developing countries needs to be explored. This presents the question: “Have the restrictions imposed and taxing provisions applied by these developing countries on the wealth created, and any subsequent repatriation thereof by foreign companies operating within the ambit of their borders and using their natural resources, been sufficient to prevent a loss of wealth for these countries?”

One of the key aspects of any DTA is its definition of a PE. In the OECD MTC, a PE is generally defined as a “fixed place of business through which the business of the enterprise is carried on”. The UN MTC is, to a large extent, consistent with the OECD MTC but is broader in its scope with regard to specific inclusions and also narrower in its exclusions. The PE provisions aim to establish a threshold before a non-resident entity’s profits may be considered for taxation. This is crucial as once a PE is found to exist then the non-resident entity cannot escape the source country’s right to tax profits attributable to that PE. Both the OECD and UN MTCs, as the primary bases for DTAs of African (developing) countries, provide that the contracting state wherein a PE is found to exist will have the primary taxing rights on any income derived which is attributable to such PE.

This dissertation will determine whether or not the definition of a PE, as used in the DTAs of selected SADC countries, sufficiently protects the right these countries have to tax foreign companies or other non-resident taxpayers who use their natural resources profitably.

The analyses of the selected SADC countries’ DTAs indicated a preference by these developing countries to incorporate the provisions of the UN MTC, particularly for DTAs concluded more recently. The analyses also found that despite the foregoing, it was noted that some of the DTAs these countries had with developed countries tended to follow the provisions of the OECD MTC. Zambia, in particular, was found to have concluded the majority of its DTAs prior to the development of both the OECD and UN MTCs. Two of the countries selected for analysis, these being Angola and the DRC, were found not to have any DTAs in force or pending to be analysed for the purposes of this dissertation.

While a number of DTAs contained exceptions which were unique to that country's respective set of DTAs, these exceptions to a large degree do not significantly alter or enhance the right to tax which would otherwise have been afforded to the country concerned.

Based on these findings, the following recommendations are proposed:

- As the selected countries are all considered to be developing economies, it is submitted that future DTAs entered into should strictly follow the UN MTC as it affords the greatest taxing rights to developing countries based on current international practices;
- These countries should also attempt to renegotiate their current treaties, or enter into protocols with the other contracting states, with a view to aligning such treaties with the provisions of the UN MTC. This is especially applicable to Zambia as many of its DTAs were entered into at a time when neither the OECD MTC nor the UN MTC had come into existence;
- The selected countries should also consider further insertions of provisions into the PE Article (particularly Article 5(3)) aimed at the protection of their key natural resources (where deficiencies identified exist). A practical example hereof would be the inclusion of mining exploration activities as part of article 5(3) by mineral rich countries such as Botswana and Namibia.

## ABBREVIATIONS AND GLOSSARY

|                     |  |
|---------------------|--|
| AFDB                | African Development Bank                               |
| CIA                 | Central Intelligence Agency                            |
| DRC                 | Democratic Republic of Congo                           |
| DTA                 | Double Tax Agreement                                   |
| GDP                 | Gross Domestic Product                                 |
| OECD                | Organisation for Economic Co-operation and Development |
| OECD MTC Commentary | Commentary to the OECD MTC                             |
| OECD MTC            | OECD Model Tax Convention on Income and on Capital     |
| PE                  | Permanent establishment                                |
| SADC                | Southern African Development Community                 |
| UK                  | United Kingdom   |
| UN                  | United Nations   |
| UN MTC Commentary   | Commentary to the UN MTC                               |
| UN MTC              | UN Model Tax Convention on Income and on Capital       |
| VCLT                | Vienna Convention on the Law of Treaties               |

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# CHAPTER 1: INTRODUCTION

## 1.1 Background and rationale

The SADC<sup>1</sup> is seen as one of the richest regions in Africa and has numerous initiatives currently in force to increase its wealth by fostering trade incentives and foreign direct investment for foreign entities. The vast agricultural activities and mineral resources of the region present an opportunity for much wealth to be created, an opportunity which has not been overlooked by established foreign companies incorporated in developed countries (Chauvin & Gaulier, 2002: 1).

In spite of the abundant resources and opportunity for wealth creation within the SADC community, the GDP per capita and income distribution has remained poor. Apart from the internal strife which has crippled so many of the SADC countries over the last century, the possibility of loss of wealth to developed countries needs to be explored. This presents the question: “Have the restrictions imposed and taxing provisions applied by these countries on the wealth created and its subsequent repatriation, by foreign companies operating within the ambit of their borders and using their natural resources, been sufficient to prevent a loss of wealth for these countries?”

When entities incorporated and residing in one tax jurisdiction commence operations in another jurisdiction this brings about complexities in taxing the income derived from such operations. The country in which the entity is resident would look to tax the company’s income and the country of source would look to tax the same income. In this basic example, it is clear that if each country were to exercise a taxing right then the entity would be taxed twice on the same income. For this reason, DTAs have been negotiated between countries globally with the aim of avoiding double taxation and supporting trading activities between countries. A DTA would typically contain specific provisions dealing with various types of income which aim to allocate taxing rights to one of the two contracting states who have entered into a DTA. DTA models have been produced by international organisations to provide a benchmark for contracting states when negotiating DTAs. The two most widespread and popular models are the Model Tax Convention on Income and on Capital by the Organisation for Economic Co-operation and Development (the “OECD MTC”) and the United Nations Model Double Taxation Convention (the “UN MTC”).

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<sup>1</sup> Southern African Development Community which has a membership of fifteen states comprised of: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe.

One of the key aspects of any DTA is its definition of a PE. In the OECD MTC, a PE is generally defined as a “fixed place of business through which the business of the enterprise is carried on”.<sup>2</sup> The UN MTC is to a large extent consistent with the OECD MTC but is broader in its scope with regard to specific inclusions and also narrower in its exclusions.<sup>3</sup> The PE provisions aim to establish a threshold before a non-resident entity’s profits may be considered for taxation. This is crucial as, once a PE is found to exist, the non-resident entity cannot escape the source country’s right to tax profits attributable to such PE. Both the OECD and UN MTCs, as the primary bases for DTAs of African (developing) countries, provide that the contracting state wherein which a PE is found to exist will have the primary taxing rights on any income derived which is attributable to such PE.

It is therefore vital that the selected SADC countries have DTAs which establish PEs in line with the OECD and UN MTCs as, in the absence thereof, tax on income derived from the use of their infrastructure and natural resources by foreign companies could be lost. It must be noted, however, that while a DTA’s definition of a PE merely creates a right for the source state to tax the attributable income, the domestic law of that contracting state actually imposes the tax. As the primary focus of this dissertation is on whether or not the definition of a PE sufficiently allocates a taxing right to the source state, it does not simultaneously aim to comment on whether or not the foreign companies are actually taxed by the source state. To answer this question would involve research into the domestic laws of the source country concerned, which is beyond the scope of this dissertation.

A comparative study of this nature has also not previously been undertaken for the SADC countries. The conclusions could prove useful for future negotiation of DTAs, or possible amendments to existing DTAs, to allocate greater taxing rights over business profits derived by non-resident entities from a source within the selected SADC countries.

## **1.2 Focal research question**

With this background in mind, this dissertation aims to determine whether or not the definition of a PE, as used in the DTAs of selected SADC countries, sufficiently protects the taxing rights of these countries over foreign companies or other non-resident taxpayers using their natural resources.

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<sup>2</sup> Article 5(1), OECD (2010). *Model Tax Convention on Income and Capital*

<sup>3</sup> *UN Model Double Taxation Convention between Developed and Developing Countries*

### **1.3 Scope of the Study**

The scope of the study will be the largest countries by GDP of the western region of the SADC community. Based on GDP and abundance of natural resources, the following five countries have been selected:

- Angola;
- Botswana;
- The DRC
- Namibia; and
- Zambia.

The study will specifically address the question of whether or not the definitions of a PE as used in the DTAs, both “in force” or “pending”, of these selected countries sufficiently protect these countries’ rights to tax profits or income attributable to a source from within their borders and which arise through the use of their natural resources. As noted previously, this dissertation will focus on the right to tax as afforded by the DTAs entered into, or pending, of these countries and will not consider whether or not this taxing right is actually enforced in terms of their respective domestic legislation. The DTAs used for analysis are those which were either in-force or pending as at 1 June 2010.

### **1.4 Structure**

This dissertation will aim to comment on whether or not the DTAs of the selected countries sufficiently protect their rights to tax on profits derived from the use of their natural resources. The PE term is the primary mechanism used in DTAs to allocate such a right to tax. Prior to an analysis of the actual DTAs, a sample of countries within the SADC region will need to be selected and an interpretational framework developed before any DTAs can be analysed meaningfully. Being a comparative international study, a framework for interpreting DTAs generally is addressed followed by a discussion of the interpretational issues specific to the PE definition. In addition, the selected countries’ natural resources must be assessed to justify the sample selection. The dissertation therefore has the structure that follows:

- Chapter 2 provides an outline of the selected countries’ natural resources to justify their selection for the purpose of this dissertation;
- Chapter 3 deals with interpretational issues generic to all DTAs and provides the general framework from which the specific DTAs can be interpreted and understood. The chapter also discusses and justifies the use of the OECD and UN MTCs, and their respective commentaries, as a benchmark to be used for the purpose of the country specific analyses;

- Chapter 4 delves specifically into the definition of the PE term from a purely theoretical standpoint and will aim to provide valuable interpretational tools for the country specific analysis to follow;
- Chapter 5 provides an actual analysis of the DTAs examined in relation to the OECD and UN MTCs. All exceptions noted will be discussed in depth as to whether or not they are of significance in the context of the respective country's natural resources which it has at its disposal;
- Chapter 6 provides concluding remarks on the analysis performed and lists all recommendations arising from this dissertation.

## **1.5 Limitations to the study**

### ***1.5.1 DTAs only available in non-English text***

Where a DTA was only available in non-English text, it was excluded from the study. However, where an unofficial English translation was available, such translated DTA has been analysed.

### ***1.5.2 Country specific domestic laws***

As indicated previously, this dissertation will not consider the domestic legislation of the respective countries. As an international comparative study, an international interpretive approach has been adopted. In addition, this study is only concerned with the right to tax allocated in terms of a DTA and not whether the specific country exercised that right.

## CHAPTER 2: OVERVIEW OF MAJOR NATURAL RESOURCES CONTRIBUTING TO GDP

The purpose of this chapter is to provide a broad economic analysis of the countries forming part of the selected sample. Such economic analysis will provide a greater understanding of the natural resources to be found in the selected countries and subsequently allow for a more focused interpretation of variations found in the analysis of DTAs later on in the dissertation. Another important feature of the economic analysis is to justify the sample selected by evidencing the fact that these particular countries possess sufficiently large economies with an abundance of natural resources. The countries selected for the purpose of this dissertation are Angola, Botswana, DRC, Namibia, and Zambia and a discussion on the composition of their respective economies follows.

### 2.1 Angola

Angola is a country which is still emerging from a civil war that raged for decades and left the country with a lack of production, social services, or infrastructure (AFDB Angola Country Gender Profile, 2008:5).

Oil and petroleum production and related activities contribute about 85% of Angola's GDP. Much of the country's infrastructure remains damaged or underdeveloped due to war. Subsistence agriculture provides the main livelihood for most of the population but half of the country's food still has to be imported. Angola's GDP per capita as measured in 2009 was \$8 400.<sup>4</sup>

The economy composition between agriculture, industry, and services is as follows:<sup>5</sup>

- Agriculture – 9.6%
- Industry – 65.8%
- Services – 24.6%

The country's agricultural produce largely consists of: bananas, sugarcane, coffee, sisal, corn, cotton, manioc (tapioca), tobacco, vegetables, plantains, livestock, forest products, and fish.<sup>6</sup> The agricultural sector in Angola is considered to have good potential due to an abundance of good quality land but a significant amount of land is unusable due to land mines (AFDB Angola Country Strategy Update,

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<sup>4</sup> CIA. *World Factbook*. Available: <https://www.cia.gov/library/publications/the-world-factbook/geos/ao.html> [27 September 2010]

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

2008:5). Angola also has a rich biodiversity with forest land occupying approximately 35% of the country's territory while also possessing a coastline of 1 600 km which is rich in fish species. The government is aiming to attract private investment to strengthen the farm and agricultural production (AFDB Angola Country Strategy Update, 2008:5). Despite its relatively small contribution to GDP however, the agricultural sector provides employment and income for roughly 60% of the population. This sector had lacked an exhaustive list of inputs and supplies during the war and continues to lack numerous inputs in the post-war era. The sector is thus characterised by the use of rudimentary and manual soil preparation practices (AFDB Angola Country Gender Profile, 2008:20).

The industrial sector is mainly comprised of the following: oil and petroleum, diamonds, iron ore, phosphates, feldspar, bauxite, uranium, gold, cement, basic metal products, fish processing, food processing, brewing, tobacco products, sugar, textiles, and ship repair.<sup>7</sup> Angola is the world's fourth largest producer of diamonds and other mineral resources and has the second largest oil and gas reserves in Sub-Saharan Africa (AFDB Angola Country Gender Profile, 2008:20). Mining of diamonds and production of oil were the major contributors to the growth in Angola's GDP achieved during the war (AFDB Angola Country Gender Profile, 2008:10). While the mining and oil sectors have been the most sustainable and productive sector in Angola, it is dominated by a minority of the population with the majority of the population not deriving any returns from the activities of this sector (AFDB Angola Country Gender Profile, 2008:5).

## **2.2 Botswana**

The following extract is taken from the African Development Bank's Country Governance Profile for Botswana (2009:i):

*“At independence in 1966, Botswana was one of the poorest countries in the world, but one basic imperative was the creation of a sound administrative basis for development. The country's strengths lie in its sound policy choices, the utilisation of capable state machinery that is disciplined, and operation of a realistic social and economic development planning process, complimented by the ability to adapt and blend traditional and modern institutions of governance. Hence Botswana is, forty-two years after independence, considered successful in achieving a status upgrade from least developed country to upper middle income category. Currently, Botswana is one of the very few countries in Africa with little foreign aid dependence.*

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<sup>7</sup> *Ibid.*

*The macroeconomic framework is sound and the economy continues to perform well in terms of economic growth. It registered an average growth rate of 5.7% during the period 2002/03 – 2006/07. The economy grew from 0.6% in 2005/06 to 6.2% in 2006/07 but slowed down to 3.3% in 2007/08 due to a decline in the growth of all the major sectors of the economy. Mining which drives the economy declined from 32% in 2006/07 to 3.9% in 2007/08, agriculture from 28.9% to 12.4%, manufacturing from 27.8% to 19.4%, water and electricity from 40.7% to 8.4%, construction from 18.3% to 17.7% and transport from 31.2% to 17.9% during the same period. Thus Botswana’s recent growth performance though positive has been fluctuating due to the erratic performance of the mining sector. The inflation rate increased from 7.1% in 2007 to 13.1% in 2008 due to the increase in fuel and food prices; reserves increased from \$9.7 billion in 2007 to \$10.1 billion in 2008 equivalent to 30 months of import cover; the current account surplus as a percentage of GDP declined from 19.4% in 2007 to 3.4% in 2008 and the budget surplus from 10.7% to 5.8% during the same period. In 2008, the Pula depreciated against most major currencies except the Rand against which it has appreciated by 13.7%.”*

Botswana has maintained one of the world’s highest economic growth rates over the past half a decade and is now firmly recognised as a middle income country with an estimated gross domestic product (“GDP”) per capita in 2009 of approximately \$12 800.

The economy composition between agriculture, industry, and services is as follows:<sup>8</sup>

- Agriculture – 2.3%
- Industry – 45.8%
- Services – 51.9%

The agricultural produce of the country is significantly comprised of livestock, sorghum, maize, millet, beans, sunflowers, and groundnuts.<sup>9</sup>

The industrial contribution to Botswana’s GDP is significantly due to diamonds, copper, nickel, salt, soda ash, potash, livestock processing and textiles.<sup>10</sup> The country does not export any oil and neither does it produce natural gas. Diamond mining has been the single biggest contributor to its economic well-being and currently accounts for one third of the country’s GDP, 70 – 80% of its export earnings, and about half

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<sup>8</sup> CIA. *World Factbook*. Available: <https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html> [27 September 2010]

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

of the government's revenues.<sup>11</sup> Botswana is today the largest producer of diamonds in the world by value and volume and the mining sector is the country's most important driver of growth. Despite its contribution to GDP and export earnings, mining in Botswana does not have strong linkages with other sectors. All output is exported and many major inputs are imported (AFDB Botswana Country Strategy Paper, 2009:x).

Land is not a constraint to investment in Botswana as the country has a relatively large land area of about 582 000 square kilometres compared with a population of about 1.7 million people only. There is therefore adequate land for economic and subsistence activities. The land is divided into three categories: state land, customary or tribal land, and freehold land. State and customary land cannot be bought but could be leased for specific uses for periods of up to 99 years and 50 years respectively. On the contrary, freehold land can be purchased by anyone for investment activities. Botswana has implemented a number of policies related to land which include: the Tribal Grazing Land Policy of 1975, National Policy of Land on Land Tenure of 1985, National Policy on Natural Resources Conservation and Development of 1990, Tribal Land (Amendment Act) of 1993, and a land policy review of 2002. There is adequate land available for productive investment (AFDB Botswana Country Governance Profile, 2009:7).

### **2.3 Democratic Republic of Congo ("DRC")**

The DRC is currently ranked as one of the poorest countries in the world despite an abundance of natural resources (AFDB DRC Result-Based Country Strategy Paper, 2008:5). As a result of conflict within the country during the 1990s, many natural resources were plundered amidst major human disasters which resulted in the deaths of approximately 3.5 million people. Peace and reconciliation processes culminated in the 2006 elections and the first democratically elected government in the country since 1960 (AFDB DRC Result-Based Country Strategy Paper, 2008:9). Much of the DRC's economic activity still occurs in the informal sector and is not reflected in official GDP data. The DRC had a GDP per capita of \$300 as estimated in 2009.<sup>12</sup> There is a lack of infrastructure which is a major constraint on development in many areas. The DRC has less than 600 km of tarred roads and only one other major town is accessible by road from Kinshasa. The country has enormous hydro-electric potential but currently has an electrification rate which is estimated to be the lowest in Africa (AFDB DRC Result-Based Country Strategy Paper, 2008:6).

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<sup>11</sup> *Ibid.*

<sup>12</sup> CIA. *World Factbook*. Available: <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>. [27 September 2010]

The economy composition between agriculture, industry, and services is as follows: <sup>13</sup>

- Agriculture – 55%
- Industry – 11%
- Services – 34%

The country's agricultural produce currently consists of: coffee, sugar, palm oil, rubber, tea, quinine, cassava (tapioca), palm oil, bananas, root crops, corn, fruits, and wood products. The DRC has a dense river system and immense hydro-electric potential, vast animal and plant production potential with approximately 10 million hectares (equivalent to 100 000 square kilometres) of arable land, and diversified fishery resources. The country also has natural forests of 22.5 million hectares (equivalent to 2 250 000 square kilometres) and an abundance of diversified flora and fauna (AFDB DRC Result-Based Country Strategy Paper, 2008:15).

The industrial sector is focused primarily on mining (diamonds, gold, copper, cobalt, coltan, and zinc), mineral processing, consumer products (including textiles, footwear, cigarettes, processed foods and beverages), cement, and commercial ship repair. The DRC has an abundance of gas, diamonds, potassium, copper, cobalt, zinc, and iron (AFDB DRC Result-Based Country Strategy Paper, 2008:15).

## **2.4 Namibia**

Post colonial Namibia is a stable and peaceful country with a progressive constitution. The country continues to witness sustained economic stability with GDP and real GDP growth averaging about 22% and 6% respectively during the period 2003 – 2007 (AFDB Namibia Country Strategy Paper, 2009:8). Namibia is a middle income country with a GDP per capita of \$3 500 which is more than double the average GDP per capita of Sub-Saharan Africa (AFDB Namibia Country Strategy Paper, 2009:13). The prevalence of poverty, inequality, and unemployment in Namibia is however relatively high compared to countries with a similar per capita GDP (AFDB Namibia Country Strategy Paper, 2009:17). The country is endowed with natural resources including: diamonds, uranium, lead, gold, copper, zinc, fish and fish products, livestock, and natural gas (AFDB Namibia Country Strategy Paper, 2009:20).

The economy composition between agriculture, industry, and services is as follows: <sup>14</sup>

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<sup>13</sup> *Ibid.*

<sup>14</sup> CIA. *World Factbook*. Available: <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html>. [27 September 2010]

- Agriculture – 9.6%
- Industry – 34.2%
- Services – 56.2%

The country's agricultural produce largely consists of: millet, sorghum, peanuts, grapes, livestock, and fish.

The industrial sector's output is largely driven by: meatpacking, fish processing, dairy products, and mining of diamonds, lead, zinc, tin, silver, tungsten, uranium, and copper. The Namibian economy is hugely reliant on the extraction and processing of minerals for export. Mining accounts for roughly 8% of the country's GDP but provides more than 50% of its foreign exchange earnings. Rich alluvial diamond deposits make Namibia a primary source for gem-quality diamonds and diamonds account for 70% of the total mineral exports (AFDB Namibia Country Strategy Paper, 2009:13). Namibia is also the fourth largest exporter of nonfuel minerals in Africa, the world's fifth largest producer of uranium, and the producer of large quantities of zinc, lead, tin, silver, and tungsten. The mining sector, however, only employs about 3% of the population while approximately 35 - 40% of the population depends on subsistence farming for their livelihood.<sup>15</sup>

For primarily historic reasons, the Namibian economy is dominated by dealings with South Africa as approximately 80% of its trade is conducted with or through South Africa. Namibia is, however, seeking to diversify its trading activities and has recently achieved greater success in Europe with its fish and meat products. Despite the continued dominance of the economy by mining activities, the Namibian government has placed importance on developing the manufacturing sector and has offered numerous incentive packages for investment in this sector (AFDB Namibia Country Strategy Paper, 2009:13).

## **2.5 Zambia**

Zambia was, until two decades ago, one of the most prosperous countries in Sub Saharan Africa but now ranks as one of the least developed. The country's economy has largely developed based on copper exports but recent downturns in the price of copper coupled with repeated droughts have left the economy in stagnation (AFDB Republic of Zambia Multi-Sector Country Gender Profile, 2006:6).

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<sup>15</sup> *Ibid.*

The Zambian economy has experienced strong growth in recent years with real GDP growth averaging about 6% per annum over the period 2003 – 2008. Copper mining has returned to profitability following the privatisation of the former state owned copper mines in the 1990s. Copper output has increased continuously since 2004 as a result of foreign investment. The latest estimates taken in 2009 reflected that the country has a GDP per capita of approximately \$1 600.<sup>16</sup>

The economy composition between agriculture, industry, and services is as follows:<sup>17</sup>

- Agriculture – 19.7%
- Industry – 32.4%
- Services – 47.9%

The agricultural sector's output is largely comprised of corn, sorghum, rice, peanuts, sunflower seed, vegetables, flowers, tobacco, cotton, sugarcane, cassava (tapioca), coffee, cattle, goats, pigs, poultry, milk, eggs, and hides.<sup>18</sup> Almost 72% of the Zambian population are engaged in agricultural activities, the majority of whom are small scale farmers who are resource poor and have poor production (AFDB Republic of Zambia Multi-Sector Country Gender Profile, 2006:14). This sector is stated as being the key priority in the growth and poverty reduction programme of Zambia and it is considered that the country is abundantly endowed with the required resources to stimulate development of the agricultural sector. Recent estimates indicate that 58% of the country's 752 000 square kilometres of landmass is suitable for arable use yet only about 14% of this is currently under cultivation. In addition to the abundance of arable land, the country possesses an agricultural conducive climate, adequate labour, and water resources (Republic of Zambia Fifth National Development Plan, 2006:38-61).

The industrial sector is focused primarily on mining and processing, construction, foodstuffs, beverages, chemicals, textiles, fertilizer, and horticulture. As noted above, mining is the driving force in the Zambian economy. Although mining is a vital aspect for the Zambian economy, the involvement of the population in this key aspect of its economy is low (AFDB Republic of Zambia Multi-Sector Country Gender Profile, 2006:32). Copper and cobalt production have dominated the mining sector in Zambia over the years. Deposits of gold, diamonds, zinc, gemstones, coal, and a variety of agro and industrial minerals are also found in Zambia. Small scale mining of gemstones (specifically of emeralds) is also prevalent in the

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<sup>16</sup> CIA. *World Factbook*. Available: <https://www.cia.gov/library/publications/the-world-factbook/geos/za.html> [27 September 2010]

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

country. The Zambian government commenced privatisation of the mining industry in 1991 and by 2005 \$1.4 billion had been invested into the sector by private investors (Republic of Zambia Fifth National Development Plan, 2006:77).

Zambia has a two tier land system of land ownership, state and customary. The state owns roughly 6% of the total land available for production in the country, with the other 94% allocated at the discretion of the chief or village head in accordance with customary practices (AFDB Republic of Zambia Multi-Sector Country Gender Profile, 2006:15). Despite the abundance of land in the country, Zambia faces challenges that hinder its ability to empower the people of Zambia to realise the full potential of its land resources adequately (Republic of Zambia Fifth National Development Plan, 2006:71).

## **2.6 Conclusion**

As is evident from this chapter, the selected countries have significant amounts of natural resources at their disposal to achieve economic prosperity. One aspect which is vital to this is the respective countries' right to tax on profits derived from the use of such natural resources. The remaining chapters and appendices of this dissertation will provide a comparative analysis and discussion on the adequacy of the PE definition, as used in the selected countries' DTAs, in granting sufficient rights to tax on profits derived from the use of their natural resources.

### CHAPTER 3: THE PURPOSE AND INTERPRETATION OF DTAs

*“The taxpayer hopes the treaty will prevent the double taxation of his income; the tax gatherer hopes the treaty will prevent fiscal evasion; and the politician just hopes.”<sup>19</sup>*

DTAs have more than one purpose and are perceived differently by different persons, be they taxpayers or governments. From a governmental perspective, DTAs are usually entered into and exist for the dual purpose of avoiding double taxation and preventing fiscal evasion (Baker, 2010:B-5).

A DTA does not describe a tax system and neither does it seek to impose any taxes on the would-be taxpayer. The DTA is however indicative of the limits to which the tax system of the source state can be applied (Baker, 2010:B-7). From the taxpayer’s viewpoint, DTAs exist to provide some guidance and a limited guarantee to a trader or investor of the tax treatment to be expected in a foreign territory, DTAs offer protection against double taxation, and they provide specific relief, in the form of exemptions or reductions, of tax (Baker, 2010:B-8).

In addition to the comprehensive commentary provided by the various bodies which are responsible for the compilation of the various DTA model conventions in existence, there are also numerous academic works, such as textbooks and research papers, and court cases from a multitude of foreign jurisdictions which all aid in providing a structure and framework for the international interpretation of DTAs. While these afore-mentioned sources would mostly be specific in their application, e.g. the OECD MTC Commentary specifically relates to the OECD MTC, there are however general issues in relation to interpretation which will be examined in this chapter. Furthermore, and as will be evident later in the dissertation, since the majority of the SADC countries selected have seemingly adopted the UN MTC when concluding bilateral DTAs, and since the UN MTC is essentially an adaptation of the OECD MTC, the reference to the OECD MTC Commentary and Article 3(2) of the OECD and UN MTCs are of particular importance.

Per Baker (2010:E-1): *“It is worth pausing for a moment and asking the question: what is being interpreted when one seeks to interpret a double tax convention?”*

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<sup>19</sup> A. McKie at the 22<sup>nd</sup> Tax Conference of the Canadian Tax Foundation, quoted by P. Gravelle, “Tax Treaties: Concepts, Objectives and Types” (1988) Bull I.B.F.D. 522

DTAs have a dual nature – on the one hand they are international agreements entered into by states under which they agree, *inter alia*, to limit the exercise of their fiscal jurisdiction while on the other hand they then also become part of the domestic legislation of each of the states concerned. This duality presents somewhat of a dilemma as once DTAs become part of the domestic legislation the strict construction approach to their interpretation could be seen to be the correct approach to adopt. Indeed, it has been argued that since a DTA generally offers relief to the taxpayer, the relief sought should be strictly construed and it should be for the taxpayer to show that he falls within the exact terms of the relief.<sup>20</sup> Being an international treaty however, a DTA should be subject to the same rules of interpretation as other treaties (Baker, 2010:E-1).

It has been accepted by a number of courts in various jurisdictions that DTAs should be interpreted in accordance with the rules of public international law applicable to the interpretation of treaties, and not by application of the rules applicable to the respective domestic tax legislation (Baker, 2010:E-2).

### **3.1 The rules of public international law on the interpretation of treaties**

As mentioned previously, DTAs are international agreements entered into between states and as such the conclusion and interpretation of these DTAs is governed by public international law and specifically by the Vienna Convention on the Law of Treaties of 23 May 1969 (“VCLT”).<sup>21</sup>

Articles 31 to 33 of the afore-mentioned VCLT deal with the interpretation of treaties.<sup>22</sup> These articles in the VCLT have been referred to in a growing number of decisions worldwide which have involved the interpretation of DTAs. As an example, in the case of Thiel,<sup>23</sup> the High Court of Australia referred to the VCLT even though the contracting state, which was in that case Switzerland, was not a party to this convention (Baker, 2010:E-4).

### **3.2 The approach of the courts in various jurisdictions**

Baker (2010) indicates, through a review of court cases in various jurisdictions<sup>24</sup> that a broad interpretation is to be followed in line with the intentions of the drafters of DTAs.

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<sup>20</sup> Cohen L.J. in *Littman v Barron* (1951) 33 T.C. 373 at 386

<sup>21</sup> The Vienna Convention entered into force on 27 January 1980

<sup>22</sup> The articles have been reproduced in Appendix A.

<sup>23</sup> *Thiel v F.C.T.* (1990) 90 A.T.C. 4,717 (High Court of Australia)

<sup>24</sup> These being: *Saunders v M.N.R.* (1954) 54 D.T.C. 524 – 526; *R. v Crown Forest Industries Limited* (1995) D.T.C. 5 389 – 5393; *United Dominions Trust Limited v C.I.R.* (1973) 1 N.Z.T.C. 61 028 to 61 031.

The High Court of Australia has adopted an approach to the interpretation of DTAs based on Articles 31 and 32 of the afore-mentioned VCLT in the case of *Thiel v F.C.T.* The French courts, on the other hand, have generally adopted a literal interpretation of DTAs (Baker, 2010:E-6).

In the United States of America, the rules of construction used by the courts in interpreting treaties as domestic law are essentially the same as those used by the courts in interpreting statutory law.<sup>25</sup> Furthermore, in *US v A.L. Burbank*<sup>26</sup> the Second Circuit Court of Appeal sanctioned a broad approach to the interpretation of DTAs. The case referred both to the Commentaries to the OECD MTC as an aid to interpretation, and looked at the purpose of the DTA to prevent fiscal evasion as a guide to the interpretation of the exchange of information provisions.<sup>27</sup>

English courts have recognised that a broad approach to the interpretation of DTAs is necessary and have sanctioned the reference to *travaux préparatoires* as an aid to interpretation. The English courts have also recognised that DTAs are not necessarily drafted in the same manner as domestic tax legislation might be. In *I.R.C v Exxon Corporation*<sup>28</sup> Goulding J. sanctioned an approach which departs from the plain meaning of language to give effect to a provision in a DTA in accordance with its objectives as negotiated between the two contracting governments.<sup>29</sup>

A summary of the approach for interpreting DTAs was provided by Mummery J. in *I.R.C. v Commerzbank AG*<sup>30</sup> which essentially states that.<sup>31</sup>

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<sup>25</sup>As per the judgement in *North West Life Assurance Co. of Canada v Cr.I.R.* (1996) 107 T.C. (US) 363

<sup>26</sup> (1975) 525 F. 2d 9 (2d Cir.) 426 US 934

<sup>27</sup> *Ibid*

<sup>28</sup> *I.R.C v Exxon Corporation* [1982] S.T.C. 356 at 369

<sup>29</sup> This was subsequently reaffirmed by Harman J. in the matter of *Union Texas Petroleum Corporation v Critchley* [1988] S.T.C. 691 where the judge also added the following: “*I consider that I should bear in mind that this double tax agreement is an agreement. It is not a taxing statute, although it is an agreement about how taxes should be imposed. On that basis, in my judgment this agreement should be construed as ut res magis valeat quam pereat (‘so that the thing has validity rather than perishes’ [emphasis added], as should all agreements. The fact that the parties are ‘high contracting parties’, to use an old description, does not change the way the in which the Courts should approach the construction of any agreement.*”

<sup>30</sup> *I.R.C. v Commerzbank AG* [1990] S.T.C. 285 at 297f to 298h

<sup>31</sup> This summary of the approach to interpretation was subsequently adopted by the Court of Appeal in *Memec plc v I.R.C.* [1998] S.T.C. 754 at 766g-j

- The ordinary meaning of words used in the DTA should first be followed but that consideration of the purpose of an enactment should also be considered. The purposive approach would be of particular assistance where, for example, the provisions of an article are ambiguous;
- Any interpretation of the words used in a DTA should be interpreted on broad principles of general acceptance;
- Included in the principles of general acceptance is the general principle of international law, as embodied in Article 31(1) of the VCLT that “*a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in that context and in the light of its object and purpose*”;
- If the adoption of this approach results in ambiguity in the meaning of a particular provision or leads to a result which is absurd then recourse to supplementary means of interpretation, *including travaux préparatoires*, should be permissible;
- Subsequent commentaries on a convention or treaty are of persuasive value only, depending on their cogency and, similarly, reliance as authority on decisions of foreign courts on the interpretation of the provisions of a convention or treaty depend on the reputation and status of the foreign court; and
- Aids to interpretation of a treaty are not a substitute for the study of the terms used in a convention or treaty. Their use is instead discretionary and based on their relevance to the terms used.

### **3.3 The OECD MTC Commentary**

As the DTAs of the countries selected largely follow a hybrid use of the OECD and UN MTCs, and since the UN MTC is essentially an adaptation of the former, reliance on the OECD MTC Commentary as an aid to interpretation is vital for the purpose of this dissertation. What follows therefore, is a discussion on the basis for the use of the OECD MTC Commentary as an aid to interpretation.

There has been an increase in judicial authority supporting the use of the OECD MTC Commentary recently, with support flowing from at least the following countries: Austria, Australia, Belgium, Canada, Denmark, Japan, Malaysia, the Netherlands, New Zealand, Spain, Sweden, Switzerland, the UK, and the USA. Despite the wealth of support in favour thereof, there remain some important questions to be answered with regard to the OECD MTC Commentary:

- (1) What is the legal basis for reference to the OECD MTC Commentary?
- (2) Which version of the OECD MTC Commentary should be referred to?
- (3) Is the OECD MTC Commentary relevant for Articles not in OECD form?

(4) Is the OECD MTC Commentary relevant to conventions with non-OECD states?<sup>32</sup>

### 3.3.1 *What is the legal basis for reference to the OECD MTC Commentary?*

The legal basis for reference to the OECD MTC Commentary is not clear as they are, after all, simply commentaries on a model convention which may be used by treaty negotiators as the basis for the negotiation of DTAs. There are, however, several areas within the VCLT for the category within which the OECD MTC Commentary might fall, though none provide an exact fit. These are (paraphrasing each):

- Article 31(1), which states that the material establishing the ordinary meaning should be given to the terms of a treaty;
- Article 31(2), which states that as part of the context of a treaty should be included an agreement made between all the parties in connection with the conclusion of the treaty, or an instrument made by one or more parties and accepted by the other parties;
- Article 31(3), which states that any subsequent agreement or practice between the parties regarding the interpretation of the treaty shall be taken into account;
- Article 31(4), which states that a special meaning shall be given to a term if the parties so intended;
- and
- Article 32, which states supplementary means of interpretation, including the preparatory of the treaty, may be used as recourse in order to determine the meaning (Baker, 2010:E-13).

Academic writers have varying opinions as to which articles of the VCLT, as outlined above, the OECD MTC Commentary should form part of (Baker, 2010:E-14). Despite this uncertain legal basis for making reference to the OECD MTC Commentary, the courts have made regular references to them without, in most cases, discussing the basis for so doing. An exception here is the Australian case of *Thiel*, as noted previously, which made reference to the OECD MTC Commentary on the basis that they had “*been made in connection with and accepted by the parties to a bi-lateral treaty subsequently concluded in accordance with the framework of the model*”.<sup>33</sup> This would seem to imply that the OECD MTC Commentary should form part of the context within the provisions of Article 31(2) of the VCLT or alternatively as a supplementary means of interpretation within Article 32 of the afore-mentioned Convention.<sup>34</sup> The Supreme Court of Canada also accepted reference to the OECD MTC Commentary in the *Crown Forest Industries Limited* case based on the following:

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<sup>32</sup> *Ibid*

<sup>33</sup> *Ibid.*, p.4 723, *per* Dawson J.

<sup>34</sup> *Ibid*

*“I agree with the intervener Government of the United States’ submission that, in ascertaining these goals and intentions, a Court may refer to extrinsic materials which form part of the legal context (these include accepted model conventions and official commentaries thereon) without the need first to find an ambiguity before turning to such materials”.*<sup>35</sup>

In making this claim that there is no ambiguity, it is suggested that the OECD MTC Commentary should fall within the provisions of Article 31 of the VCLT, and not within Article 32. The US Court of Claims also accepted reference to the OECD MTC Commentary in *National Westminster Bank plc v US* as a document which is presumed to be in the mind of the negotiators when they drafted the treaty.<sup>36</sup>

It is submitted therefore that, while there may be no strict legal basis for their use, the OECD MTC Commentary is a cogent interpretational aid especially where the terms used in a DTA mirror those of the OECD MTC. Reliance on the OECD MTC Commentary in such circumstances, and similarly in the DTA analyses in this dissertation, is therefore warranted.

### **3.3.2 Which version of the OECD MTC Commentary should be referred to?**

The OECD MTC and related commentaries have been updated on numerous occasions since the initial 1963 Draft and the subsequent 1977 MTC. The most recent amendment to the OECD MTC Commentary was made in 2010. As treaties are not renegotiated with each and every amendment to the OECD MTC or its commentaries, what is the impact of such changes on treaties which existed prior to these changes becoming effective? As the commentaries have become ambulatory, the OECD Council, in adopting the 1997 MTC, made a recommendation<sup>37</sup> which clarifies that the commentaries to be used are the latest versions. While this view is not necessarily the view of all academic writers and is not universally accepted, the reference to the latest version of the OECD MTC Commentary approach is the generally accepted method with respect to the use thereof as an aid to interpreting treaties including those concluded prior to the adoption of the first OECD MTC. As will be evident in Chapter 5 of this dissertation, a number of DTAs forming part of the analysis were in fact concluded prior to the adoption of the first OECD MTC and this approach assists immeasurably in the comparison of these DTAs to the OECD and UN MTCs as a benchmark.

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<sup>35</sup> (1995) 95 D.T.C. 5 389 at 5 396

<sup>36</sup> *Ibid*

<sup>37</sup> Reproduced in Appendix B

The issue of the use of later versions of the Commentary was also discussed by the US Tax Court in the *Taisei Fire & Marine Insurance*<sup>38</sup> case where relevant changes to the OECD MTC Commentary on Article 5 had been made between the 1977 OECD MTC and the 1992 OECD MTC and it was deemed that the criteria in the later version of the Commentary reflected the original intention of the earlier model.

The answer to the question of ‘to which version of the Commentary should reference be made?’ also depends in part on the issue previously raised regarding the correct category within the VCLT to which the OECD MTC Commentary belongs. If, for example, they are regarded as a subsequent agreement between the parties regarding the interpretation of a treaty within the provisions of Article 31(3)(a) of the VCLT then there would be justification for referring to subsequent versions of the OECD MTC Commentary (Baker, 2010:E-17).

In conclusion, the use of both the version of the OECD MTC Commentary existing at the time a DTA is concluded as well as subsequent versions, the former indicating the interpretation which prevailed at the time the DTA was concluded and the latter indicating any change in approach, would seem to be the most pragmatic (Baker, 2010:E-18) and it is this approach to interpretation, known as the ambulatory approach to interpretation, using the OECD MTC Commentary as an aid which will be followed in this dissertation. This is of relevance to this dissertation due to the hybrid use of the OECD and UN MTCs found in the analysis of DTAs in Chapter 5. The ambulatory approach also assists in a more meaningful analysis as the interpretation thereof can be made uniformly in accordance with the prevailing version of the OECD MTC Commentary.

### ***3.3.3 Is the OECD MTC Commentary relevant for Articles not in OECD form?***

There does not seem to be any authority for the view that recourse to the OECD MTC Commentary should be limited to situations where a specific Article is identical to the OECD MTC. The OECD MTC Commentary would therefore still be useful in explaining the perceived problem to which a non-OECD-form Article might be addressed. However, it is submitted that the further a specific Article deviates from the OECD MTC, the less relevance the OECD MTC Commentary would have.<sup>39</sup>

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<sup>38</sup> (1995) 104 T.C. (US) 535, quoted in Baker at pg E-17

<sup>39</sup> *Ibid*

### **3.3.4 Is the OECD MTC Commentary relevant to conventions with non-OECD states?**

It is more difficult to place the OECD MTC Commentary in the categories of the VCLT outlined previously where one (or both) states is a non-OECD member state. The OECD MTC Commentary is widely recognised by treaty negotiators world-wide, including those from non-OECD states. The OECD MTC Commentary would therefore remain relevant to DTAs concluded with or between non-OECD states where, for example, it is clear that the DTA has been concluded on the basis of the OECD MTC. There are also cases where the OECD MTC Commentary has been referred to in relation to DTAs between non-OECD states (Baker, 2010:E-19).

This approach is vital for the purpose of this dissertation given that none of the selected countries are OECD member states.

### **3.4 The UN MTC Commentary**

Much of what has been written above regarding the interpretation of DTAs, and specifically regarding the use of commentaries, has referred to the OECD MTC Commentary and its applicability. In the analysis section of the DTAs of the countries selected for the purpose of this dissertation, it will be noted that a hybrid use of the UN and OECD MTCs is prevalent. The UN MTC itself is also accompanied by its own set of commentaries. Can it therefore be assumed that all the previous comments regarding the validity of the use of the OECD MTC Commentary can also be extended to the use of the UN MTC Commentary? Given that the UN MTC is essentially an adaptation of the OECD MTC, its commentaries largely follow that of the OECD. The UN MTC Commentary's use as an aid in interpretation was also referred to in the matter of *R. v Crown Forest Industries Ltd.*<sup>40</sup> It is logical to assume therefore that the use of the UN MTC as an aid to interpretation would carry as much significance where a specific DTA adopts this model as the OECD MTC Commentary would otherwise have based on the arguments and comments raised above.

### **3.5 Article 3(2)**

Article 3(2) of the OECD MTC, which is reproduced in its entirety in the UN MTC, reads as follows:

*“As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.”*

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<sup>40</sup> (1995) 95 D.T.C. 5 389 at 5 399.

As noted previously, this dissertation will not delve into the domestic legislation of the respective countries whose DTAs are analysed herein but rather focus exclusively on how a PE is defined in their respective DTAs. As such, it is considered that any further examination of the provisions of article 3(2), as outlined above, is superfluous in the context of this dissertation. Furthermore, any meaning which may be ascribed to a term, contained in the DTAs, in the domestic legislation of the contracting state concerned will therefore also not form part of the analysis.

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## CHAPTER 4: WHAT IS A PE?

As the primary focus of this dissertation is to assess the definition of a PE, as used in the DTAs of the selected countries, it is first necessary to consider this term from a theoretical perspective to establish a framework for the analysis of the actual treaties which follows later on.

The definition of a PE is an important concept which has arisen in international tax and is specifically used in DTAs to establish a threshold which must be met in order for a country to levy tax on a non-resident who earns income from a source within that country (Oguttu, 2010:165). Vogel (1986:280) states that “*under all three model conventions, the existence of a PE is the decisive condition for the taxation of income from business activities and of capital pertaining to such activities*”, the three models referred to by Vogel being the OECD MTC, the UN MTC, and the United States MTC.<sup>41</sup> The justification for the PE rule in DTAs is that until such time as a PE begins to exist, the infrastructure and resources of the source country would not have been relied upon to earn income and the source state would not therefore be deprived of a right to tax income derived from the use of its infrastructure and natural resources (Olivier & Honiball, 2008:93).

The two models which are submitted to be relevant for the selected countries analysed in this dissertation are the OECD and UN MTCs. These two models have found the most favour for adoption amongst the various nations in the world who have concluded DTAs, with the use of the UN MTC, or a hybrid of the UN and OECD MTCs, prevalent in DTAs between developed and developing countries. The reason for this is that the OECD MTC definition of a PE is more favourable to allocating taxing rights to the country of residence as opposed to the UN MTC which is more favourable toward allocating taxing rights to the country of source. Stated differently, the UN MTC has the effect of allocating taxing rights to the country of source relatively sooner than the OECD MTC (Olivier & Honiball, 2008:94).<sup>42</sup>

Having considered the interpretation of treaties generally in Chapter 3 above, what follows is a general discussion on the commentary related to and interpretation of the PE definition as used in the OECD and UN MTCs.

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<sup>41</sup> It is submitted that for the purpose of this paper, the United States MTC does not hold much relevance as African States tend to follow the OECD MTC or UN MTC or a hybrid of both.

<sup>42</sup> The definitions of a PE as provided by these two respective MTCs are outlined in Appendix C.

#### 4.1 The PE concept

An Indian judge has stated the following in regard to the term PE:

*“The words ‘permanent establishment’ postulate the existence of a substantial element of an enduring or permanent nature of a foreign enterprise in another country which can be attributed to a fixed place of business in that country. It should be of such nature that it would amount to a virtual projection of the foreign enterprise of one country into the soil of another country”.*<sup>43</sup>

The PE term is essentially a product of international law and, as such, it is strongly arguable that it should be interpreted internationally on a uniform basis (Baker, 2010:5-2/1).

There are essentially two types of PEs contemplated in the PE definition in both the OECD and UN MTCs (as found in Article 5 of both MTCs). Firstly, there is the concept of an establishment that is part of the same enterprise and under common ownership and control, such as an office, branch, etc. This type of PE is considered in Article 5(1) – (4) of the afore-mentioned models and is referred to as the “general rule PE”. The second type of PE contained in the PE definition is that of an agent, which is legally separate from the enterprise, but which is nevertheless dependent on the enterprise to such an extent that a PE can be said to exist. This second type of PE is referred to as an “agency PE” and is dealt with in Article 5(5) and Article 5(6) of the OECD MTC and Article 5(5) – (7) of the UN MTC.

It is submitted that a general rule PE would use the resources and infrastructure of a host country to a greater extent than what an agency PE would in usual circumstances. As agency PEs would be reliant on the natural resources and infrastructure of a host country, albeit to a lesser extent than a general rule PE, both types of PE are however discussed in this chapter, and in the analysis in the following chapter, but the emphasis is placed on the general rule PE.

#### 4.2 The general rule PE

Both the OECD and UN MTCs formulate the general rule PE as constituting “a fixed place of business through which the business of the enterprise is wholly or partly carried on”.<sup>44</sup> From this general definition, three key elements are required to be met before a PE can be found to exist, these being that:

- there must be a place of business;
- the place of business must be fixed; and

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<sup>43</sup> *C.I.T. v Visakhapatnam Port Trust* (1983) 144 I.T.R. 146

<sup>44</sup> Article 5(1) of the OECD and UN MTCs

- the business of the enterprise must be carried on through this fixed place of business.

Paragraph 1(3) of the OECD MTC Commentary on Article 5 makes it clear that although the term ‘business’ is used in the basic rule, this does not imply that such business is necessarily a profitable one. The business component representing the PE may simply be an essential, but unprofitable, component.<sup>45</sup> Each of the key elements listed above has its own interpretation rules and are thus further examined in turn below.

#### **4.2.1 Place of business**

The place of business test effectively conveys the fact that for a general rule PE to exist there must be a physical presence in the country of source (OECD MTC Commentary, 2008:82). Olivier and Honiball (2008:96) summarise this section of the commentary as implying that “*there must be a tangible office, shop, factory, workshop, etc present in the country of source*” before a PE can exist.<sup>46</sup> The OECD MTC Commentary (2008:82) notes in this regard that the requirement is not that the place of business “*is actually fixed to the soil on which it stands but that it is enough that the equipment remains on a particular site*”.

The local wording is interpreted in light of the OECD MTCs term “place of business” along with the commentary thereon. A “place” has been interpreted broadly to include: any open-air place, such as in a forest where logging equipment is situated; the wharf of a shipping enterprise; the place where a drilling ship or rig is located; a home office, or even simply a desk and a filing cabinet; and a bookmaker’s patch at a racecourse. A place of business could also be underground, as would be the case with mines, quarries, and underground pipelines. The term does also not require a presence of human beings. Therefore vending machines, gaming machines, antennas and satellite receivers, water pipelines, electrical cables, transformer stations, pumping stations, and underground cables for telecommunication purposes should be considered places of business, despite not necessarily being staffed with human beings.

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<sup>45</sup> Refer OECD MTC Commentary (2008: 80) for support.

<sup>46</sup> Also supported by Sasseville and Skaar in the IFA General Report (2009:23) where it is noted that the place of business must be a tangible asset of a substantial nature and that, therefore, items such as securities, bank accounts, and websites do not in isolation result in an enterprise having a PE in a source country

#### 4.2.2 *The place of business must be fixed*

Per Olivier and Honiball (2008:97), for a place of business to be fixed there are two tests which are required to be met, these being:

- the “location” test; and
- the “duration” test.

The location test requires that a link between the place of business and a specific geographical point should exist, although the place of business does not necessarily need to be physically connected to the land. Therefore without a distinct place of business no PE will exist, irrespective of the length of time for which it may operate.<sup>47</sup> As an example, a ship, train, or truck will not meet the requirements for a general rule PE as they do not remain at a particular location during their normal use.<sup>48</sup> Per the OECD MTC Commentary, places which are connected commercially but not geographically do not constitute a “place”. Therefore, activities carried on as part of a single project constituting a coherent commercial whole may lack the necessary geographical coherence to be considered as one single place of business (Sasseville & Skaar, 2009: 27).

The second test specified above is the duration test. The essence of this test is that a certain degree of permanence is required and that, therefore, activities of a temporary nature are excluded (Olivier & Honiball, 2008: 98). It must be noted, however, that the word ‘permanent’ does not necessarily require perpetuity, a view which has notably been rejected in the USA (Sasseville & Skaar, 2009: 28). Paragraph 6 of the OECD MTC Commentary (2008: 82) to Article 5 of the OECD MTC attempts to quantify the permanence test in absolute terms by stating that:

- where the business is conducted for less than six months a PE would not normally exist;
- where the business is conducted for a period longer than six months but less than twelve months a PE may possibly exist; and
- where the business is conducted for a period longer than twelve months a PE is likely to exist.

This same paragraph in the OECD MTC Commentary also contains two exceptions to the rule, the first being where the activities are recurrent in nature and the second being where a business is carried on exclusively in the country of source for a short period of time (less than six months). The OECD MTC Commentary suggests that for recurrent activities the period of time should be aggregated across the

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<sup>47</sup> *Ibid*

<sup>48</sup> *Ibid*

number of times for which the activity has recurred when applying the duration test. For the second exception, it is suggested that if the business is solely carried on in a source country, even if only for a short duration, then the source country should still be given the right to tax the entity as a PE. Sasseville and Skaar note that the duration test is applied retrospectively and that the intentions of the taxpayer are less important than the factual duration of the right of use (Sasseville & Skaar, 2009: 29). Olivier and Honiball (2008:99) submit that the OECD MTC lays down longer periods for the duration test before a PE can exist than the UN MTC does which is a clear indication of the UN MTC's aim to allocate taxing rights to a source country sooner than the OECD MTC.

#### **4.2.3 *The business of the enterprise must be carried on through this fixed place of business***

Having established that there is a "place of business" which exists in the source country and which has a certain degree of permanence, the last requirement of the basic rule is that the business of the enterprise needs to be carried on *through* this fixed place of business. For example, if an entity sets up a fixed place of business in a country but subsequently rents it out, then no PE can exist as the third requirement would not be met. This is outlined by Skaar (1991:112) who states that "*an important feature of the place of business is that its purpose is to serve the business activity and not to be subject to business activities. The mere ownership of a fixed asset, such as real estate for example, is not sufficient to constitute a PE. This general principle is helpful, however, when it comes to foreign investments in real estate, management of investment capital, as well as leasing activities and bare boat chartering of large tangible assets such as drilling rigs for example. Although some of these assets could obviously be a foreign place of business for somebody, they will not always be for the owner*".<sup>49</sup>

#### **4.2.4 *The illustrative list***

The next part of the Article, Article 5(2), contains a list of examples which, *prima facie*, can be taken to constitute a PE. The list is however illustrative and is noted as such in the OECD MTC Commentary at paragraph 12.<sup>50</sup> Therefore, as the list provided by Article 5(2) is an illustrative list, it is to be expected,

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<sup>49</sup> Olivier and Honiball (2008:100) also elaborate that the words 'to serve the business' require that the activities being carried out may be the main activity or it may be auxiliary, substantial, or even insignificant and that, therefore, the requirement of 'business being carried on' is narrower than that. Sasseville and Skaar (2009:43) also make the point that any combination of auxiliary activities does not amount to a core business activity but if combined with a core business activity then a PE will exist even if the core activity is performed outside the place of business but within the same source country.

<sup>50</sup> OECD MTC Commentary (2010 version) at paragraph 12 states that: "*This paragraph contains a list, by no means exhaustive, of examples, each of which can be regarded, prima facie, as constituting a permanent establishment. As these examples are to be seen against the background of the general definition given in paragraph 1, it is assumed that the Contracting States interpret the*

and is in fact common, that specific agreements will contain further examples which are more relevant to the respective countries involved in those agreements, such as for example “farms”, “plantations”, and “forestry property” (Baker, 2010: 5-2/7). It is questionable whether the provisions of Article 5(2) are of much more use than the general rule since the Commentary makes it clear that the requirements of Article 5(1) need to be met in any event before a PE can be found to exist.

#### **4.2.5 Building sites and construction or installation projects**

This is dealt with in Article 5(3) of the OECD and UN MTCs respectively and deals with building sites and construction or installation projects, including the installation of machinery.<sup>51</sup>

There is a general issue surrounding Article 5(3) in that it is not clear whether the construction or installation site PE is meant to be simply a form of fixed place of business PE, or whether it is meant to be a different, and third type of PE. If the former, it would also need to adhere to the requirements of Article 5(1), which contains the general rule, and Article 5(3) could then be seen as a limitation in that a PE can only exist once the construction or installation site continues for more than 12 months. If, however, it is meant to be a third type of PE, then a construction or installation which endures for greater than 12 months will result in a PE being formed notwithstanding whether or not the provisions of Article 5(1) have been met. The OECD MTC Commentary on Article 5(3) does not contain any specific wording, as it does for Article 5(2), which explicitly states whether or not the general rule PE also has to be fulfilled prior to a construction or installation site PE being formed. Indeed, paragraph 20 of the Commentary alludes to the fact that a construction or installation site need not be at a fixed site throughout the 12 month period in order for a PE to be formed. It is submitted that it is correct to view construction and installation sites as examples of a fixed place of business PE and that the provisions of Article 5(3) are in fact words of limitation, but that the construction or installation site need not remain at the same place

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*terms listed, “a place of management”, “a branch”, “an office”, etc. in such a way that such places of business constitute permanent establishments only if they meet the requirements of paragraph 1.”*

<sup>51</sup> *Ibid*

Paragraph 17 of the OECD MTC Commentary at pg 99-100 also explains that “*The term “building site or construction or installation project” includes not only the construction of buildings but also the construction of roads, bridges or canals, the renovation (involving more than mere maintenance or redecoration) of buildings, roads, bridges or canals, the laying of pipelines and excavating and dredging. Additionally, the term “installation project” is not restricted to an installation related to a construction project; it also includes the installation of new equipment, such as a complex machine, in an existing building or outdoors. On-site planning and supervision of the erection of a building are covered by paragraph 3. States wishing to modify the text of the paragraph to provide expressly for that result are free to do so in their bilateral conventions.*”

throughout the 12 month period.<sup>52</sup> This is an important interpretational issue for the purpose of this dissertation as, it will be seen, a number of DTAs of the selected countries inserted the building sites and construction or installation projects provisions, which are relevant to the extraction of natural resources, as part of the illustrative list and not as a separate provision in accordance with the OECD and UN MTCs. It is submitted that, assuming the above interpretation of these provisions is correct, such a variance in the DTAs weakens the position to tax of the source country.

The UN MTC differs from the OECD MTC in the following ways in Article 5(3):

- the UN MTC includes an “assembly project” and also makes explicit reference to “supervisory activities”;
- the time period limitation is shortened to 6 months instead of 12 months; and
- the UN MTC also includes a sub-paragraph on the “*furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose ... for a period or periods aggregating more than 6 months in any 12 month period*”.

These differences are all aimed at allocating greater taxing rights to source countries and would be beneficial especially to a developing country which has concluded a bilateral treaty with a developed country.

As regards the first exception noted above, Edwin van der Bruggen (2002:259) notes the following:

*“The UN MC [UN Model Convention] added ‘supervisory activities’ to the OECD definition (and reduced the time limit to six months) with respect to building sites, installation and assembly. The UN Commentary does not elaborate on the addition. Under the OECD MC [OECD Model Convention], planning and supervisory services are only included in the term ‘building site or construction project’ if they are carried out by the same enterprise as the one that actually does (or at least participates in) the physical construction. As Blumenberg puts it: ‘In some cases the foreign enterprise’s activity may be restricted to the mere planning and supervising of the work, i.e. the enterprise acts only as a consultant of the building contractor. These types of activities do not constitute a PE, neither according to German domestic law, nor according to German treaty law’. With the UN addition, however, supervisory activities lead to a PE if they are ‘in connection with’ a building or construction site. In other words, even when the service performer is not itself participating in the physical construction, the (‘intellectual’)*

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<sup>52</sup> This submission is also supported by Baker (2010: 5-2/8)

*services may still constitute a PE under the UN Model treaty if those services concern the envisaged construction activity”.*

With regard to the second exception noted above and the use of the 6 month period limitation as opposed to the 12 month period limitation adopted by the OECD MTC, the UN MTC Commentary (2001:76) states that:

*“Concerning the six-month threshold in paragraph 3, subparagraphs (a) and (b), of Article 5 of the United Nations Model Convention, some developing countries would prefer to remove the time limit altogether for two main reasons: first, because construction, assembly and similar activities could as a result of modern technology be of very short duration and still result in a considerable profit for the enterprise carrying on those activities; and second, because the period during which the foreign personnel involved in the activities remained in the source country was irrelevant to the right of developing countries to tax the income. Other members from developing countries feel that any time limit should be removed because such a limitation was apt to be used by enterprises of capital-exporting countries to evade taxation in the source country”.*

With regard to the third exception noted above, the UN MTC Commentary (2001:76) notes that:

*“It is believed that management and consultancy services should be covered because the provision of such services in developing countries by corporations of industrialized countries often involves very large sums of money”.*

Edwin van der Bruggen (2002:259) argues that this provision was designed by the UN Group of Experts to mitigate the lack of source taxation possibilities for varying types of business services which, for the most part, do not fall within the scope of the royalty article.

#### **4.2.6 The exclusionary list**

Article 5(4) contains a list of activities that will not result in a PE being formed. The OECD MTC Commentary on Article 5 at paragraph 21<sup>53</sup> (2008:101) indicates that a fundamental feature of these

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<sup>53</sup> Paragraph 21 reads as follows: *“This paragraph lists a number of business activities which are treated as exceptions to the general definition laid down in paragraph 1 and which are not permanent establishments, even if the activity is carried on through a fixed place of business. The common feature of these activities is that they are, in general, preparatory or auxiliary activities. This is laid down explicitly in the case of the exception mentioned in subparagraph e), which actually amounts to a general restriction of the scope of the definition contained in paragraph 1. Moreover subparagraph f) provides that combinations of activities mentioned in subparagraphs a) to e) in the same fixed place of business shall be deemed not to be a permanent establishment, provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory*

activities is that they are all of a preparatory or auxiliary nature but that, per the MTC, only paragraphs (e) and (f) refer to preparatory or auxiliary activities while paragraphs (a) – (d) refer to specific activities. Paragraph (e) also includes any other activities of a preparatory or auxiliary nature while paragraph (f) includes a combination of activities provided that the overall activity is of a preparatory or auxiliary character (Baker, 2010:5-2/10). Advertising activities are also no longer included from in exclusionary list provided in Article 5(4), in contrast to the 1963 draft. However, the OECD MTC Commentary (2008:102) at paragraph 23<sup>54</sup> seems to recognise that fixed places of business used for the purpose of advertising, for example, will not constitute a PE if they are preparatory or auxiliary in nature.

The UN MTC again differs from the OECD MTC in the following aspects in Article 5(4):

- The “delivery of goods” is omitted from Article 5(4)(a); and
- The “delivery of goods” is omitted from Article 5(4)(b).

The UN MTC Commentary at paragraph 16 (2001:80) of the Article 5 commentary makes this clear:

*“This paragraph reproduces article 5, paragraph 4 of the OECD Model Convention with two substantive amendments: the deletion of ‘delivery’ in subparagraphs (a) and (b). The deletion of the word ‘delivery’ means that a ‘warehouse’ used for that purpose is a permanent establishment. A ‘commercial warehouse’, where space is rented to other concerns, is also a permanent establishment under paragraph 2”.*

The UN MTC Commentary (2001:80) further explains the rationale behind these variations as follows:

*“The word ‘delivery’ is deleted because the presence of a stock of goods for prompt delivery facilitates sales of the product and thereby the earning of profit in the host country by the enterprise having the facility. A continuous connection and hence the existence of such a supply of goods should be a permanent establishment, leaving as a separate matter the determination of the amount of income properly attributable to the permanent establishment. [...]”.*

It is submitted that the use of the UN MTC’s exclusionary list is preferable for developing countries. Not only would the delivery of goods from a fixed place of business involve the use of the host country’s land

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*or auxiliary character. Thus the provisions of paragraph 4 are designed to prevent an enterprise of one State from being taxed in the other State, if it carries on in that other State, activities of a purely preparatory or auxiliary character.”*

<sup>54</sup> Paragraph 23 reads as follows “... Examples are fixed places of business solely for the purpose of advertising or for the supply of information or for scientific research or for the servicing of a patent or a know-how contract, if such activities have a preparatory or auxiliary character.”

and transport facilities, such as train lines or shipping ports, but the goods being delivered might also have been sourced in the host country as a product of the use of its natural resources, such as jewellery made from gold and diamonds for example.

The UN MTC Commentary (2001:80-81) also observes the following, however, in relation to these variations in paragraphs 17 and 18 of the commentary on Article 5:

- “
17. *... Some members from developed countries disagree with this conclusion, believing that since only a small amount of income would normally be allocated to a permanent establishment whose only activity is delivery, this variance from the OECD Model Convention serves no purpose.”*
  18. *The question whether the use of facilities for the “delivery of goods” could be incorporated in subparagraphs 4(a) and (b) as an activity that would not give rise to a permanent establishment has engaged the attention of the Group of Experts for a long time, primarily because the phrase “delivery of goods” is included in subparagraphs 4(a) and (b) of Article 5 of the OECD Model Convention. It has been observed that many developing countries had agreed to raise the threshold of permanent establishment and that almost 75 per cent of the bilateral tax treaties entered into by developing countries have included the “delivery of goods” in subparagraphs 4(a) and (b) in their treaties as revealed in a study in 1997. It cannot be ignored that the omission of “delivery of goods” in subparagraphs 4(a) and (b) of article 5 in the United Nations Model Convention is one of the important features which distinguish it from the OECD Model Convention. On the other hand, it is contended that even if the delivery of goods is treated as an activity which gives rise to a permanent establishment, very little income per se could be attributed to this activity. On the other hand, if such activity of “delivery of goods” is considered as giving rise to a permanent establishment, there would be a tendency on the part of tax authorities to try to attribute income to this activity, whether in reality income actually arose or not. This may lead to fruitless and prolonged litigation. The Group of Experts did not reach a consensus to amend the provisions of subparagraphs 4(a) and (b) of article 5 to include “delivery of goods” as an activity which may not constitute a permanent establishment. Hence, the Contracting States may consider both these divergent points of view while entering into bilateral tax treaties”.*

In light of these comments, it is arguable whether the host country receives any meaningful benefit from this variation in the UN MTC. What is decisive though is that an omission of “delivery of goods” from the exclusionary list in a DTA, in accordance with the UN MTC, at least provides the host country with the opportunity to tax profits attributable to PEs established as a consequence thereof.

### 4.3 Agency PEs

Article 5(5) and (6) of the OECD MTC and Article 5(5) – (7) of the UN MTC respectively deal with situations where an agent may constitute a PE of a foreign enterprise. Article 5(5) states that a “dependent agent” will constitute a PE even if the general definition outlined in Article 5(1) is not met. The OECD and UN MTCs also make it clear, however, that an “independent agent”, including a broker, general commission agent, or any other agent of an independent nature, will not give rise to a deemed PE for the foreign enterprise (Baker, 2010:5-2/12). As noted at the beginning of this chapter, agency PEs are reliant on a host country’s natural resources and infrastructure to a lesser extent than general rule PEs. As such, a discussion thereof is warranted, but not as in depth as that given above for general rule PEs. An example of how an agency PE could use a country’s natural resources could be where a local subsidiary of a foreign company sources agricultural commodities, such as grains for example, within the host country and exclusively negotiates the sale thereof as agent, with its foreign parent as the principal, to foreign customers. In such a scenario, the host country should receive its adequate right to tax those profits earned by the foreign parent which are attributable to the activities of its agent in the host country.

A dependent agent is legally separate from the enterprise on whose behalf it acts. Therefore, the agent may be another enterprise, or an employee or director of the enterprise who is legally empowered to bind the enterprise, or it may be a partner of the enterprise. The agency PE is a deemed PE and the wording of Article 5(5) gives effect to this as follows:

*“... 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...”*<sup>55</sup>

This is distinctly different to the general rule PE given in Article 5(1) which requires an element of physical location prior to the establishment of a PE. As per the example above, it should be noted that the use of resources or infrastructure does not necessarily only arise from having a physical location in the host country. The agency PE concept is therefore important in allocating taxing rights to the host country where the use of the resources and infrastructure is not directly evident.

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<sup>55</sup> OECD MTC Article 5(5)

It is important to note that there is a difference between the civil law concept of “agent” as opposed to its common law concept. This difference is explained as follows by Baker (2010:5-2/12):<sup>56</sup> “*put briefly, under the civil law concept of indirect representation, brokers and general commission agents do not bind their principals, and so they never need to be excluded from Article 5(5); at common law, an agent for an undisclosed principal might bind his principal even if he does not ‘conclude contracts in the name of [his principal]’*”.

Paragraph 37 of the OECD MTC Commentary (2010:107) notes the following regarding independent agents:

*“A person will come within the scope of paragraph 6, i.e. he will not constitute a permanent establishment of the enterprise on whose behalf he acts only if:*

- (a) he is independent of the enterprise both legally and economically, and*
- (b) he acts in the ordinary course of his business when acting on behalf of the enterprise”.*

The UN MTC again diverges from the OECD MTC in the following aspects as far as the provisions regarding agency PEs are concerned:

- A further provision in Article 5(5) which states that a PE will be deemed to exist even in circumstances where the agent “*might not have the necessary authority to conclude contracts but instead ‘maintains a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of that enterprise’*”.<sup>57</sup> This paragraph deviates substantially from the OECD MTC and results in a broader application to dependent agents (UN Commentary, 2001:88) which is more beneficial to developing countries;
- An additional paragraph, Article 5(6), which states that “*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*

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<sup>56</sup> The OECD MTC Commentary at paragraph 32 (2010:105) also states as follows:

*“Also, the phrase “authority to conclude contracts in the name of the enterprise” does not confine the application of the paragraph to an agent who enters into contracts literally in the name of the enterprise; the paragraph applies equally to an agent who concludes contracts which are binding on the enterprise even if those contracts are not actually in the name of the enterprise. Lack of active involvement by an enterprise in transactions may be indicative of a grant of authority to an agent”* This is a clear indication that the commentary favours the common law agent interpretation.

<sup>57</sup> UN MTC Article 5(5)(b)

*applies*".<sup>58</sup> It is submitted that the collection of insurance premiums does not arise through a significant use of natural resources or infrastructure of the host country and that no further discussion on this exception is therefore warranted; and

- An additional sentence in the paragraph dealing with “independent agents”, Article 5(7) of the UN MTC, which says that “*when the activities of such an [independent] agent are devoted wholly or almost wholly on behalf of that enterprise, and conditions are made or imposed between that enterprise and the [independent] agent in their commercial and financial relations which differ from those which would have been made between independent enterprises, he will not be considered an agent of an independent status within the meaning of this paragraph*”<sup>59</sup> [emphasis added].

The UN MTCs rationale for including this additional sentence is also alluded to in paragraph 37 of the OECD MTC Commentary and as such, despite the lengthier wording of the UN MTC in this regard, it is submitted that the overall interpretation of this paragraph seems to be the same for both the UN and OECD MTCs.

#### 4.4 Subsidiaries

The last paragraph of both the OECD and UN MTCs recognises the separate legal persona of companies in providing that a controlled subsidiary will not necessarily constitute a PE by virtue of that fact alone, i.e. in the absence of the other provisions outlined in Article 5 not being met. This is summarised in the OECD MTC Commentary (2010:109) at paragraph 40<sup>60</sup> and is recognition of the separate legal persona of subsidiary companies.

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<sup>58</sup> UN MTC Article 5(6)

<sup>59</sup> UN MTC Article 5(7)

<sup>60</sup> Paragraph 40 of the OECD MTC Commentary states that: “*It is generally accepted that the existence of a subsidiary company does not, of itself, constitute that subsidiary company a permanent establishment of its parent company. This follows from the principle that, for the purpose of taxation, such a subsidiary company constitutes an independent legal entity. Even the fact that the trade or business carried on by the subsidiary company is managed by the parent company does not constitute the subsidiary company a permanent establishment of the parent company.*”

## CHAPTER 5: COMPARISON OF ALL SELECTED COUNTRIES' DTAs DEFINITIONS OF A PE TO THE OECD AND UN MTC

### 5.1 Angola

No DTAs were analysed for Angola due to the fact that it did not have any DTAs currently in force or pending. The lack of analysis is therefore not indicative of a limitation in this dissertation.

### 5.2 Botswana

A total of eleven DTAs were examined, eight of which are in-force and three of which are still pending. The DTA with Russia was not analysed as no official English version, nor an unofficial translation, was found to exist. The comparative analysis of the PE Article in the eleven DTAs for Botswana's to the same Article in the OECD and UN MTCs can be found in Appendix D. From this analysis, Botswana appears to have largely followed the UN MTC in its DTAs. The exceptions noted from the comparison are discussed in further detail below.

#### 5.2.1 *The general rule PE*

##### Article 5(1)

Botswana followed Article 5(1) of the OECD and UN<sup>61</sup> MTCs PE article in all eleven of the DTAs examined.

##### Article 5(2)

All eleven DTAs also followed the illustrative list of the OECD and UN MTCs in paragraphs 2(a) – (f)<sup>62</sup>. Furthermore, in all but one of the DTAs which were examined, the following clause was inserted into paragraph 2 of the PE article (the exception being the DTA with Barbados, which includes this clause as part of paragraph 3 of the PE article instead):

*“an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of [...]”.*

The timeframe specified in all cases is six months, with one DTA applying the six month limit within a rolling twelve month period (which it is submitted is an undesirable variation open to abuse when compared to the other DTAs as it could allow enterprises to conduct exploration activities over a number of years without forming a PE provided they do not exceed the 6 months within any 12 months

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<sup>61</sup> These two models do not differ in paragraph 1

<sup>62</sup> These two models do not differ in paragraph 2

threshold).<sup>63</sup> This inclusion in the illustrative list in Botswana's treaties would, *prima facie*, result in it being of much wider application than the OECD and UN MTCs, in that not only would "extraction" activities qualify for determination as a PE in terms of article 5(1), but any activities pertaining to the exploration of such natural resources would also qualify, provided the time limitation set out in the various DTAs is met.

As is evident from the section on Botswana's natural resources outlined in Chapter 2 above, the country's economy is largely reliant on income derived from mining activities. It seems logical to infer that where substantial mining activities occur, and mineral resources are still considered to be in abundance, not only would extraction of such mineral resources constitute a major activity but the continuous exploration of and for such mineral resources would also constitute a major activity from which a substantial amount of income would be derived. This inclusion is therefore a suitable variation as the Botswana fiscus would essentially earn more revenue from taxes on profits derived not only from the extraction of natural resources but also from the exploration of and for such natural resources. It is to Botswana's detriment that the DTAs each specify a time period potentially limiting the application of the general PE rule contained in Article 5(1). Absent this time period limitation, an installation or structure used for the exploration of natural resources would constitute a PE the moment that the general rule is met. It could be that Botswana's treaty negotiators, in attempting to conclude DTAs, which included exploration as an illustrative example, agreed to insert a time limitation in exchange for concession by the other negotiating parties to the DTAs. As noted in Chapter 4.2.4, it is questionable whether Article 5(2) serves much purpose in light of the respective MTC Commentaries' specification that the requirements of Article 5(1) be met in any event. Botswana's treaty negotiators may, inadvertently, have worsened their right to tax by inserting an arguably worthless paragraph at the expense of an undesirable time limitation.

The DTAs negotiated with India, Mauritius, and the United Kingdom also included "*a warehouse in relation to a person providing storage facilities for others*" and the DTAs with India and the United Kingdom included "*a farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on*" in the illustrative list encapsulated by Article 5(2). These may very well be more adapted to Botswana's particular natural resources<sup>64</sup> but, once again, their overall impact on Botswana's position to tax is arguably not strengthened by these inclusions in Article 5(2) as the provisions of Article 5(1) are still required to be met in any event.

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<sup>63</sup> Refer Botswana-Mauritius DTA findings in Appendix D

<sup>64</sup> Which as noted in chapter 2 comprises numerous farming and mining activities which, it is submitted, would both require land to produce output and for storage thereof

### Article 5(3)

In all of the DTAs examined, the provisions of Article 5(3) of the UN MTC were followed without exception. As noted in Chapter 4.2.5, Article 5(3) of the UN MTC varies from the OECD MTC. This variation is considered to be important due to the shorter time limitation specified as well as the fact that any supervisory activities performed in connection therewith will also qualify for PE status under Article 5(3) of the UN MTC. This prevents the scenario of having persons from developed countries earning income from the supervision of construction, assembly, or installation projects in Botswana which are not subject to in Botswana if the requirements of Article 5(1) are not otherwise met, assuming that Article 7 read in conjunction with Botswana's domestic legislation would actually levy tax in such circumstances.<sup>65</sup> This also creates less scope for any abuse which could otherwise occur by soliciting domestic companies to perform the construction, assembly, or installation projects while leaving the supervisory activities to be performed by a foreign person which, assuming the general rule was not met, could then not be subject to tax in Botswana. It is submitted that a building site, construction, assembly, or installation project could result in extensive use of natural resources in the host country and that, therefore, the right to tax profits, as afforded by the UN MTC, earned from supervisory activities performed in relation thereto is correctly allocated to Botswana in these instances, especially since it is a developing country and the supervisory activities might typically be performed by a non-resident from a developed country. The decrease in time limitation to 6 months also decreases the scope for abuse as completing a project within a 6 month period is much less practical than having to complete it within a 12 month period, an approach which could otherwise be followed by foreign enterprises so as to avoid the burden of having to pay taxes, and attend to any requisite administrative compliance in relation to such taxes, in Botswana.

As noted above, the DTA with Barbados adopted the approach of including "*an installation, structure or ship used for the exploration of natural resources, only if it lasts for a period of more than six months*" as a separate paragraph under Article 5(3) instead of under Article 5(2). In Chapter 4.2.5 above, based on the wording of paragraph 20 of the OECD MTC Commentary, it was submitted that the provisions of Article 5(3) are in fact words of limitation, but that the construction or installation site need not remain at the same place throughout the 12 month period. The inclusion under Article 5(3) is therefore more desirable as, although a time limitation is stipulated, it is done for the benefit of not having to satisfy the fixed place of business requirement laid down Article 5(1). It is submitted that Botswana's right to tax would have been greatly enhanced had this exception occurred in more instances.

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<sup>65</sup> Article 7 as well as the domestic legislation of the selected countries are not within the scope of this research paper and have therefore not been considered further.

With regard to the furnishing of services provision included in the UN MTC, but not in the OECD MTC, Botswana has adopted this clause in all but one of the DTAs examined, the exception being the DTA with Sweden. Furthermore, in all but one of the DTAs which included this clause, the time period limitation is specified as an aggregate of 6 months within any 12 month period in accordance with the provisions of the UN MTC. The exception here was in the DTA with Swaziland, which instead adopted an aggregate 3 month within any 12 month period time limitation. The use of this paragraph, i.e. Article 5(3)(b), is in keeping with the spirit of the UN MTC for providing developing countries greater rights to tax income derived from a source therein. It would have been of greater benefit had the DTAs with developed countries in particular, where an asymmetric relationship would assumedly exist, specified a shorter time period than the prevailing 6 months, as was the case in the DTA with Swaziland for example. For a country which relies to a large extent on mining activities, it is submitted that the furnishing of professional related activities would occur with sufficient regularity and that this type of expertise could frequently be provided by persons from developed countries. It is in fact noted in the UN MTC Commentary, and discussed in Chapter 4.2.5, that such services are usually of short duration with the implication that the fees earned in respect thereof would usually not therefore be earned by a PE of the foreign person or enterprise rendering the service as the 6 month limitation is a relatively generous concession by the host country.

#### Article 5(4)

Three of the DTAs examined did not follow Article 5(4) of the UN MTC, these being the DTAs with France, Mauritius, and Sweden respectively. For the latter two exceptions, the only variation found was the omission of Article 5(4)(f) from the treaties. Article 5(4)(f) excludes “*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*”. There is judicial support from a Hoge Raad court case indicating that a combination of preparatory or auxiliary activities can in fact lead to a PE being formed despite the fact that each activity, if carried out in isolation, would have constituted a preparatory or auxiliary activity.<sup>66</sup> This infers that the DTAs with Mauritius and Sweden are more advantageous to the source country where more than one preparatory or auxiliary activity is being carried out, providing a greater right to tax income derived as a result of such activities. Despite this, Article 5(4)(f) of the OECD and UN MTCs both state that the “*overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character*”, which implies that even for those DTAs which do contain the

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<sup>66</sup> Decision of 24 March 1976, BNB 1976/121 discussed in (1976) E.T. 240.

provisions of Article 5(4)(f) a PE can still be found to exist where a combination of preparatory or auxiliary activities are carried on. This is also in line with the afore-mentioned Hoge Raad decision, where it was found that the activities taken together were more than preparatory and auxiliary and in fact amounted to the establishment of a PE. The OECD MTC Commentary (2010:104) also makes it clear that where a multitude of activities occurs by the same enterprise, be they at one or separate locations, then it would be incorrect to view each activity in isolation without giving effect to the overall commercial purpose for which they are so carried out. It can therefore be concluded that the use of Article 5(4)(f) does not impact significantly on the question of whether or not a PE will be found to exist as, if a *bona fide* set of unrelated preparatory or auxiliary activities are carried on at a particular location with no real commercial or business significance then, even in the absence of Article 5(4)(f), a PE would still not be formed.

The other exception noted above is the DTA with France which follows the OECD MTC in Articles 5(4)(a) and (b). As discussed in Chapter 4.2.6, the two MTCs vary here due to the UN MTCs omission of “*delivery of goods*” as an exclusion from the general rule PE. Having seemingly followed the OECD MTC however, the DTA<sup>67</sup> then includes the following paragraph as part of its definition of a PE contained in Article 5:

*“In respect of paragraphs 4(a) and (b) ‘delivery’ made out of the stock of goods or merchandises situated in a Contracting State will constitute a permanent establishment therein if operations other than storage, display, transport or other preparatory or auxiliary operations are carried on in that State out of this stock or facilities”.*

The inclusion of this additional paragraph seemingly re-aligns the use of the OECD version with the UN MTC for the particular DTA. As noted in Chapter 4.2.6, however, it is questionable whether the removal of delivery by the UN MTC results in any significant impact on tax revenues for the developing countries.

### **5.2.2 Agency PEs**

The majority of DTAs substantially followed the UN MTC construct for agency PEs with the only exception being the DTA with France, which was found to follow the OECD MTC wording instead.

In the DTA with Namibia, the dependent agent paragraph, encapsulated in Article 5(5), states that it applies notwithstanding the provisions of article 5(1), (2), and (3) whereas the UN MTC only applies notwithstanding article 5(1) and (2). In Chapter 4.2.5 above it was concluded that the provisions of article

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<sup>67</sup> Botswana – France DTA

5(3) are to be interpreted as words of limitation but that the fixed place requirement does not need to be met. In light of this interpretation, it is submitted that having the dependent agent paragraph override article 5(3) as well is of no substantial consequence given that if the provisions of article 5(5) were met then it would override article 5(3) in any event as the latter does not formulate a general requirement but rather limits the application of article 5(1) in certain circumstances. Whatever the reason for this variance by Botswana's treaty negotiators therefore, it is submitted that the impact on the country's overall position in this DTA has not really been enhanced and that the variation has no meaningful impact and its insertion in the DTA may simply be for the sake of clarity.

In the DTA with Mauritius, it was found that the provisions of Article 5(5)(a) of the UN MTC which limits the application of the paragraph to activities other than those contemplated in the exclusionary list has not been included. It is submitted that this is an important variation and would essentially render any dependent agent who regularly exercises an authority to conclude contracts to be a PE of the enterprise on whose behalf such authority is being exercised, even if his activities are only of a preparatory or auxiliary nature. Despite this however it should also be noted that the business profits attributable to such PEs would in all likelihood not be significant given that the nature of the activity would be of an auxiliary or preparatory nature. The impact of this variation leads to a greater burden of compliance by enterprises who establish PEs by virtue of the foregoing. It is not clear therefore whether the treaty negotiators omitted this limitation of article 5(5) for any specific reason.

Another variation noted was the inclusion in the dependent agency provisions of "*filling orders*" (found in the DTAs with Seychelles and Zimbabwe) or "*habitually secures orders [...] wholly or almost wholly for the enterprise*" (found in the DTAs with India and the United Kingdom) in addition to the delivery of goods. These inclusions could simply be re-affirming the UN MTC Commentary's interpretation of the dependent agency provisions. According to the Commentary, if only delivery takes place within the country, and all other sales related activities occur outside the country, then a PE will not be deemed to exist (UN Commentary, 2001:88). On the other hand, the specific inclusion of these activities could also imply that the interpretation should be that a PE will exist whenever delivery of goods occurs as contemplated in the DTA, notwithstanding the fact that "*the filling of orders*" may take place outside the country. It is submitted that if only delivery of goods occurs in the host country, and not the filling or securing of orders, then, even though a PE may be deemed to exist, it is arguable whether a significant amount of profits could be attributable to such a PE. Finally, it is submitted that the filling of orders would in any event constitute a PE in terms of article 5(5)(b) of the UN MTC as this would entail an activity which is a sales-related activity as contemplated by the UN Commentary.

Exceptions were also noted in relation to the collection of insurance premiums and independent agent provisions in the DTAs. It is submitted that the applicability of these provisions do not arise from a significant use of the host country's infrastructure and natural resources by foreign entities and that no further discussion thereon is warranted.

### **5.2.3 Subsidiaries**

All the DTAs examined followed the wording of article 5(7) of the OECD MTC, and article 5(8) of the UN MTC, in recognising the separate legal persona of subsidiaries residing therein.

## **5.3 DRC**

As will be evident in the analysis of the countries DTAs to be found later on in this dissertation, no DTAs were analysed for the DRC. This is however due to the fact that the DRC was found not to have any DTAs currently in force or pending and, as such, the lack of analysis is not indicative of a limitation in this dissertation.

## **5.4 Namibia**

A total of twelve DTAs were examined for Namibia, ten of which are in-force and two of which are still pending. The comparative analysis of the PE Article in Namibia's DTAs against the same Article in the OECD and UN MTCs can be found in Appendix E. From this analysis, the PE Articles in Namibia's DTAs largely follow that of the UN MTC, but certain DTAs do contain exceptions where the OECD MTC has been used as the basis for negotiation.

### **5.4.1 The general rule PE**

#### Article 5(1)

All but one of the DTAs examined followed the provisions of article 5(1) of the OECD and UN MTCs, the exception being the DTA with the United Kingdom ("UK"). The Namibia/UK DTA instead defines a PE generally in article 5(1) as "*the term 'permanent establishment' means a fixed place of business in which the business of the enterprise is wholly or partly carried on*" whereas the current versions of the OECD and UN MTCs both define a PE as a fixed place of business "*through which*" the business of an enterprise is wholly or partly carried on. The DTA with the UK is old, having being entered into force on 19 December 1962, and, seeing as the ambulatory approach to interpretation is adopted for the purpose of this dissertation, it is submitted that the current interpretation to article 5(1) of both the OECD and UN

MTCs would render this exception meaningless and that the interpretation thereof would be no different to the general rule as formulated in the other DTAs.

#### Article 5(2)

The DTAs examined contained a multitude of exceptions in their illustrative lists, as can be noted in Appendix E. These exceptions are essentially additions to the illustrative list which can be summarised as:

- timber or forest produce;<sup>68</sup>
- a warehouse, where storage facilities are provided to parties other than the enterprise;<sup>69</sup>
- a farm, a plantation;<sup>70</sup>
- an orchard or vineyard;<sup>71</sup>
- a hotel;<sup>72</sup>
- a guest farm;<sup>73</sup> and
- a guest farm or other operation of a similar nature.<sup>74</sup>

Despite these many exceptions, however, it has previously been noted in this dissertation that an expansion of the illustrative list does not serve much purpose given that the requirements of Article 5(1) will in any event need to be complied with prior to a PE being found to exist. Therefore, despite the fact that these activities may be particularly relevant to Namibia<sup>75</sup> their inclusion in the DTAs does not result in an enhanced position for the Namibian fiscus to derive a greater right to tax profits from these activities.

In addition to the expansion of the illustrative list as noted above, there were a number of DTAs which contained also the following provisions as part of its illustrative list:

- an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of [...];<sup>76</sup>

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<sup>68</sup> Found in the DTAs with Malaysia and the UK

<sup>69</sup> Found in the DTAs with France, India, Malaysia, Mauritius, Romania, South Africa, and Sweden

<sup>70</sup> Found in the DTAs with Malaysia, Romania, and Sweden

<sup>71</sup> Found in the DTA with Romania

<sup>72</sup> Found in the DTA with Russia

<sup>73</sup> Found in the DTA with France

<sup>74</sup> Found in the DTAs with India, Mauritius, Russia, and South Africa

<sup>75</sup> As noted in Chapter 2, the Namibian economy is largely dependent on mining activities and on agricultural produce.

<sup>76</sup> Found in the DTAs with Malaysia, Russia, Sweden, and Botswana

- a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than [...];<sup>77</sup>
- a building site or construction or assembly project which exists for more than twelve months;<sup>78</sup> and
- the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the Contracting State for a period or periods aggregating more than six months within any twelve- month period.<sup>79</sup>

With regard to the first exception noted above, the timeframes specified were 9 months in the treaty with Malaysia and 6 months in all the others which contained this exception. As is evident from Chapter 2.4, mining activities constitute a significant portion of the economic composition of Namibia, as was the case with Botswana. It was also submitted in the discussion of Botswana's DTAs above that although this inclusion seems logical given the composition of the economy, the inclusion thereof in the illustrative list of the DTAs can be interpreted as having no added impact for the source country while simultaneously introducing an undesirable time limitation. It is not clear why the treaty negotiators (of both Botswana and Namibia) resorted to such wording (i.e. the inclusion of a time limitation) but it is submitted that it is an undesirable variation.

The second, third, and fourth exceptions listed above, effectively replace the provisions of article 5(3) of the UN MTC as all of the DTAs which contained this exception in its illustrative lists were subsequently void of the comparable provisions in Article 5(3). It is again submitted that the inclusion of these provisions in article 5(2) is undesirable as the fixed place of business requirement also needs to be met in light of the interpretation of Article 5(2). As submitted in Chapter 4.2.5, although the interpretation of Article 5(3) is seen as a limitation of the general rule, the application of its provisions does not have to meet the fixed place of business requirement. The Namibian treaty negotiators have therefore compromised Namibia's right to tax income by including these provisions in the illustrative list. This would not have been the case had the DTAs included these provisions in Article 5(3) as per the UN MTC.

### Article 5(3)

It was noted that the DTAs with France, Germany, and Canada all followed the OECD MTC provisions for Article 5(3) with an exception being that the Canadian DTA specifies a 6 month limitation as opposed

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<sup>77</sup> Found in the DTAs with Malaysia and South Africa

<sup>78</sup> Found in the DTA with the UK

<sup>79</sup> Found in the DTA with South Africa

to the OECD MTC's standard 12 month limitation.<sup>80</sup> It must be noted that France, Germany, and Canada are all developed countries and that the use of the OECD MTC as opposed to the UN MTC is undesirable for Namibia, as it can be assumed that an asymmetrical relationship would exist between Namibia and these respective countries. The rationale behind the difference in wording between the OECD and UN MTCs was discussed in Chapter 4.2.5 where it was noted that these differences are all aimed at allocating greater taxing rights to source countries and would therefore be especially beneficial to a developing country which has concluded a bilateral treaty with a developed country, as is the case here.

The remainder of the DTAs,<sup>81</sup> being those DTAs which have not followed the OECD MTC nor those which contained these provisions in Article 5(2) as discussed above, all followed the UN MTC format for Article 5(3). It should be noted however that of all these DTAs which have adopted the provisions of Article 5(3) of the UN MTC, only one is with a developed country (this being the DTA with Sweden). Furthermore, the following exceptions were found:

- Article 5(3)(a) of the DTAs with Romania and Russia specify a 9 month time limitation as opposed to the 6 month limitation laid down by the UN MTC;
- Article 5(3)(b) of the DTA with India does not make reference to consultancy fees, while the UN MTC does, and also excludes fees paid for technical fees;<sup>82</sup>
- Article 5(3)(b) of the DTA with Russia does not make reference to a roving 6 months within any 12 months period, as required by the UN MTC, but merely requires that the activities are performed for a period exceeding 6 months for a PE to be formed.

It is submitted that these exceptions are not of any great significance. The first exception represents a relaxation of the UN MTCs usual 6 month limitation. The second exception is unique to that particular DTA given that it defines the term "technical fees" and that these are then covered by a separate article in the DTA. The third exception provides less scope for abuse by enterprises that might otherwise be able to ensure that the time period during which their activities extend do not fall within the criteria of the paragraph while continuously providing services over a number of years.

The DTA with the UK also contains an additional deeming provision which reads as follows:

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<sup>80</sup> Found in the DTAs with France, Germany, and Canada

<sup>81</sup> These being the DTAs with India, Mauritius, Romania, Russia, Sweden, and Botswana

<sup>82</sup> Technical fees are dealt with separately under article 14 of the DTA.

*“an enterprise of one of the territories shall be deemed to have a permanent establishment in the other territory if it carries on the activity of providing the services of public entertainers or of athletes referred to in Article XV, in that other territory”.*<sup>83</sup>

Article XV of the DTA then reads as follows:

*“Notwithstanding anything contained in the present Convention, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the territory in which these activities are exercised”.*<sup>84</sup>

These types of activities are however not deemed to be within the scope of this dissertation as their use of natural resources is submitted to be minimal.

#### Article 5(4)

Interestingly, a large number of DTAs followed the OECD MTCs wording for Article 5(4)(a) and (b) as opposed to the UN MTC, these being the DTAs with France, Germany, India, Malaysia, Romania, South Africa, and the UK. As was noted in Chapter 4.2.4, the UN MTC does not include *“delivery of goods or merchandise”* as part of its exclusionary list whereas the OECD MTC does. It was also noted in that chapter that the UN MTC Commentary makes it clear that the deletion of the word delivery means that a warehouse used for that purpose, for example, will result in a PE being formed and that the reason for the deletion is due to the fact that it is considered that the presence of a stock of goods for prompt delivery is essential to facilitate sales of the product and thereby a proportion of the profit is earned in the host country in which the enterprise has the facility. Despite this it is also noted at paragraphs 17 and 18 of the UN MTC Commentary that certain developing countries are of the opinion that if this is the only activity being performed at a particular location then, even though a PE can be found to exist in accordance with the provisions of the UN MTC, there would be very little income which could be attributed to this activity. It is also noted there that almost 75% of the bilateral DTAs entered into by developing countries have in fact included *“delivery of goods”* as part of the exclusionary list. On the basis of these comments therefore it is submitted that the DTAs which follow the OECD MTC in including *“delivery of goods or merchandise”* as part of the exclusionary list are not significantly prejudiced as a result thereof.

The DTAs with Mauritius, Romania, South Africa, and the United Kingdom have all adopted the following wording for article 5(4)(e):

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<sup>83</sup> Namibia – UK DTA at Article II(k)

<sup>84</sup> Namibia – UK DTA at Article XV

*“the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise”.*

The OECD Commentary (2010:102) at paragraph 23<sup>85</sup> recognises that a fixed place of business used solely for the purpose of advertising which has a preparatory or auxiliary character will not result in the formation of a PE. The exclusion of advertising was initially included in the 1963 draft OECD MTC but was subsequently removed, and in light of the commentary above therefore, and applying the ambulatory approach to interpretation of DTAs, it is submitted that this wording change does not result in an interpretation which is different to that of the OECD and UN MTCs current version of article 5(4)(e). It is submitted that these activities would not make extensive use of the country’s natural resources in any event.

It was also noted that the DTA with the UK was void of the provisions of article 5(4)(f) of the OECD and UN MTCs, which excludes from the definition of a PE *“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”*. The same exception was also found in two instances for Botswana and its impact discussed in detail under the analysis for Botswana and will not therefore be discussed at length here again. In summary, it is submitted that the absence of this provision in the DTA is of no significant impact for the same reasons as those discussed for Botswana above.

#### **5.4.2 Agency PEs**

The DTAs with France, Germany, and Canada (notably these are all developed countries) have all made use of the OECD MTC wording for the dependent agency paragraph contained in Article 5(5) while those with India, Malaysia, Mauritius, Romania, Russia, South Africa, Sweden, and Botswana have all largely adopted the UN MTC wording (with a few exceptions which are in turn discussed below). It was documented in Chapter 4.3 that the major deviation between the OECD and UN MTCs, as far as the provisions of Article 5(5) are concerned, revolve around the inclusion in the latter MTC of a provision for

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<sup>85</sup> Paragraph 23 states that *“...Subparagraph e) provides that a fixed place of business through which the enterprise exercises solely an activity which has for the enterprise a preparatory or auxiliary character, is deemed not to be a permanent establishment. The wording of this subparagraph makes it unnecessary to produce an exhaustive list of exceptions. ... Examples are fixed places of business solely for the purpose of advertising or for the supply of information or for scientific research or for the servicing of a patent or a know-how contract, if such activities have a preparatory or auxiliary character.”*

*“where such agent has no authority to conclude contracts but instead maintains in the state a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise”*. As is the case with the omission of *“delivery of goods or merchandise”* from the exclusionary list in Article 5(4), the inclusion of the additional paragraph (b) to article 5(5) of the UN MTC was made based on the view that the presence of stock for delivery by an agent is essential to facilitate sale of the product. This would be of particular relevance in the context of this dissertation where such stock is essentially a product of the country’s natural resources in that the country should be afforded an adequate right to tax the profits derived from the sale thereof. However, as noted in the discussion of the exceptions to Namibia’s DTAs in Article 5(4) and in Chapter 4.3 above, it is questionable whether this has any significant impact on tax revenues if the maintenance of a stock of goods for delivery is the only activity which is being performed in the host country. It is therefore submitted that the use of either of the MTCs in this regard has no significant impact either way.

Various other exceptions were also noted in the DTAs which followed the UN MTC wording of article 5(5), only one of which it is submitted is relevant for the purpose of this dissertation. This exception was found in the DTA with Malaysia, which used the following wording in its equivalent of the UN MTC Article 5(5)(b): *“manufactures or processes in the first-mentioned State for the enterprise goods or merchandise belonging to the enterprise”*. This exception seems unique to Malaysia and was possibly only included in the DTA at the request of the Malaysian treaty negotiators. Namibia is any event not a significant manufacturer of goods on a global scale and, as is evident from the discussion in Chapter 2.4, the significant amount of its international trading activity is conducted with South Africa. It could be argued that the manufacture or processing of goods would in any event occur at a fixed place of business that the enterprise has at its disposal, which would then render it a PE in terms of the general rule but it is submitted that further discussion is not warranted. What could be of greater concern in the context of the Namibian economy is that the DTA, by including this specific paragraph, has in the process omitted the standard UN MTC Article 5(5)(b) wording which states that a PE will be deemed to exist where a dependent agent, who does not otherwise have the authority to conclude contacts, maintains a stock of goods or merchandise from which goods are regularly delivered. Despite this, it has been discussed previously that the mere maintenance and delivery of goods by itself will probably not result in a significant amount of income to be attributed to this activity and it is submitted that the impact of this omission is therefore of no significance.

A final exception which was noted in the wording of Article 5(5), or its equivalent thereof in the actual DTAs, was in the DTA with the UK, which as noted previously is somewhat outdated. The equivalent of Article 5(5) of this DTA reads as follows:

*“a person acting in one of the territories on behalf of an enterprise of the other territory -- other than an agent of an independent status to whom sub-paragraph (vi) applies -- shall be deemed to be a permanent establishment in the first-mentioned territory if he has, and habitually exercises in that territory, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise”.*

This provision is in substance the same as that contained in the current version of the OECD MTC, with the exception being that its application does not only apply to activities outside the full spectrum of the exclusionary list but, instead, does not apply only if the activity being performed is the purchase of goods or merchandise. The ambulatory approach to DTA interpretation could however result in this exception being construed in such a manner that its application should be limited to the full exclusionary list, as is the case with the OECD and UN MTCs. It should also be noted, once again, that it has been submitted that PEs which are found to exist by virtue of an activity which is only of a preparatory or auxiliary nature will in any event not give rise to a significant amount of income to be attributed to such PE and, by extension, will therefore not give rise to a significant amount of tax on such income.

Exceptions were also noted in relation to the collection of insurance premiums and independent agent provisions in the DTAs. It is submitted that the applicability of these provisions do not arise from a significant use of the host country's infrastructure and natural resources by foreign entities and that no further discussion thereon is warranted.

#### **5.4.3 Subsidiaries**

All the DTAs examined followed the wording of article 5(7) of the OECD MTC, and article 5(8) of the UN MTC, in recognising the separate legal persona of subsidiaries residing therein.

### **5.5 Zambia**

A total of nineteen DTAs were analysed, eighteen of which are in-force and one of which is still pending. The DTA with Romania was not analysed as no official English version, nor an unofficial translation, was found to exist. As was evident from the dates of entry in force, effective date, or signature / conclusion dates specified in the DTAs, the majority of these DTAs were negotiated quite some time ago and are therefore relatively outdated. Notwithstanding this fact however the ambulatory approach to interpretation which has been adopted for the purpose of this dissertation still allows for meaningful analysis using the

current versions of the OECD and UN MTCs as well as their respective commentaries. The comparative analysis of the PE Article in Zambia's DTAs to the same article in the OECD and UN MTCs can be found in Appendix F. The exceptions noted from the comparison are discussed in further detail below.

### ***5.5.1 The general rule PE***

#### Article 5(1)

The DTAs with Canada, Denmark, Finland, Germany, India, Ireland, Italy, Japan, Kenya, and Poland all follow precisely the wording used in the OECD and UN MTCs. The remainder of the DTAs (being those with France, Netherlands, Norway, South Africa, Sweden, Switzerland, Tanzania, Uganda, and the UK) all have different wording yet all refer to a "*fixed place of business*" in accordance with the general rule laid down in Article 5(1) of the OECD and UN MTCs. Therefore, it is submitted that despite the difference in wording the interpretation of the general rule laid down in these DTAs is no different to that laid down by the OECD and UN MTCs. A subset of these DTAs with different wording in Article 5(1) to that contained in the OECD and UN MTCs also contained a list of places or activities which would otherwise have been classified as part of the illustrative list under the OECD and UN MTCs. This subset (which comprises the DTAs with France, South Africa, and Switzerland) does therefore not have an equivalent of Article 5(2) as found in the OECD and UN MTCs. The impact of the illustrative list was discussed in Chapter 4.2.4 where it was noted that the provisions of Article 5(1) are at all times required to be met for a PE to exist. As the ambulatory approach is adopted in this dissertation, these DTAs are interpreted as being no different to that of the OECD and UN MTCs and that for the general rule PE to exist there must always be a fixed place of business through which the business of the enterprise is wholly or partly carried on (the interpretation of Article 5(1) of the OECD and UN MTCs was discussed in Chapter 4.2.1 – 4.2.3 above).

#### Article 5(2)

It was noted above that some of the DTAs included as part of Article 5(1) a list of illustrative examples of places or activities as opposed to their inclusion as a separate paragraph within the DTA, in contrast to the OECD and MTCs which include places or activities separately in Article 5(2).

Of those DTAs which included the illustrative list as a separate paragraph, those with Canada and India also included "*a farm, plantation or other place where agricultural, forestry, or related activities are carried on*" while the DTAs with Kenya, Tanzania, and Uganda also included "*a farm or plantation*" as part of their respective illustrative lists. The DTA with India also specified that "*a warehouse or other facilities for the maintenance of a stock of goods or merchandise belonging to the enterprise from which*

*orders are filled*". While these inclusions may be particularly relevant to Zambia's economy,<sup>86</sup> it has been submitted previously that it is questionable whether an expansion to the illustrative list serves much purpose, if any, given that the requirements of the general rule are at all times also required to be met.

From the analysis shown in Appendix F, it is concerning that a number of the DTAs include, as part of their respective illustrative lists, a "*building site or construction or assembly project*",<sup>87</sup> "*supervisory activities in connection therewith*",<sup>88</sup> and, in one instance, "*the furnishing of services, including consultancy services*".<sup>89</sup> These DTAs then subsequently also introduce a time limit in the illustrative list for these activities which is required to be met prior to a PE being formed. These provisions would of course usually be found in Article 5(3) had these DTAs adopted the approach of the OECD and UN MTCs. The implication of not following the OECD and UN MTCs is that these activities must then also meet the fixed place of business requirement laid down by Article 5(1). It should be noted that this exception was found to occur in the analyses of both Botswana and Namibia above, where its impact was discussed, and, in summary, it is submitted that this places the Zambian fiscus at a disadvantage as the fixed place of business requirement has to be complied with, which would not have been the case had the format of the OECD and UN MTCs been followed, while simultaneously introducing an undesirable time limit.

### Article 5(3)

As was noted under the discussion of Article 5(2) above, the majority of Zambia's DTAs incorporated the provisions of Article 5(3)(a) of the UN MTC, which deals with building sites, construction, assembly, or installation projects, as part of their illustrative lists. Notably, only the DTA with Poland has adopted the OECD MTC version of article 5(3). Despite the fact that many DTAs placed the provisions of Article 5(3)(a) as part of their illustrative lists, a handful of these DTAs have included the carrying on of any "*supervisory activities in connection with a construction, installation, or assembly project*" as constituting a PE in a separate deeming provision in accordance with Article 5(3)(b) of the UN MTC.<sup>90</sup> It is not evidently clear what the reasons behind this difference in approach are but it is submitted that the

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<sup>86</sup> As noted in Chapter 2, the Zambian economy is largely reliant on agricultural produce and copper and cobalt mining.

<sup>87</sup> Found in the DTAs with Canada, Denmark, Germany, India, Ireland, Italy, Japan, Kenya, Netherlands, Norway, Sweden, Tanzania, Uganda, and the United Kingdom

<sup>88</sup> Found in the DTAs with Canada and India

<sup>89</sup> Found in the DTA with Canada

<sup>90</sup> This was evident in the DTAs with Denmark, Ireland, Kenya, Netherlands, Norway, Sweden, Tanzania, Uganda, and the United Kingdom.

treaty negotiators considered that a building site, construction, assembly, or installation project would ordinarily constitute a PE under the general rule in any event while any supervisory activities in connection therewith would not. Furthermore, three DTAs<sup>91</sup> make no reference whatsoever to building sites, construction, assembly, or installation projects. In addition, only the DTA with Finland included a paragraph in Article 5(3) which results in the furnishing of services, including consultancy services, resulting in a PE being formed after a certain time period. This is of concern for a country which has much potential for the development of infrastructure projects, as noted in Chapter 2.5 and which is also reliant to large extent on mining activities.

Four DTAs<sup>92</sup> also stipulate that a PE will be deemed to exist where an enterprise which consists of “*providing the services of public entertainers*” is carried on and the DTA with the United Kingdom also included the provision of “*the services of an athlete*” as part of this deeming provision. These activities, when performed by an individual, are then also covered by a separate article in the respective DTAs which allocates the taxing rights to the source country. These types of activities are however not deemed to be within the scope of this dissertation as the use of natural resources would be expected to be minimal.

#### Article 5(4)

The majority of DTAs<sup>93</sup> adopted the standard OECD MTC provisions of article 5(4)(a) and (b), which includes “*delivery of goods or merchandise*” as an excluded activity, as opposed to the UN MTC, which does not. Despite this it was discussed in Chapter 4.2.6 that PEs which are found to exist as a result of delivery only will probably not result in a significant amount of income to be attributed to such PE. It is submitted that the impact of following the OECD approach here is not significant to the Zambian fiscus.

Numerous other DTAs<sup>94</sup> used the following wording in drafting the equivalent of Article 5(4)(e):

*“the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise”.*

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<sup>91</sup> Found in the DTAs with France, South Africa, and Switzerland

<sup>92</sup> Found in the DTAs with Kenya, Tanzania, Uganda, and the United Kingdom

<sup>93</sup> Found in the DTAs the DTAs with Canada, Denmark, Finland, Germany, Ireland, Italy, Japan, Kenya, Netherlands, Norway, Sweden, Tanzania, Uganda, the United Kingdom, and Poland

<sup>94</sup> Found in the DTAs with Canada, Denmark, Germany, India, Ireland, Italy, Japan, Kenya, Netherland, Norway, Sweden, Tanzania, Uganda, and the United Kingdom

As was submitted as part of the analysis for Namibia above, this wording change does not result in an interpretation which is different to that of the OECD and UN MTCs' current version of Article 5(4)(e). It is submitted that these activities would not make extensive use of the country's natural resources in any event.

A number of DTAs<sup>95</sup> also contained no provision similar to that of Article 5(4)(f) of the OECD and UN MTCs. This type of exception has also been discussed under both the analyses for Botswana and Namibia above and, in summary, it is submitted that it has no impact on the overall position on Zambia's right to tax.

Furthermore, three DTAs<sup>96</sup> contain the following provision only as its equivalent of article 5(4):

*“the fact that an enterprise of one of the territories maintains in the other territory a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute that fixed place of business a permanent establishment of the enterprise”.*

All three of the DTAs which contained this provision were entered into before the first OECD MTC became effective and, in the absence of any wording to the contrary, cannot therefore be said to provide for a comprehensive list of excluded activities from the definition of a PE, in contrast to the OECD and UN MTCs. The impact of this is that any activity which may constitute an activity of a preparatory or auxiliary nature could result in a PE being formed if the activity is not exclusively used for the purchase of goods or merchandise. This could therefore result in many more PEs being formed. It has however previously been submitted that if PEs are formed where the activity or activities being conducted are solely of a preparatory or auxiliary nature, it is questionable whether the amount of income which could be attributed to such PEs will be significant, and by extension therefore whether the tax revenues derived from the taxation of such PEs would be significant. It is therefore submitted that the absence of a comprehensive list of excluded activities does not necessarily, and will probably not, result in any significant increase in tax revenues for the Zambian fiscus.

### **5.5.2 Agency PEs**

The DTAs with Denmark and Poland provide as follows with regard to dependent agents:

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<sup>95</sup> Found in the DTAs with Canada, Denmark, Germany, India, Ireland, Italy, Japan, Kenya, Netherlands, Norway, Sweden, Tanzania, Uganda, and the United Kingdom.

<sup>96</sup> Found in the DTAs with France, South Africa, and Switzerland

*“A person acting in a Contracting State on behalf of an enterprise of the other Contracting State – other than an agent of independent status to whom paragraph 6 applies – shall be deemed to be a permanent establishment in the first-mentioned Contracting State, if he has and habitually exercises in that Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise”.*

This is an approach which is based on the OECD MTC wording but without excluding the entire spectrum of activities outlined in Article 5(4) of the OECD MTC. This exception is again submitted to be of no significance for reasons as outlined previously regarding the insignificant amount of income which might be attributed to PEs formed as a result of this exception.

The remainder of the DTAs all followed the UN MTC approach for their equivalent of Article 5(5), with the following notable exceptions:

- Numerous DTAs<sup>97</sup> only excluded *“activities limited to the purchase of goods or merchandise”* from the application of article 5(5)(a) as opposed to the full spectrum of activities outlined Article 5(4) of the UN MTC. The remainder of the DTAs<sup>98</sup> (with an exception being the DTA with Canada) did not limit the application of its equivalent of Article 5(5)(a). This exception is again submitted to be of no significance for reasons as outlined previously regarding the insignificant amount of income which might be attributed to PEs formed as a result of this exception;
- The DTAs with Denmark, Germany, Ireland, Italy, Japan, Netherlands, Norway, Sweden, the United Kingdom, and Switzerland did not contain any provisions regarding an agency PE being formed where an agent regularly deliver goods or merchandise on behalf of the enterprise. This variation is undesirable and could result in a dependent agent who performs sales related activities not establishing a PE in Zambia to the detriment of the Zambian fiscus;

Exceptions were also noted in relation to the collection of insurance premiums and independent agent provisions in the DTAs. It is submitted that the applicability of these provisions do not arise from a significant use of the host country’s infrastructure and natural resources by foreign entities and that no further discussion thereon is warranted.

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<sup>97</sup> Found in the DTAs with Finland, Germany, India, Ireland, Italy, Japan, Kenya, Netherlands, Norway, Sweden, Tanzania, Uganda, and the United Kingdom

<sup>98</sup> Found in the DTAs with France, South Africa, and Switzerland

### **5.5.3 Subsidiaries**

All the DTAs examined followed the wording of article 5(7) of the OECD MTC, and article 5(8) of the UN MTC, in recognising the separate legal persona of subsidiaries residing therein.

## **CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS**

### **6.1 Summary of countries' analysis**

#### **6.1.1 Botswana**

Of the eight 'in-force' and three 'pending' DTAs which were examined for Botswana, the UN MTCs PE definition was largely adopted. All of the DTAs established the two common types of PEs, being the general rule PE and the agency PE. This is desirable and allows the country to establish rights to tax over a wide range of activities which make use of their natural resources. The notable exceptions found in the analysis are discussed further in Chapter 6.2 below.

#### **6.1.2 Namibia**

A total of twelve DTAs were examined for Namibia, ten of which were "in-force" and two of which were still pending. All of the DTAs established the two common types of PEs, being the general rule PE and the agency PE. This is desirable and allows the country to establish rights to tax over a wide range of activities which make use of their natural resources. The notable exceptions found in the analysis are discussed further in Chapter 6.2 below.

#### **6.1.3 Zambia**

A total of nineteen DTAs were examined for Zambia, eighteen of which were in-force and one of which was still pending. As is evident from the dates of entry in force, effective date, or signature / conclusion dates of the DTAs, the majority of the DTAs which formed part of the analysis are relatively outdated. All of the DTAs established the general rule PE as found in both the OECD and UN MTC definitions of a PE. With regard to the agency PE however, a number of DTAs did not establish such a PE where an agent regularly deliver goods or merchandise on behalf of the enterprise. The notable exceptions found in the analysis are discussed further in Chapter 6.2 below.

### **6.2 Common exceptions**

#### **6.2.1 Illustrative activities**

In many instances it was found that the PE definition in the DTAs analysed contained specific examples of illustrative activities which aimed to make the DTA more specific to the particular resources of the country concerned. In all cases it was concluded that based on the Commentary and interpretation of Article 5(2), it is questionable whether or not this serves much purpose in allocating a greater right to tax as the provisions of the general rule laid down in Article 5(1) would in any event need to be satisfied.

A common finding was the inclination by the selected countries to include more relevant activities, such as the exploratory activities for example, in the illustrative lists of their DTAs while also introducing a time limitation to be met before a PE would be formed. It is submitted that this places the countries concerned at a disadvantage in so far as the right to tax profits derived from those activities is concerned. These countries would be better off had these activities been omitted from their illustrative lists altogether with the result that a PE would be formed once the general rule has been met as the rule does not contain an absolute time limitation.

### **6.2.2 *Building sites, construction, installation, assembly, and supervisory activities***

Numerous exceptions were found in this regard in the PE definition in the DTAs examined. It is submitted that the most significant of these exceptions were those DTAs which included any portion of the provisions of Article 5(3) of the OECD or UN MTCs as part of their illustrative lists instead. This was particularly prevalent in Zambia's DTAs. It was submitted in all instances where this occurred that the treaty negotiators placed the respective countries at a disadvantage as a simultaneous time limitation was also introduced. It is submitted that if these DTAs are renegotiated, the inclusion of these provisions should be as a separate paragraph within the PE definition in accordance with the provisions of the OECD and UN MTCs.

It must also be noted that the provisions of Article 5(3) differ between the OECD and UN MTCs for reasons discussed in Chapter 4.2.5. It is submitted that all DTAs which exclusively followed the OECD MTC PE definition are detrimental to the right to tax which would otherwise be afforded to the developing countries forming part of the sample selected for this dissertation for which a comparative analysis could be performed.

In conclusion, article 5(3) of the UN MTC represents a key variance from the OECD MTC provisions and developing countries should aim to follow the provisions of the former MTC precisely to obtain the maximum right to tax afforded within prevailing international DTA practices.

### **6.2.3 *The exclusionary list***

While numerous exceptions were noted across the PE definition in the DTAs analysed, it is submitted that none are of any significance as the amount of income which could be attributed to PEs arising solely from such exceptions is submitted to be insignificant.

#### **6.2.4 Agency PEs**

It is submitted that the numerous exceptions found in the PE definition in the DTAs analysed are of no significance. It was submitted that although the wording of the OECD and UN MTCs vary, the interpretation to be given to the respective models does not. Furthermore, where deviations arose from the treatment of agents possessing stocks of goods or filling orders, it was submitted that the income to be attributed to PEs formed as a result thereof would not be expected to be significant and the deviations can therefore be considered meaningless even though these DTAs clearly afford a greater right to tax. In Zambia's case, many exceptions were noted in this regard and although the amount of income attributable to such PEs may be considered insignificant, it is submitted that its omission from numerous DTAs could result in a significant loss of tax revenues.

#### **6.3 Recommendations**

- As the selected countries are all considered to be developing economies, it is submitted that future DTAs entered into should strictly follow the UN MTC as it affords the greatest taxing rights to developing countries based on current international practices;
- These countries should also attempt to renegotiate their current treaties, or enter into protocols with the other contracting states, with a view to aligning such treaties with the provisions of the UN MTC. This is especially applicable to Zambia as many of its DTAs were entered into at a time when neither the OECD MTC nor the UN MTC had come into existence;
- The selected countries should also consider further insertions of provisions into the PE Article (particularly Article 5(3)) aimed at the protection of their key natural resources (where deficiencies identified exist). A practical example hereof would be the inclusion of mining exploration activities as part of article 5(3) by mineral rich countries such as Botswana and Namibia.

#### **6.4 Areas for further research**

- As Angola and the DRC were found not to have any DTAs in force or pending, it would be worthwhile conduct research on whether or not these countries domestic laws adequately protect their right to tax.
- The DTAs from the countries selected adopted mainly the provisions of the UN MTC in defining the PE term in its DTAs. Whether or not this model is more effective for African states requires further research.

## **APPENDIX A: EXTRACTS FROM THE VCLT**

### **Article 31:**

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

### **Article 32:**

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

- (a) *Leaves the meaning ambiguous or obscure; or*
- (b) *Leads to a result which is manifestly absurd or unreasonable.*

### **Article 33:**

1. *When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in the case of divergence, a particular text shall prevail.*
2. *A version of the treaty in a language other than one of those in which the text is authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.*
3. *The terms of the treaty are presumed to have the same meaning in each authentic text.*

4. *Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.*

## APPENDIX B: EXTRACTS FROM THE OECD COUNCIL RECOMMENDATIONS

*“THE COUNCIL*

*[...]*

*Taking note of the Model Tax Convention and the Commentaries thereon (as last modified by the 1997 Report), which may be amended from time to time hereafter;*

*I. RECOMMENDS the Government of Member countries:*

- 1. [...]*
- 2. when concluding new bilateral conventions or revising existing bilateral conventions, to conform to the Model Tax Convention, as interpreted by the Commentaries thereon;*
- 3. that their tax administrations follow the commentaries on the Articles of the Model Tax Convention, as modified from time to time, when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles”.*<sup>99</sup>

The OECD CFA has also dealt with this issue in its Introduction to the Model as follows:

- “*
- 33. When drafting the 1977 Model Convention, the Committee on Fiscal Affairs examined the problems of conflicts of interpretation that might arise as a result of changes in the Articles and Commentaries of the 1963 Draft Convention. At that time, the Committee considered that existing conventions should, as far as possible, be interpreted in the spirit of the revised Commentaries, even though the provisions of these conventions did not yet include the more precise wording of the 1977 Model Convention [...]*
  - 34. The Committee believes that the changes to the Articles of the Model Convention and the Commentaries that have been made since 1977 should be similarly interpreted.*
  - 35. Needless to say, amendments to the Articles of the Model Convention and changes to the Commentaries that are a direct result of these amendments are not relevant to the interpretation or application of previously concluded conventions where the provisions of those conventions are different in substance from the amended Articles. However, other changes or additions to the Commentaries are normally applicable to the interpretation and application of Conventions concluded before their adoption, because they reflect the consensus of the OECD Member countries as to the proper interpretation of existing provisions and their application to specific situations”.*

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<sup>99</sup> Baker E-15

## APPENDIX C: OECD AND UN MTC DEFINITIONS OF A PE

|           | OECD MTC  |           | UN MTC   |
|-----------|---|-----------|--|
| <b>1</b>  | 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. | <b>1</b>  | Yes  |
| <b>2</b>  | The term "permanent establishment" includes especially:   | <b>2</b>  | Yes  |
| <b>a)</b> | a place of management;  | <b>a)</b> | Yes  |
| <b>b)</b> | a branch;   | <b>b)</b> | Yes  |
| <b>c)</b> | an office;  | <b>c)</b> | Yes  |
| <b>d)</b> | a factory;  | <b>d)</b> | Yes  |
| <b>e)</b> | a workshop, and   | <b>e)</b> | Yes  |
| <b>f)</b> | a mine, an oil or gas well, a quarry or any other place of extraction of natural resources  | <b>f)</b> | Yes  |
| <b>3</b>  | A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.   |           |  |
|           |   | <b>3</b>  | The term "permanent establishment" also encompasses:   |
|           |   | <b>a)</b> | 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>b)</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.  |
| <b>4</b>  | Notwithstanding the preceding provisions of this article, the term "permanent establishment" shall be deemed not to include:                                     | <b>4</b>  | Yes  |
| <b>a)</b> | the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;                                |           |  |
|           |  | <b>a)</b> | the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;      |
| <b>b)</b> | the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;                           |           |  |
|           |  | <b>b)</b> | the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display; |
| <b>c)</b> | the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;                       | <b>c)</b> | Yes  |
| <b>d)</b> | the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;         | <b>d)</b> | Yes  |
| <b>e)</b> | the maintenance of a fixed place business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character; | <b>e)</b> | Yes  |
| <b>f)</b> | the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided                              | <b>f)</b> | Yes  |

|   |  |   |  |
|---|--|---|--|
|   | 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. |   |  |
|   |  | 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 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 that 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. |
| 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. |    |  |

|          |  |          |   |
|----------|--|----------|---|
|          |  | <b>7</b> | An enterprise shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other 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. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, and conditions are made or imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises, he will not be considered an agent of an independent status within the meaning of this paragraph. |
| <b>7</b> | 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. | <b>8</b> | Yes   |

## **APPENDIX D: COMPARISON OF BOTSWANA'S DTAs TO THE OECD AND UN MTCs DEFINITION OF A PE**

Botswana has a total of nine DTAs, currently in force, with the following countries;

- Barbados (*entered into force on 25 August 2005*)
- France (*entered into force on 1 June 2003*)
- India (*entered into force on 30 January 2008*)
- Mauritius (*entered into force on 1 July 1996*)
- Russia (*not analysed due unavailability of English text*)
- Seychelles (*entered into force on 22 June 2005*)
- South Africa (*entered into force on 20 April 2004*)
- Sweden (*entered into force on 23 December 1992*)
- United Kingdom (*entered into force on 30 January 2008*)

The treaty with Russia was not available in English text and has therefore been excluded for the purpose of this dissertation.

Botswana also has three DTAs which are currently pending finalisation with the following countries:

- Namibia (*signed on 16 June 2004*)
- Swaziland (*signed on 21 April 2010*)
- Zimbabwe (*signed on 16 June 2004*)

Appendix D: Botswana DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Barbados  | France  |
|-------------------------|-----------------------|---|---|
| 1                       | 1                     | Yes   | Yes   |
| 2                       | 2                     | Yes   | Yes   |
| a)                      | a)                    | Yes   | Yes   |
| b)                      | b)                    | Yes   | Yes   |
| c)                      | c)                    | Yes   | Yes   |
| d)                      | d)                    | Yes   | Yes   |
| e)                      | e)                    | Yes   | Yes   |
| f)                      | f)                    | Yes   | Yes   |
|                         |                       |   | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than six months. |
| 3                       |                       |   |   |
|                         | 3                     | Yes   | Yes   |
|                         | a)                    | Yes   | Yes   |
|                         |                       | an installation, structure or ship used for the exploration of natural resources, only if it lasts for a period of more than six months |   |
|                         | b)                    | Yes   | Yes   |
| 4                       | 4                     | Yes   | Yes   |
| a)                      |                       |   | Yes   |
|                         | a)                    | Yes   |   |

Appendix D: Botswana DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Barbados | France  |
|-------------------------|-----------------------|----------|---|
| b)                      |                       |          | Yes   |
|                         | b)                    | Yes      |   |
| c)                      | c)                    | Yes      | Yes   |
| d)                      | d)                    | Yes      | Yes   |
| e)                      | e)                    | Yes      | Yes   |
| f)                      | f)                    | Yes      | Yes   |
|                         |                       |          | In respect of paragraphs 4(a) and (b) "delivery" made out of the stock of goods or merchandises situated in a Contracting State will constitute a permanent establishment therein if operations other than storage, display, transport or other preparatory or auxiliary operations are carried on in that State out of this stock or facilities. |
| 5                       |                       |          | Yes   |
|                         | 5                     | Yes      |   |
|                         | a)                    | Yes      |   |
|                         | b)                    | Yes      |   |
|                         | 6                     | Yes      |   |
| 6                       |                       | Yes      | Yes   |
|                         | 7                     |          |   |
| 7                       | 8                     | Yes      | Yes   |

Appendix D: Botswana DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | India  | Mauritius   |
|-------------------------|-----------------------|--|---|
| 1                       | 1                     | Yes  | Yes   |
| 2                       | 2                     | Yes  | Yes   |
| a)                      | a)                    | Yes  | Yes   |
| b)                      | b)                    | Yes  | Yes   |
| c)                      | c)                    | Yes  | Yes   |
| d)                      | d)                    | Yes  | Yes   |
| e)                      | e)                    | Yes  | Yes   |
| f)                      | f)                    | Yes  | Yes   |
|                         |                       | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than six months | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than 6 months within any 12 month period |
|                         |                       | a warehouse in relation to a person providing storage facilities for others  | a warehouse in relation to a person providing facilities for others   |
|                         |                       | a farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on  |   |
| 3                       |                       |  |   |
|                         | 3                     |  | Yes   |
|                         | a)                    | Yes  | Yes   |
|                         | b)                    | Yes  | Yes   |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | India  | Mauritius |
|-------------------------|-----------------------|--|-----------|
| 4                       | 4                     | Yes  | Yes       |
| a)                      |                       |  |           |
|                         | a)                    | Yes  | Yes       |
| b)                      |                       |  |           |
|                         | b)                    | Yes  | Yes       |
| c)                      | c)                    | Yes  | Yes       |
| d)                      | d)                    | Yes  | Yes       |
| e)                      | e)                    | Yes  | Yes       |
| f)                      | f)                    | Yes  |           |
| 5                       |                       |  |           |
|                         | 5                     | Yes  | Yes       |
|                         | a)                    | Yes  | Yes       |
|                         | b)                    | Yes  | Yes       |
|                         |                       | habitually secures orders in the first-mentioned State,<br>wholly or almost wholly for the enterprise itself |           |
|                         | 6                     | Yes  |           |
| 6                       |                       |  |           |
|                         | 7                     | Yes  | Yes       |
| 7                       | 8                     | Yes  | Yes       |

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| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Seychelles</b>  | <b>South Africa</b>  |
|---------------------------------|-------------------------------|--|--|
| 1                               | 1                             | Yes  | Yes  |
| 2                               | 2                             | Yes  | Yes  |
| a)                              | a)                            | Yes  | Yes  |
| b)                              | b)                            | Yes  | Yes  |
| c)                              | c)                            | Yes  | Yes  |
| d)                              | d)                            | Yes  | Yes  |
| e)                              | e)                            | Yes  | Yes  |
| f)                              | f)                            | Yes  | Yes  |
|                                 |                               | an installation or structure used for the exploration of natural resources provided that the installation or structure continues for a period of not less than 183 days. | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of more than six months |
| 3                               |                               |  |  |
|                                 | 3                             | Yes  | Yes  |
|                                 | a)                            | Yes  | Yes  |
|                                 | b)                            | Yes  | Yes  |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Seychelles | South Africa  |
|-------------------------|-----------------------|------------|---|
|                         |                       |            | the performance of professional services or other activities of an independent character by an individual, but only where those services or activities continue within a Contracting State for a period or periods exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned |
| 4                       | 4                     | Yes        | Yes   |
| a)                      |                       |            |   |
|                         | a)                    | Yes        | Yes   |
| b)                      |                       |            |   |
|                         | b)                    | Yes        | Yes   |
| c)                      | c)                    | Yes        | Yes   |
| d)                      | d)                    | Yes        | Yes   |
| e)                      | e)                    | Yes        | Yes   |
| f)                      | f)                    | Yes        | Yes   |
| 5                       |                       |            |   |
|                         | 5                     |            | Yes   |
|                         | a)                    | Yes        | Yes   |
|                         | b)                    | Yes        | Yes   |
|                         | 6                     | Yes        | Yes   |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Seychelles | South Africa |
|-------------------------|-----------------------|------------|--------------|
| 6                       |                       |            | Yes          |
|                         | 7                     | Yes        |              |
| 7                       | 8                     | Yes        | Yes          |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Sweden   | United Kingdom  |
|-------------------------|-----------------------|--|---|
| 1                       | 1                     | Yes  | Yes   |
| 2                       | 2                     | Yes  | Yes   |
| a)                      | a)                    | Yes  | Yes   |
| b)                      | b)                    | Yes  | Yes   |
| c)                      | c)                    | Yes  | Yes   |
| d)                      | d)                    | Yes  | Yes   |
| e)                      | e)                    | Yes  | Yes   |
| f)                      | f)                    | Yes  | Yes   |
|                         |                       | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than six months | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than six months. |
|                         |                       |  | a warehouse in relation to a person providing storage facilities for others   |
|                         |                       |  | a farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on   |
| 3                       |                       |  |   |
|                         | 3                     |  |   |
|                         | a)                    | Yes  | Yes   |
|                         | b)                    |  | Yes   |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Sweden | United Kingdom   |
|-------------------------|-----------------------|--------|--|
| 4                       | 4                     | Yes    | Yes  |
| a)                      |                       |        |  |
|                         | a)                    | Yes    | Yes  |
| b)                      |                       |        |  |
|                         | b)                    | Yes    | Yes  |
| c)                      | c)                    | Yes    | Yes  |
| d)                      | d)                    | Yes    | Yes  |
| e)                      | e)                    | Yes    | Yes  |
| f)                      | f)                    |        | Yes  |
| 5                       |                       |        |  |
|                         | 5                     |        |  |
|                         | a)                    | Yes    | Yes  |
|                         | b)                    | Yes    | Yes  |
|                         |                       |        | habitually secures orders in the first-mentioned State,<br>wholly or almost wholly for the enterprise itself |
|                         | 6                     |        | Yes  |
| 6                       |                       |        |  |
|                         | 7                     | Yes    | Yes  |
| 7                       | 8                     | Yes    | Yes  |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Namibia  | Swaziland  |
|-------------------------|-----------------------|--|--|
| 1                       | 1                     | Yes  | Yes  |
| 2                       | 2                     | Yes  | Yes  |
| a)                      | a)                    | Yes  | Yes  |
| b)                      | b)                    | Yes  | Yes  |
| c)                      | c)                    | Yes  | Yes  |
| d)                      | d)                    | Yes  | Yes  |
| e)                      | e)                    | Yes  | Yes  |
| f)                      | f)                    | Yes  | Yes  |
|                         |                       | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of more than six months | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period aggregating more than 183 days. |
| 3                       |                       |  |  |
|                         | 3                     | Yes  | Yes  |
|                         | a)                    | Yes  | Yes  |
|                         | b)                    | Yes  | Yes  |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Namibia | Swaziland   |
|-------------------------|-----------------------|---------|---|
|                         |                       |         | the performance of professional services or other activities of an independent character by an individual, but only where those services or activities continue within a Contracting State for a period or periods exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the year of assessment concerned. |
| 4                       | 4                     | Yes     | Yes   |
| a)                      |                       |         |   |
|                         | a)                    | Yes     | Yes   |
| b)                      |                       |         |   |
|                         | b)                    | Yes     | Yes   |
| c)                      | c)                    | Yes     | Yes   |
| d)                      | d)                    | Yes     | Yes   |
| e)                      | e)                    | Yes     | Yes   |
| f)                      | f)                    | Yes     | Yes   |
| 5                       |                       |         |   |
|                         | 5                     | Yes     | Yes   |
|                         | a)                    | Yes     | Yes   |
|                         | b)                    | Yes     | Yes   |
|                         | 6                     |         | Yes   |

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| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Namibia</b> | <b>Swaziland</b> |
|---------------------------------|-------------------------------|----------------|------------------|
| 6                               |                               |                | Yes              |
|                                 | 7                             | Yes            |                  |
| 7                               | 8                             | Yes            | Yes              |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Zimbabwe  |
|-------------------------|-----------------------|---|
| 1                       | 1                     | Yes   |
| 2                       | 2                     | Yes   |
| a)                      | a)                    | Yes   |
| b)                      | b)                    | Yes   |
| c)                      | c)                    | Yes   |
| d)                      | d)                    | Yes   |
| e)                      | e)                    | Yes   |
| f)                      | f)                    | Yes   |
|                         |                       | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than six months  |
| 3                       |                       |   |
|                         | 3                     | Yes   |
|                         | a)                    | Yes   |
|                         | b)                    | Yes   |
|                         |                       | the performance of professional services or other activities of an independent character by an individual, but only where those services or activities continue within a Contracting State for a period or periods exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the |

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| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Zimbabwe</b>       |
|---------------------------------|-------------------------------|-----------------------|
|                                 |                               | fiscal year concerned |
| 4                               | 4                             | Yes                   |
| a)                              |                               |                       |
|                                 | a)                            | Yes                   |
| b)                              |                               |                       |
|                                 | b)                            | Yes                   |
| c)                              | c)                            | Yes                   |
| d)                              | d)                            | Yes                   |
| e)                              | e)                            | Yes                   |
| f)                              | f)                            | Yes                   |
| 5                               |                               |                       |
|                                 | 5                             | Yes                   |
|                                 | a)                            | Yes                   |
|                                 | b)                            | Yes                   |
|                                 | 6                             | Yes                   |

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| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Zimbabwe</b> |
|---------------------------------|-------------------------------|-----------------|
| 6                               |                               |                 |
|                                 | 7                             | Yes             |
| 7                               | 8                             | Yes             |

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## **APPENDIX E: COMPARISON OF NAMIBIA'S DTAs TO THE OECD AND UN MTCs**

### **DEFINITION OF A PE**

Namibia has a total of ten DTAs, currently in force, with the following countries;

- France (*entered into force on 1 May 1999*)
- Germany (*entered into force on 27 July 1995*)
- India (*entered into force on 22 January 1999*)
- Malaysia (*entered into force on 13 December 2004*)
- Mauritius (*entered into force on 25 July 1996*)
- Romania (*entered into force on 5 August 1999*)
- Russia (*entered into force on 23 June 2000*)
- South Africa (*entered into force on 11 April 1999*)
- Sweden (*entered into force on 26 June 1995*)
- United Kingdom (*entered into force on 19 December 1962*)

Namibia also has two DTAs which are currently pending finalisation with the following countries:

- Botswana (*signed on 16 June 2004*)
- Canada (*signed on 25 March 2010*)

Appendix E: Namibia DTAs

| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>France</b>   | <b>Germany</b> |
|---------------------------------|-------------------------------|---|----------------|
| 1                               | 1                             | Yes   | Yes            |
| 2                               | 2                             | Yes   | Yes            |
| a)                              | a)                            | Yes   | Yes            |
| b)                              | b)                            | Yes   | Yes            |
| c)                              | c)                            | Yes   | Yes            |
| d)                              | d)                            | Yes   | Yes            |
| e)                              | e)                            | Yes   | Yes            |
| f)                              | f)                            | Yes   | Yes            |
|                                 |                               | a warehouse, where storage facilities are provided to parties other than the enterprise |                |
|                                 |                               | a guest farm in the case of Namibia   |                |
| 3                               |                               | Yes   | Yes            |
|                                 | 3                             |   |                |
|                                 | a)                            |   |                |
|                                 | b)                            |   |                |
| 4                               | 4                             | Yes   | Yes            |

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| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>France</b> | <b>Germany</b> |
|---------------------------------|-------------------------------|---------------|----------------|
| a)                              |                               | Yes           | Yes            |
|                                 | a)                            |               |                |
| b)                              |                               | Yes           | Yes            |
|                                 | b)                            | Yes           |                |
| c)                              | c)                            | Yes           | Yes            |
| d)                              | d)                            | Yes           | Yes            |
| e)                              | e)                            | Yes           | Yes            |
| f)                              | f)                            | Yes           | Yes            |
| 5                               |                               | Yes           | Yes            |
|                                 | 5                             |               |                |
|                                 | a)                            |               |                |
|                                 | b)                            |               |                |
|                                 | 6                             |               |                |
| 6                               |                               | Yes           | Yes            |
|                                 | 7                             |               |                |
| 7                               | 8                             | Yes           | Yes            |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | India  | Malaysia  |
|-------------------------|-----------------------|--|---|
| 1                       | 1                     | Yes  | Yes   |
| 2                       | 2                     | Yes  | Yes   |
| a)                      | a)                    | Yes  | Yes   |
| b)                      | b)                    | Yes  | Yes   |
| c)                      | c)                    | Yes  | Yes   |
| d)                      | d)                    | Yes  | Yes   |
| e)                      | e)                    | Yes  | Yes   |
| f)                      | f)                    | Yes  | a mine, an oil or gas well, a quarry or any other place of extraction of natural resources including timber or other forest produce   |
|                         |                       | a warehouse, in relation to a person providing storage facilities for others | a warehouse, in relation to a person providing storage facilities for others  |
|                         |                       | in the case of Namibia, a guest farm or other operation of a similar nature  | a farm or plantation  |
|                         |                       |  | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than 9 months  |
|                         |                       |  | a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than 9 months |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | India | Malaysia   |
|-------------------------|-----------------------|-------|--|
| 3                       |                       |       |  |
|                         | 3                     |       |  |
|                         | a)                    | Yes   |  |
|                         | b)                    | Yes   |  |
| 4                       | 4                     | Yes   | Yes  |
| a)                      |                       | Yes   | Yes  |
|                         | a)                    |       |  |
| b)                      |                       | Yes   | Yes  |
|                         | b)                    |       |  |
| c)                      | c)                    | Yes   | Yes  |
| d)                      | d)                    | Yes   | Yes  |
| e)                      | e)                    | Yes   | Yes  |
| f)                      | f)                    | Yes   | Yes  |
| 5                       |                       |       |  |
|                         | 5                     | Yes   | Yes  |
|                         | a)                    | Yes   | Yes  |
|                         | b)                    | Yes   | manufactures or processes in the first-mentioned State<br>for the enterprise goods or merchandise belonging to<br>the enterprise |
|                         | 6                     |       |  |
| 6                       |                       |       |  |

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| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>India</b> | <b>Malaysia</b> |
|---------------------------------|-------------------------------|--------------|-----------------|
|                                 | 7                             | Yes          | Yes             |
| 7                               | 8                             | Yes          | Yes             |

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| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Mauritius</b>   | <b>Romania</b>   |
|---------------------------------|-------------------------------|--|--|
| 1                               | 1                             | Yes  | Yes  |
| 2                               | 2                             | Yes  | Yes  |
| a)                              | a)                            | Yes  | Yes  |
| b)                              | b)                            | Yes  | Yes  |
| c)                              | c)                            | Yes  | Yes  |
| d)                              | d)                            | Yes  | Yes  |
| e)                              | e)                            | Yes  | Yes  |
| f)                              | f)                            | Yes  | Yes  |
|                                 |                               | a warehouse, in relation to a person providing storage facilities for others | a warehouse, in relation to a person providing storage facilities for others |
|                                 |                               | in the case of Namibia, a guest farm or other operation of a similar nature  | a farm, a plantation, an orchard or vineyard                                 |
| 3                               |                               |  |  |
|                                 | 3                             | Yes  | Yes  |
|                                 | a)                            | Yes  | Yes  |
|                                 | b)                            | Yes  | Yes  |
| 4                               | 4                             | Yes  | Yes  |
| a)                              |                               |  | Yes  |
|                                 | a)                            | Yes  |  |
| b)                              |                               |  | Yes  |
|                                 | b)                            | Yes  |  |

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| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Mauritius</b>   | <b>Romania</b>   |
|---------------------------------|-------------------------------|--|--|
| c)                              | c)                            | Yes  | Yes  |
| d)                              | d)                            | Yes  | Yes  |
| e)                              | e)                            | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise | the maintenance by an enterprise of a fixed place of business solely for the purpose of advertising, for supply of information, for marketing research, or for similar activities which have a preparatory or auxiliary character, for that enterprise |
| f)                              | f)                            | Yes  | Yes  |
|                                 |                               |  | the sale of displayed goods or merchandise belonging to the enterprise in the frame of an occasional temporary fair or exhibition within 30 days after the closing of the said fair or exhibition  |
| 5                               |                               |  |  |
|                                 | 5                             | Yes  | Yes  |
|                                 | a)                            | Yes  | Yes  |
|                                 | b)                            | Yes  | Yes  |
|                                 | 6                             |  | Yes  |
| 6                               |                               |  |  |
|                                 | 7                             | Yes  | Yes  |
| 7                               | 8                             | Yes  | Yes  |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Russia   | South Africa   |
|-------------------------|-----------------------|--|--|
| 1                       | 1                     | Yes  | Yes  |
| 2                       | 2                     | Yes  | Yes  |
| a)                      | a)                    | Yes  | Yes  |
| b)                      | b)                    | Yes  | Yes  |
| c)                      | c)                    | Yes  | Yes  |
| d)                      | d)                    | Yes  | Yes  |
| e)                      | e)                    | Yes  | Yes  |
| f)                      | f)                    | Yes  | Yes  |
|                         |                       |  | a warehouse, where storage facilities are provided to parties other than the enterprise  |
|                         |                       | a hotel, a guest farm or other activity of a similar nature  | a guest farm or other operation of a similar nature  |
|                         |                       | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than six months |  |
|                         |                       |  | a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than six months |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Russia | South Africa  |
|-------------------------|-----------------------|--------|---|
|                         |                       |        | the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the Contracting State for a period or periods aggregating more than six months within any twelve- month period |
| 3                       |                       |        |   |
|                         | 3                     | Yes    |   |
|                         | a)                    | Yes    |   |
|                         | b)                    | Yes    |   |
| 4                       | 4                     | Yes    | Yes   |
| a)                      |                       |        | Yes   |
|                         | a)                    | Yes    |   |
| b)                      |                       |        | Yes   |
|                         | b)                    | Yes    |   |
| c)                      | c)                    | Yes    | Yes   |
| d)                      | d)                    | Yes    | Yes   |
| e)                      | e)                    | Yes    | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary  |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Russia | South Africa   |
|-------------------------|-----------------------|--------|--|
|                         |                       |        | character, for the enterprise  |
| f)                      | f)                    | Yes    | Yes  |
| 5                       |                       |        |  |
|                         | 5                     | Yes    | A person acting in a Contracting State on behalf of an enterprise of the other Contracting State (other than an agent of an independent status to whom paragraph 5 applies) notwithstanding that he or she has no fixed place of business in the first- mentioned State shall be deemed to be a permanent establishment in that State if |
|                         | a)                    | Yes    | Yes  |
|                         | b)                    | Yes    | he or she maintains in the first- mentioned State a stock of goods or merchandise belonging to the enterprise from which he or she regularly fills orders on behalf of the enterprise  |
|                         | 6                     |        |  |
| 6                       |                       |        |  |
|                         | 7                     | Yes    | Yes  |
| 7                       | 8                     | Yes    | Yes  |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Sweden   | UK  |
|-------------------------|-----------------------|--|---|
| 1                       | 1                     | Yes  | the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on |
| 2                       | 2                     | Yes  | Yes   |
| a)                      | a)                    | Yes  | Yes   |
| b)                      | b)                    | Yes  | Yes   |
| c)                      | c)                    | Yes  | Yes   |
| d)                      | d)                    | Yes  | Yes   |
| e)                      | e)                    | Yes  | Yes   |
| f)                      | f)                    | Yes  | a mine, quarry or other place of extraction of natural resources  |
|                         |                       | a warehouse, where storage facilities are provided to parties other than the enterprise  |   |
|                         |                       | a farm or a plantation   |   |
|                         |                       | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than six months |   |
|                         |                       |  | a building site or construction or assembly project which exists for more than twelve months  |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Sweden | UK  |
|-------------------------|-----------------------|--------|---|
|                         |                       |        | an enterprise of one of the territories shall be deemed to have a permanent establishment in the other territory if it carries on the activity of providing the services of public entertainers or of athletes referred to in Article XV, in that other territory |
| 3                       |                       |        |   |
|                         | 3                     | Yes    |   |
|                         | a)                    | Yes    |   |
|                         | b)                    |        |   |
| 4                       | 4                     | Yes    | the term "permanent establishment" shall not be deemed to include   |
| a)                      |                       |        | Yes   |
|                         | a)                    | Yes    |   |
| b)                      |                       |        | Yes   |
|                         | b)                    | Yes    |   |
| c)                      | c)                    | Yes    | Yes   |
| d)                      | d)                    | Yes    | Yes   |
| e)                      | e)                    | Yes    | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise                          |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Sweden | UK  |
|-------------------------|-----------------------|--------|---|
| f)                      | f)                    | Yes    |   |
| 5                       |                       |        |   |
|                         | 5                     | Yes    |   |
|                         | a)                    | Yes    |   |
|                         | b)                    | Yes    |   |
|                         |                       |        | <p>a person acting in one of the territories on behalf of an enterprise of the other territory -- other than an agent of an independent status to whom sub-paragraph (vi) applies -- shall be deemed to be a permanent establishment in the first-mentioned territory if he has, and habitually exercises in that territory, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise</p> |
|                         | 6                     |        |   |
| 6                       |                       |        |   |
|                         | 7                     | Yes    | <p>an enterprise of one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on business in that other territory through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of</p>   |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Sweden | UK             |
|-------------------------|-----------------------|--------|----------------|
|                         |                       |        | their business |
| 7                       | 8                     | Yes    | Yes            |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Botswana   | Canada  |
|-------------------------|-----------------------|--|---|
| 1                       | 1                     | Yes  | Yes   |
| 2                       | 2                     | Yes  | Yes   |
| a)                      | a)                    | Yes  | Yes   |
| b)                      | b)                    | Yes  | Yes   |
| c)                      | c)                    | Yes  | Yes   |
| d)                      | d)                    | Yes  | Yes   |
| e)                      | e)                    | Yes  | Yes   |
| f)                      | f)                    | Yes  | a mine, an oil or gas well, a quarry or any other place relating to the exploration for or the exploitation of natural resources    |
|                         |                       | an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of more than six months |   |
| 3                       |                       |  | A building site or construction or installation project constitutes a permanent establishment only if it lasts more than six months |
|                         | 3                     | Yes  |   |
|                         | a)                    | Yes  |   |
|                         | b)                    | Yes  |   |
| 4                       | 4                     | Yes  | Yes   |

Appendix E: Namibia DTAs

| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Botswana</b> | <b>Canada</b> |
|---------------------------------|-------------------------------|-----------------|---------------|
| a)                              |                               |                 |               |
|                                 | a)                            | Yes             | Yes           |
| b)                              |                               |                 |               |
|                                 | b)                            | Yes             | Yes           |
| c)                              | c)                            | Yes             | Yes           |
| d)                              | d)                            | Yes             | Yes           |
| e)                              | e)                            | Yes             | Yes           |
| f)                              | f)                            | Yes             | Yes           |
| 5                               |                               |                 | Yes           |
|                                 | 5                             | Yes             |               |
|                                 | a)                            | Yes             |               |
|                                 | b)                            | Yes             |               |
|                                 | 6                             |                 |               |
| 6                               |                               |                 | Yes           |
|                                 | 7                             | Yes             |               |
| 7                               | 8                             | Yes             | Yes           |

## **APPENDIX F: COMPARISON OF ZAMBIA'S DTAs TO THE OECD AND UN MTCs**

### **DEFINITION OF A PE**

Zambia has a total of nineteen DTAs, currently in force, with the following countries;

- Canada (*entered into force on 28 December 1989*)
- Denmark (*entered into force on 18 October 1974*)
- Finland (*entered into force on 17 May 1985*)
- France (*entered into force on 1 July 1964*)
- Germany (*entered into force on 8 November 1975*)
- India (*entered into force on 18 January 1984*)
- Ireland (*entered into force on 31 July 1973*)
- Italy (*in force (date unspecified) and signed on 27 October 1972*)
- Japan (*entered into force on 23 January 1971*)
- Kenya (*in force (date unspecified) and effective as of 1 April 1964*)
- Netherlands (*entered into force on 9 November 1982*)
- Norway (*entered into force on 22 March 1973*)
- Romania (*not analysed due unavailability of English text*)
- South Africa (*entered into force on 31 August 1956*)
- Sweden (*entered into force on 7 November 1975*)
- Switzerland (*entered into force on 21 September 1961*)
- Tanzania (*in force (date unspecified) and effective as of 1 April 1964*)
- Uganda (*in force (date unspecified) and effective as of 1 April 1964*)
- United Kingdom (*in force (date unspecified) and signed on 22 March 1972*)

The treaty with Romania was not available in English text and has therefore been ignored for the purpose of this dissertation.

Zambia also has one DTA which is currently pending finalisation with the following country:

- Poland (*concluded on 19 May 1995*)

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Canada   | Denmark   |
|-------------------------|-----------------------|--|---|
| 1                       | 1                     | Yes  | Yes   |
| 2                       | 2                     | Yes  | Yes   |
| a)                      | a)                    | Yes  | Yes   |
| b)                      | b)                    | Yes  | Yes   |
| c)                      | c)                    | Yes  | Yes   |
| d)                      | d)                    | Yes  | Yes   |
| e)                      | e)                    | Yes  | Yes   |
| f)                      | f)                    | Yes  | Yes   |
|                         |                       | a farm, plantation or other place where agricultural, forestry, or related activities are carried on   |   |
|                         |                       | a building site or construction or assembly project or supervisory activities in connection therewith, where such site, project or activity continues for a period of more than three months   | a building site or construction or assembly project which exists for more than six months |
|                         |                       | the furnishing of services, including consultancy services, by an enterprise through employees or other persons, where activities of that nature continue (for the same or a connected project) within the country for a period or periods aggregating more than three months within any twelve month period |   |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Canada  | Denmark   |
|-------------------------|-----------------------|---|---|
| 3                       |                       |   |   |
|                         | 3                     |   |   |
|                         | a)                    |   | An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if it carries on supervisory activities in that other Contracting State for more than six months in connection with a construction, installation, or assembly project which is being undertaken in that other Contracting State |
|                         | b)                    |   |   |
| 4                       | 4                     | Yes   | Yes   |
| a)                      |                       | Yes   | Yes   |
|                         | a)                    |   |   |
| b)                      |                       | Yes   | Yes   |
|                         | b)                    |   |   |
| c)                      | c)                    | Yes   | Yes   |
| d)                      | d)                    | Yes   | Yes   |
| e)                      | e)                    | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research, or for similar activities which have a preparatory or auxiliary | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or  |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Canada  | Denmark   |
|-------------------------|-----------------------|---|---|
|                         |                       | character, for the enterprise   | auxiliary character, for the enterprise   |
| f)                      | f)                    |   |   |
| 5                       |                       |   | A person acting in a Contracting State on behalf of an enterprise of the other Contracting State -- other than an agent of independent status to whom paragraph 6 applies -- shall be deemed to be a permanent establishment in the first-mentioned Contracting State, if he has and habitually exercises in that Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise |
|                         | 5                     | A person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State -- other than an agent of an independent status to whom the provisions of paragraph 6 apply -- shall be deemed to be a permanent establishment in the first- mentioned State if |   |
|                         | a)                    | Yes   |   |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Canada  | Denmark |
|-------------------------|-----------------------|---|---------|
|                         | b)                    | he has no such authority, but maintains in that first-mentioned State a stock of goods or merchandises belonging to that enterprise from which he regularly fills orders on behalf of that enterprise |         |
|                         | 6                     | Yes   |         |
| 6                       |                       |   |         |
|                         | 7                     | Yes   | Yes     |
| 7                       | 8                     | Yes   | Yes     |

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Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Finland   | France  |
|-------------------------|-----------------------|---|---|
| 1                       | 1                     | Yes   | the term "permanent establishment", when used with respect to an enterprise of one of the territories, means a branch, management, factory, or other fixed place of business in which is exercised, in whole or in part, the activity of the enterprise |
| 2                       | 2                     | Yes   |   |
| a)                      | a)                    | Yes   |   |
| b)                      | b)                    | Yes   |   |
| c)                      | c)                    | Yes   |   |
| d)                      | d)                    | Yes   |   |
| e)                      | e)                    | Yes   |   |
| f)                      | f)                    | Yes   |   |
| 3                       |                       |   |   |
|                         | 3                     |   |   |
|                         | a)                    | Yes   |   |
|                         | b)                    | The furnishing of services, including management or consultancy services, by an enterprise of a Contracting State through employees or other personnel, where activities of that nature continue (for the same or a connected project) in the other Contracting State for a |   |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Finland  | France  |
|-------------------------|-----------------------|--|---|
|                         |                       | period or periods aggregating more than three months within any twelve-month period shall constitute a permanent establishment in that other State |   |
| 4                       | 4                     | Yes  |   |
| a)                      |                       | Yes  |   |
|                         | a)                    |  |   |
| b)                      |                       | Yes  |   |
|                         | b)                    |  |   |
| c)                      | c)                    | Yes  |   |
| d)                      | d)                    | Yes  | the fact that an enterprise of one of the territories maintains in the other territory a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute that fixed place of business a permanent establishment of the enterprise |
| e)                      | e)                    | Yes  |   |
| f)                      | f)                    | Yes  |   |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Finland  | France   |
|-------------------------|-----------------------|--|--|
| 5                       |                       |  |  |
|                         | 5                     | A person acting in a Contracting State on behalf of an enterprise of the other Contracting State-other than an agent of an independent status to whom the provisions of paragraph 8 apply-shall be deemed to be a permanent establishment in the first-mentioned State if: |  |
|                         | a)                    | he has, and habitually exercises in that State, an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for that enterprise  | does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of such enterprise  |
|                         | b)                    | Yes  | has a stock of merchandise from which he regularly fills orders  |
|                         | 6                     | Yes  |  |
| 6                       |                       |  |  |
|                         | 7                     | Yes  | an enterprise of one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on business dealings in that other territory through a bona fide broker or general commission agent |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Finland | France  |
|-------------------------|-----------------------|---------|---|
|                         |                       |         | acting in the ordinary course of his business as such |
| 7                       | 8                     | Yes     | Yes   |

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| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Germany</b>   | <b>India</b>  |
|---------------------------------|-------------------------------|--|---|
| 1                               | 1                             | Yes  | Yes   |
| 2                               | 2                             | Yes  | Yes   |
| a)                              | a)                            | Yes  | Yes   |
| b)                              | b)                            | Yes  | Yes   |
| c)                              | c)                            | Yes  | Yes   |
| d)                              | d)                            | Yes  | Yes   |
| e)                              | e)                            | Yes  | Yes   |
| f)                              | f)                            | Yes  | Yes   |
|                                 |                               |  | a farm, plantation or other place where, agricultural, forestry plantation or related activities are carried on   |
|                                 |                               |  | a warehouse or other facilities for the maintenance of a stock of goods or merchandise belonging to the enterprise from which orders are filled   |
|                                 |                               | a building site or construction or assembly project which exists for more than nine months | a building site or construction or assembly project or supervisory activities in connection therewith where such site, project or supervisory activity continues for a period of more than 9 months |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Germany | India   |
|-------------------------|-----------------------|---------|---|
|                         |                       |         | An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if it carries on a business which consists of providing the services of public entertainers (such as theatre, motion picture, radio or television artistes and musicians) or athletes in that other Contracting State unless the enterprise is directly or indirectly supported wholly or substantially, from the public funds of the Government of the first-mentioned Contracting State in connection with the provision of such services |
| 3                       |                       |         |   |
|                         | 3                     |         |   |
|                         | a)                    |         |   |
|                         | b)                    |         |   |
| 4                       | 4                     |         | Yes   |
| a)                      |                       | Yes     |   |
|                         | a)                    |         | Yes   |
| b)                      |                       | Yes     |   |
|                         | b)                    |         | Yes   |

Appendix F: Zambia DTAs

| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Germany</b>   | <b>India</b>  |
|---------------------------------|-------------------------------|--|---|
| c)                              | c)                            | Yes  | Yes   |
| d)                              | d)                            | Yes  | Yes   |
| e)                              | e)                            | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise   | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information or for scientific research, being activities solely of a preparatory or auxiliary character, in the trade or business of the enterprise |
| f)                              | f)                            |  |   |
| 5                               |                               |  |   |
|                                 | 5                             |  | Yes   |
|                                 | a)                            | A person acting in a Contracting State on behalf of an enterprise of the other Contracting State--other than an agent of an independent status to whom paragraph (5) applies--shall be deemed to be a permanent establishment in the first-mentioned State if he has, and habitually exercises in that State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise | he has, and habitually exercises in that State, an authority to conclude contracts for or on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise                                       |

Appendix F: Zambia DTAs

| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Germany</b> | <b>India</b>   |
|---------------------------------|-------------------------------|----------------|--|
|                                 | b)                            |                | he has no such authority but the habitually maintains in the first-mentioned Contracting State a stock of goods or merchandise belonging to that enterprise from which he regularly fulfils orders on behalf of the enterprise |
|                                 | 6                             |                | Yes  |
| 6                               |                               |                |  |
|                                 | 7                             | Yes            | Yes  |
| 7                               | 8                             | Yes            | Yes  |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Ireland  | Italy   |
|-------------------------|-----------------------|--|---|
| 1                       | 1                     | Yes  | Yes   |
| 2                       | 2                     | Yes  | Yes   |
| a)                      | a)                    | Yes  | Yes   |
| b)                      | b)                    | Yes  | Yes   |
| c)                      | c)                    | Yes  | Yes   |
| d)                      | d)                    | Yes  | Yes   |
| e)                      | e)                    | Yes  | Yes   |
| f)                      | f)                    | Yes  | a mine, quarry or other place of extraction of natural resources  |
|                         |                       | a building site or construction or assembly project which exists for more than twelve months   | a building site or construction or assembly project which exists for more than nine months              |
|                         |                       |  | supervisory activities for more than nine months on a building site or construction or assembly project |
| 3                       |                       |  |   |
|                         | 3                     |  |   |
|                         | a)                    | An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if it carries on supervisory activities in that other Contracting State for more than twelve |   |

Appendix F: Zambia DTAs

| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Ireland</b>   | <b>Italy</b>   |
|---------------------------------|-------------------------------|--|--|
|                                 |                               | months in connection with a construction, installation, or assembly project which is being undertaken in that other Contracting State  |  |
|                                 | b)                            |  |  |
| 4                               | 4                             | Yes  | Yes  |
| a)                              |                               | Yes  | Yes  |
|                                 | a)                            |  |  |
| b)                              |                               | Yes  | Yes  |
|                                 | b)                            |  |  |
| c)                              | c)                            | Yes  | Yes  |
| d)                              | d)                            | Yes  | Yes  |
| e)                              | e)                            | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise |
| f)                              | f)                            |  |  |
| 5                               |                               |  |  |
|                                 | 5                             |  |  |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Ireland   | Italy  |
|-------------------------|-----------------------|---|--|
|                         | a)                    | A person acting in a Contracting State on behalf of an enterprise of the other Contracting State--other than an agent of independent status to whom paragraph 6 applies--shall be deemed to be a permanent establishment in the first-mentioned State if he has, and habitually exercises in that State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise | A person acting in a Contracting State on behalf of an enterprise of the other Contracting State -- other than an agent of an independent status to whom paragraph (5) applies -- shall be deemed to be a permanent establishment in the first-mentioned Contracting State if he has, and habitually exercises in that Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise |
|                         | b)                    |   |  |
|                         | 6                     |   |  |
| 6                       |                       |   |  |
|                         | 7                     | Yes   | Yes  |
| 7                       | 8                     | Yes   | Yes  |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Japan  | Kenya  |
|-------------------------|-----------------------|--|--|
| 1                       | 1                     | Yes  | Yes  |
| 2                       | 2                     | Yes  | Yes  |
| a)                      | a)                    | Yes  | Yes  |
| b)                      | b)                    | Yes  | Yes  |
| c)                      | c)                    | Yes  | Yes  |
| d)                      | d)                    | Yes  | Yes  |
| e)                      | e)                    | Yes  | Yes  |
| f)                      | f)                    | A mine, quarry or other place of extraction of natural resources                             | Yes  |
|                         |                       |  | a farm or plantation   |
|                         |                       | A building site or construction or assembly project which exists for more than twelve months | a building site or construction or assembly project which exists for more than six months  |
| 3                       |                       |  |  |
|                         | 3                     |  | An enterprise of one of the Contracting States shall be deemed to have a permanent establishment in the other Contracting State if |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Japan  | Kenya  |
|-------------------------|-----------------------|--|--|
|                         | a)                    |  | it carries on supervisory activities in that other Contracting State for more than six months in connection with a construction, installation or assembly project which is being undertaken in that other Contracting State              |
|                         | b)                    |  |  |
|                         |                       |  | it carries on a business which consists of providing the services of public entertainers to in Article XIV, in that other Contracting State  |
| 4                       | 4                     | Yes  | Yes  |
| a)                      |                       | Yes  | Yes  |
|                         | a)                    |  |  |
| b)                      |                       | Yes  | Yes  |
|                         | b)                    |  |  |
| c)                      | c)                    | Yes  | Yes  |
| d)                      | d)                    | Yes  | Yes  |
| e)                      | e)                    | The maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Japan  | Kenya   |
|-------------------------|-----------------------|--|---|
| f)                      | f)                    |  |   |
| 5                       |                       |  |   |
|                         | 5                     |  | A person acting in one of the Contracting States on behalf of an enterprise of the other Contracting State--other than an agent of independent status to whom paragraph 6 applies--shall be deemed to be a permanent establishment in the former Contracting State if |
|                         | a)                    | A person acting in a Contracting State on behalf of an enterprise of the other Contracting State--other than an agent of an independent status to whom paragraph 5 applies--shall be deemed to be a permanent establishment in the first-mentioned Contracting State if he has, and habitually exercises in that Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise | he has, and habitually exercises in that former Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise                                     |
|                         | b)                    |  | he maintains in that former Contracting State a stock of goods or merchandise belonging to the enterprise from which he regularly fills orders on behalf of the enterprise  |
|                         | 6                     |  |   |

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| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Japan</b> | <b>Kenya</b> |
|---------------------------------|-------------------------------|--------------|--------------|
| 6                               |                               |              |              |
|                                 | 7                             | Yes          | Yes          |
| 7                               | 8                             | Yes          | Yes          |

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Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Netherlands  | Norway   |
|-------------------------|-----------------------|--|--|
| 1                       | 1                     | For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business in which the business of the enterprise is wholly or partly carried on | For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business in which the business of the enterprise is wholly or partly carried on |
| 2                       | 2                     | Yes  | Yes  |
| a)                      | a)                    | Yes  | Yes  |
| b)                      | b)                    | Yes  | Yes  |
| c)                      | c)                    | Yes  | Yes  |
| d)                      | d)                    | Yes  | Yes  |
| e)                      | e)                    | Yes  | Yes  |
| f)                      | f)                    | a mine, oil well, quarry or other place of extraction of natural resources   | a mine, oil well, quarry or other place of extraction of natural resources   |
|                         |                       | a building site or construction or assembly project which exists for more than six months  | a building site or construction or assembly project which exists for more than six months  |
| 3                       |                       |  |  |
|                         | 3                     |  |  |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Netherlands   | Norway  |
|-------------------------|-----------------------|---|---|
|                         | a)                    | An enterprise of one of the States shall be deemed to have a permanent establishment in the other State if it carries on supervisory activities in that other State for more than six months in connection with a construction, installation, or assembly project which is being undertaken in that other State | An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if it carries on supervisory activities in that other Contracting State for more than six months in connection with a construction, installation, or assembly project which is being undertaken in that other Contracting State |
|                         | b)                    |   |   |
| 4                       | 4                     | Yes   | Yes   |
| a)                      |                       | Yes   | Yes   |
|                         | a)                    |   |   |
| b)                      |                       | Yes   | Yes   |
|                         | b)                    |   |   |
| c)                      | c)                    | Yes   | Yes   |
| d)                      | d)                    | Yes   | Yes   |
| e)                      | e)                    | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary  | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or  |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Netherlands  | Norway   |
|-------------------------|-----------------------|--|--|
|                         |                       | character, for the enterprise  | auxiliary character, for the enterprise  |
| f)                      | f)                    |  |  |
| 5                       |                       |  |  |
|                         | 5                     |  |  |
|                         | a)                    | A person acting in one of the States on behalf of an enterprise of the other State -- other than an agent of an independent status to whom paragraph 6 of this Article applies -- shall be deemed to be a permanent establishment in the first-mentioned State if he has, and habitually exercises in that State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise | A person acting in a Contracting State on behalf of an enterprise of the other Contracting State-- other than an agent of independent status to whom paragraph 6 applies--shall be deemed to be a permanent establishment in the first-mentioned Contracting State, if he has and habitually exercises in that Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise |
|                         | b)                    |  |  |
|                         | 6                     |  |  |
| 6                       |                       |  |  |
|                         | 7                     | Yes  | Yes  |
| 7                       | 8                     | Yes  | Yes  |

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| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Netherlands</b>  | <b>Norway</b>   |
|---------------------------------|-------------------------------|---|---|
| <b>OECD Model</b>               | <b>UN Model</b>               | <b>South Africa</b>   | <b>Sweden</b>   |
| 1                               | 1                             | permanent establishment" when used with respect to an enterprise of one of the territories means a branch, depot, management, factory, farm, mine, quarry or other fixed place of business including any place of natural resources subject to exploitation and a place where construction work or the installation of plant or machinery is carried on | For the purposes of this Convention the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on |
| 2                               | 2                             |   | Yes   |
| a)                              | a)                            |   | Yes   |
| b)                              | b)                            |   | Yes   |
| c)                              | c)                            |   | Yes   |
| d)                              | d)                            |   | Yes   |
| e)                              | e)                            |   | Yes   |
| f)                              | f)                            |   | a mine, oil well, quarry or other place of extraction of natural resources  |
|                                 |                               |   | a building site or construction or assembly project which exists for more than six months   |
| 3                               |                               |   |   |
|                                 | 3                             |   |   |

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| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Netherlands   | Norway   |
|-------------------------|-----------------------|---|--|
|                         | a)                    |   | An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if it carries on supervisory activities in that other Contracting State for more than six months in connection with a construction, installation or assembly project which is being undertaken in that other Contracting State |
|                         | b)                    |   |  |
| 4                       | 4                     |   | Yes  |
| a)                      |                       |   | Yes  |
|                         | a)                    |   |  |
| b)                      |                       |   | Yes  |
|                         | b)                    |   |  |
| c)                      | c)                    |   | Yes  |
| d)                      | d)                    | the fact that an enterprise of one of the territories maintains in the other territory a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute that fixed place of business a permanent establishment of the enterprise | Yes  |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Netherlands   | Norway   |
|-------------------------|-----------------------|---|--|
| e)                      | e)                    |   | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise   |
| f)                      | f)                    |   |  |
| 5                       |                       |   |  |
|                         | 5                     |   |  |
|                         | a)                    | does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of the enterprise or has a stock of merchandise from which he regularly fills orders on its behalf | A person acting in a Contracting State on behalf of an enterprise of the other Contracting State-- other than an agent of an independent status to whom paragraph 6 applies--shall be deemed to be a permanent establishment in the first-mentioned Contracting State, if he has, and habitually exercises in that Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise |
|                         | b)                    | does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of the enterprise or has a stock of merchandise from which he regularly                            |  |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Netherlands  | Norway |
|-------------------------|-----------------------|--|--------|
|                         |                       | fills orders on its behalf   |        |
|                         | 6                     |  |        |
| 6                       |                       |  |        |
|                         | 7                     | an enterprise of one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on business dealings in that other territory through a bona fide broker or general commission agent acting in the ordinary course of his business as such | Yes    |
| 7                       | 8                     | Yes  | Yes    |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Tanzania  | Uganda  |
|-------------------------|-----------------------|---|---|
| 1                       | 1                     | For the purposes of this Convention the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on | For the purposes of this Convention the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on |
| 2                       | 2                     | Yes   | Yes   |
| a)                      | a)                    | Yes   | Yes   |
| b)                      | b)                    | Yes   | Yes   |
| c)                      | c)                    | Yes   | Yes   |
| d)                      | d)                    | Yes   | Yes   |
| e)                      | e)                    | Yes   | Yes   |
| f)                      | f)                    | a mine, oil well, quarry or other place of extraction of natural resources  | a mine, oil well, quarry or other place of extraction of natural resources  |
|                         |                       | a farm or plantation  | a farm or plantation  |
|                         |                       | a building site or construction or assembly project which exists for more than six months   | a building site or construction or assembly project which exists for more than six months   |
| 3                       |                       |   |   |
|                         | 3                     | An enterprise of one of the Contracting States shall be deemed to have a permanent establishment in the other Contracting State if  | An enterprise of one of the Contracting States shall be deemed to have a permanent establishment in the other Contracting State if  |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Tanzania  | Uganda  |
|-------------------------|-----------------------|---|---|
|                         | a)                    | it carries on supervisory activities in that other Contracting State for more than six months in connection with a construction, installation or assembly project which is being undertaken in that other Contracting State | it carries on supervisory activities in that other Contracting State for more than six months in connection with a construction, installation or assembly project which is being undertaken in that other Contracting State |
|                         | b)                    |   |   |
|                         |                       | it carries on a business which consists of providing the services of public entertainers referred to in Article XIV, in that other Contracting State  | it carries on a business which consists of providing the services of public entertainers referred to in Article XIV, in that other Contracting State  |
| 4                       | 4                     | Yes   | Yes   |
| a)                      |                       | Yes   | Yes   |
|                         | a)                    |   |   |
| b)                      |                       | Yes   | Yes   |
|                         | b)                    |   |   |
| c)                      | c)                    | Yes   | Yes   |
| d)                      | d)                    | Yes   | Yes   |
| e)                      | e)                    | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary                  | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or                            |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Tanzania   | Uganda  |
|-------------------------|-----------------------|--|---|
|                         |                       | character, for the enterprise  | auxiliary character, for the enterprise   |
| f)                      | f)                    |  |   |
| 5                       |                       |  |   |
|                         | 5                     | A person acting in one of the Contracting States on behalf of an enterprise of the other Contracting State-- other than an agent of independent status to whom paragraph 6 applies--shall be deemed to be a permanent establishment in the former Contracting State if | A person acting in one of the Contracting States on behalf of an enterprise of the other Contracting State -- other than an agent of independent status to whom paragraph 6 applies -- shall be deemed to be a permanent establishment in the former Contracting State if |
|                         | a)                    | he has, and habitually exercises in that former Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise                                      | he has, and habitually exercises in that former Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise   |
|                         | b)                    | he maintains in that former Contracting State a stock of goods or merchandise belonging to the enterprise from which he regularly fills orders on behalf of the enterprise   | he maintains in that former Contracting State a stock of goods or merchandise belonging to the enterprise from which he regularly fills orders on behalf of the enterprise  |

Appendix F: Zambia DTAs

| <b>OECD MTC<br/>(Article 5)</b> | <b>UN MTC<br/>(Article 5)</b> | <b>Tanzania</b> | <b>Uganda</b> |
|---------------------------------|-------------------------------|-----------------|---------------|
|                                 | 6                             |                 |               |
| 6                               |                               |                 |               |
|                                 | 7                             | Yes             | Yes           |
| 7                               | 8                             | Yes             | Yes           |

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Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | United Kingdom   | Switzerland   |
|-------------------------|-----------------------|--|---|
| 1                       | 1                     | For the purposes of this Convention, the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on | the term "permanent establishment" means a branch, management, office, factory, workshop or other fixed place of business, and a farm, mine, quarry or other place of natural resources subject to exploitation. It also includes a place where building construction is carried on by contract for a period of at least one year |
| 2                       | 2                     | Yes  |   |
| a)                      | a)                    | Yes  |   |
| b)                      | b)                    | Yes  |   |
| c)                      | c)                    | Yes  |   |
| d)                      | d)                    | Yes  |   |
| e)                      | e)                    | Yes  |   |
| f)                      | f)                    | a mine, quarry or other place of extraction of natural resources   |   |
|                         |                       | a building site or construction or assembly project which exists for more than six months  |   |
| 3                       |                       |  |   |
|                         | 3                     | An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if   |   |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | United Kingdom  | Switzerland   |
|-------------------------|-----------------------|---|---|
|                         | a)                    | it carries on supervisory activities in that other Contracting State for more than six months in connection with a construction, installation or assembly project which is being undertaken in that other Contracting State |   |
|                         | b)                    |   |   |
|                         |                       | it carries on the activity of providing the services within that other Contracting State of public entertainers or athletes referred to in Article 18   |   |
| 4                       | 4                     | Yes   |   |
| a)                      |                       | Yes   |   |
|                         | a)                    |   |   |
| b)                      |                       | Yes   |   |
|                         | b)                    |   |   |
| c)                      | c)                    | Yes   |   |
| d)                      | d)                    | Yes   | the fact that an enterprise of one of the territories maintains in the other territory a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute that fixed place of business a permanent establishment of the enterprise |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | United Kingdom  | Switzerland   |
|-------------------------|-----------------------|---|---|
| e)                      | e)                    | the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise  |   |
| f)                      | f)                    |   |   |
| 5                       |                       |   |   |
|                         | 5                     | A person acting in a Contracting State on behalf of an enterprise of the other Contracting State--other than an agent of an independent status to whom the provisions of paragraph (6) of this Article apply--shall be deemed to be a permanent establishment in the first-mentioned State if |   |
|                         | a)                    | he has, and habitually exercises in that State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise  | but does not include an agency unless the agent has and habitually exercises a general authority to negotiate and conclude contracts on behalf of an enterprise of one of the territories |
|                         | b)                    |   |   |
|                         | 6                     |   |   |
| 6                       |                       |   |   |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | United Kingdom | Switzerland   |
|-------------------------|-----------------------|----------------|---|
|                         | 7                     | Yes            | an enterprise of one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on business dealings in that other territory through a bona fide broker, general commission agent or other independent agent acting in the ordinary course of his business as such |
| 7                       | 8                     | Yes            | Yes   |

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Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Poland |
|-------------------------|-----------------------|--------|
| 1                       | 1                     | Yes    |
| 2                       | 2                     | Yes    |
| a)                      | a)                    | Yes    |
| b)                      | b)                    | Yes    |
| c)                      | c)                    | Yes    |
| d)                      | d)                    | Yes    |
| e)                      | e)                    | Yes    |
| f)                      | f)                    | Yes    |
| 3                       |                       | Yes    |
|                         | 3                     |        |
|                         | a)                    |        |
|                         | b)                    |        |
| 4                       | 4                     | Yes    |
| a)                      |                       | Yes    |
|                         | a)                    |        |
| b)                      |                       | Yes    |
|                         | b)                    |        |
| c)                      | c)                    | Yes    |
| d)                      | d)                    | Yes    |
| e)                      | e)                    | Yes    |

Appendix F: Zambia DTAs

| OECD MTC<br>(Article 5) | UN MTC<br>(Article 5) | Poland   |
|-------------------------|-----------------------|--|
| f)                      | f)                    | Yes  |
| 5                       |                       | A person acting in a Contracting State on behalf of an enterprise of the other Contracting State -- other than an agent of an independent status to whom the provisions of paragraph 6 of this Article apply -- shall be deemed to be a permanent establishment in the first-mentioned State if he has, and habitually exercises in that State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise |
|                         | 5                     |  |
|                         | a)                    |  |
|                         | b)                    |  |
|                         | 6                     |  |
| 6                       |                       | Yes  |
|                         | 7                     |  |
| 7                       | 8                     | Yes  |

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