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OECD'S Action plan on Tax Base Erosion and Profit Shifting (BEPS); Emphasis on treaty abuse and avoidance of Permanent Establishments and Multilateral Instruments for the cases study of Uganda*

Plan de acción de la OCDE sobre la erosión de la base tributaria y el cambio en las ganancias (BEPS); énfasis en el abuso de tratados y la evitación de Establecimientos Permanentes e Instrumentos Multilaterales para el estudio de casos de Uganda

BUSINGYE AGNES[1]

Abstract

In this article, the author deals with the question; What should be Uganda's response following the Organisation for Economic Co-operation and Development (OECD)'s[2] Base Erosion and Profit Shifting (BEPS) on Action 6 (Prevent treaty abuse), Action 7

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[2] The mission of the Organisation for Economic Co-operation and Development (OECD) is to promote policies that will improve the economic and social well-being of people around the world. (n.d.). About the OECD - OECD.org. Retrieved September 21, 2018, from http://www.oecd.org/about.

(Prevent artificial avoidance) of the Permanent Establishment (PE) Status and Action 15 (Development of Multilateral Instruments (MLI) to modify Bilateral Tax Treaty.

In answering this question, this article considers; Uganda's existing tax treaties, lessons drawn from BEPS Action 6, What a Permanent Establishment (PE) means, The existing avoidance strategies of a PE, lessons drawn from BEPS Action 7, should Uganda sign or not sign the Multilateral Instruments (MLI).

The OECD released a report on G20 Base Erosion and Profit Shifting (BEPS) which comprises of 15 Action Plans to address Base Erosion and Profit Shifting[3]. All the 15 Action Plans were set out to equip governments to domesticate international instruments in order to address tax avoidance while ensuring that profits are taxed where economic activities that generate profits are performed, and where value is created. All these BEPS 15 Action plans are broad in nature, and therefore, this article only deals with BEPS Actions 6, 7 and 15[4].

Resumen

En este artículo, el autor aborda la cuestión ¿Cuál debería ser la respuesta de Uganda después de la Erosión de Base y Cambio de Beneficios (BEPS) de la Organización para la Cooperación y el Desarrollo Económicos (OCDE) en la Acción 6 (Prevenir el abuso de los tratados), Acción 7 (Prevenir la evitación artificial) del Establecimiento Permanente (PE), Estado y Acción 15 (Desarrollo de Instrumentos Multilaterales (MLI) para modificar el Tratado Fiscal Bilateral?

En respuesta a esta pregunta, este artículo considera los tratados tributarios existentes de Uganda, lecciones extraídas de la Acción 6 de BEPS, lo que significa un Establecimiento Permanente (PE), las estrategias de evitación existentes de una EP, lecciones extraídas de la Acción 7 de BEPS y, en ese sentido, si debe Uganda firmar o no los Instrumentos Multilaterales (MLI).

La OCDE publicó un informe sobre la erosión de la base del G20 y el cambio de ganancias (BEPS), que comprende 15 planes de acción para abordar la erosión de la base y el cambio de ganancias. Todos los 15 planes de acción se establecieron para equipar a los gobiernos para domesticar los instrumentos internacionales con el fin de abordar la evasión fiscal, al tiempo que se garantiza que los beneficios se gravan donde se realizan las actividades económicas que generan beneficios y donde se crea el valor. Todos estos planes de acción de BEPS 15 son amplios y, por lo tanto, este artículo solo trata sobre las acciones 6, 7 y 15 de BEPS.

I. BEPS Action 6: Prevent treaty abuse

A. Tax treaties: Introduction

The background of tax treaties is that they are drafted based on two models; the OECD and UN model. A general examination of the two models show that; the OECD model was

[3] (n.d.). Action Plan on Base Erosion and Profit Shifting - OECD.org. Retrieved September 21, 2018, from https://www.oecd.org/ctp/BEPSActionPlan.pdf.
[4] See Sections 2, 3 and 4 respectively of this article.

drafted exclusively by developed countries from Europe and North American to use among themselves, while the UN model was developed specifically with an orientation towards developing nations like Uganda. The two models have significant common provisions, but in general comparative terms, the OECD model accords greater weight to the residence principal which is favoured by the developed countries; while the UN model leans towards the source principle and favours a greater retention of taxing rights by the country where the income is sourced, as compared to the country where the taxpayer is tax resident. This hence explains why developing countries prefer the UN model whose provisions have a lower or no threshold requirement for source country taxation. In order to mitigate the effects of international double taxation, countries normally enter into Double Taxation Agreements (DTAs) or sign tax treaties for the avoidance of double taxation on a bilateral basis. The Double Tax Treaties generally avoid and reduce the burden of juridical double taxation "in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods (R.Rohatgi, 2005).

However, studies have revealed that over the years these DTAs no longer serve their purpose of avoidance of double taxation instead they are used as conduits for tax avoidance by Multinational companies (MNC) across tax jurisdictions. For instance a taxpayer (MNCs) get involved in 'treaty shopping' this term refers to the use of tax treaties by the residents of a non - treaty state to obtain treaty benefits that are not supposed to be availed to them[5]. Taxpayers engaged in treaty shopping and other treaty abuse strategies undermine tax sovereignty by claiming treaty benefits in situations, where these benefits were not intended to be granted, thereby depriving of countries of tax revenues[6]. Treaty shopping is undesirable as it can be used to reduce exposure to withholding taxes where a taxpayer wants to invest in a country which does not have a treaty with his country of residence.

The general relationship between a Tax Treaty and the Domestic Law is that a term defined in a DTA takes precedence over a similar term in the tax law of a contracting state. The terms not defined have a meaning which it has under the Tax Law of a contracting state[7].

In this respect, Sections 88(1) of Uganda's Income Tax Act articulates that international agreements between the government of Uganda and the government of a foreign country shall have effect in response to the agreement that prevails over the provisions of the Act to the extent to which the terms

[5] (n.d.). The Improper Use of Tax Treaties - GBV. Retrieved September 21, 2018, from http://www.gbv.de/dms/spk/sbb/recht/toc/272359920.pdf
[6] (2015, October 5). Preventing the Granting of Treaty Benefits in Inappropriate - OECD.org. Retrieved August 04, 2018, from http://www.oecd.org/tax/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report-9789264241695-en.htm
[7] (2012, October 19). The Income Tax Act Cap.340 4 - Uganda Revenue Authority. Retrieved August 16, 2018, from https://www.ura.go.ug/Resources/webuploads/INLB/DT%20Laws%202014.pdf

of the agreement are inconsistent with the provisions of the Act[8].

As at August 2018, Uganda has 9 (nine) treaties in force with countries; Zambia, UK, Italy, South Africa, Denmark, Norway, Mauritius, India and Netherlands. Uganda is also a member of the East African Community (EAC), the Common Market for Eastern and Southern Africa (**COMESA**) and both of which have model tax treaties. An interview done with the Ministry of Finance officials September 2014 suggests that, in the treaty negotiations, Uganda has generally followed the UN model tax convention[9] (Martin and Jalia 2016). As earlier mentioned above, the UN model is described in its title as a model for treaties between developed and developing countries[10].

A research study conducted by SEATINI and ActionAid Uganda in 2014, indicated that some of these tax treaties have made Uganda vulnerable to treaty abuse and loss of revenue. In the same study, it is also mentioned that it has been a long time since these treaties were reviewed to put into the consideration of the emerging economic trends in Uganda such as oil and gas, regional integration, cross-border transactions, transfer pricing rules among others. In this context, in June 2014, Uganda's Ministry of Finance, Planning and Economic Development (MoFPED) announced the suspension of the new treaties negotiations and called for a review of its tax treaty network[11]. This review presents an opportunity for Uganda to formulate a clear, evidence-based approach to tax treaties, beginning by asking questions that African countries seem rarely to have posed; what effect do Uganda's tax treaties have on tax revenue[12]. This leads to the next discussion, the factors that give support to treaty abuse for the case study of Uganda[13].

B. Factors that give support to treaty abuse in Uganda

2.2.1 Tax treaties with low tax jurisdictions -Low or zero tax withholding tax rates

As earlier noted, tax treaties set maximum rates at which withholding taxes can be levied on cross-border payments, especially on dividends, interest, royalties and management or technical service fees. Uganda has indeed been successful at maintaining the right to levy a withholding tax on management fees paid to foreign companies, and the other withholding taxes have historically compared well to those of many other African countries (Martin & Jalia, 2016). In

[8] (2012, October 19). The Income Tax Act Cap.340 4 - Uganda Revenue Authority. Retrieved August 16, 2018, from https://www.ura.go.ug/Resources/webuploads/INLB/DT%20Laws%202014.pdf
[9] (n.d.). A review of Uganda's tax treaties and recommendations for action. Retrieved September 21, 2018, from http://eprints.lse.ac.uk/67868/1/Hearson_A_Review_of_Uganda_Tax.pdf
[10] (n.d.). A review of Uganda's tax treaties and recommendations for action. Retrieved September 21, 2018, from http://eprints.lse.ac.uk/67868/1/Hearson_A_Review_of_Uganda_Tax.pdf
[11] (2014, June 6). Govt suspends Double Taxation pacts - Daily Monitor. Retrieved August 16, 2018, from http://www.monitor.co.ug/Business/Govt-suspends-Double-Taxation-pacts/688322-2338432-dkw4jwz/index.html
[12] (n.d.). A review of Uganda's tax treaties and recommendations for action. Retrieved August 16, 2018, from http://eprints.lse.ac.uk/67868/1/Hearson_A_Review_of_Uganda_Tax.pdf
[13] see the next sections 2.2 of this article.

Uganda's tax code, these payments are all taxed at 15%, however, these tax rates have trended down since the first treaty with the UK, and in particular, in the more recent treaties with Uganda - Netherlands Income Tax treaty signed in 2004[14] (WHT rate at zero , 15 % on dividend, and No WHT on Management fees, 10% on interest and 10% on royalties); Uganda -Belgium Income Tax treaty signed in 2007 (WHT rate at 5% on dividend, 10% on management fees, 10% on interest 10% on royalties); and Uganda and China Income Tax treaty signed in 2012[15] (7.5% on dividend, No WHT on management fees, 10% on interest, 10% on royalties) (Martin and Jalia 2016). In general, Uganda's treaties set maximum rates that are below the rates in its domestic law.

As a result, this has contributed to tax revenues foregone by Uganda due to the reduced dividend and interest withholding tax rates as stipulated by these tax treaties. According to the International Monetary Fund (IMF) 2014 report, such revenue forgone by Uganda in figures is the Dutch treaty may dwarf all others, with a cost of between 22 billion and 63 billion shillings per year (around US $ 8 Million to US $ 24 Million) and the Mauritius treaty comes to close at 2.6 billion shillings (about US $ 1 Million) (Martin and Jalia 2016). These figures exclude the cost of lower withholding taxes on royalties and management fees, where data is not available, but which is likely to create significant further costs. Furthermore, a Ugandan Finance Ministry official once expressed that "*a lot of money was flying out through management fees"* (Martin & Jalia 2016).

More so, a general observation was made by A.W. Oguttu 2016 that tax treaties in African states that comprise of low-tax jurisdictions can be abused as part of sophisticated tax planning to frustrate the legislative tax claims of African states. The major concern is the low or zero treaty withholding tax rates agreed to in respect of dividends, interest and management fees payable by Multinational Enterprises (MNEs) which are also often used for treaty shopping purposes. Most treaty shopping schemes in Africa involve companies registered in Mauritius under the Global Business Licence 1 regime[16].

Treaty shopping refers to the practice of establishing a conduit company in a country with a favourable network of tax treaties, and usually a low effective tax rate, to take advantage of the benefits if those treaties rather than the less generous terms (if there is a treaty at all) negotiated between the investors home country rather than the destination of their investment (Cooper 2014).

Further evidence in Uganda of significant revenue loss due to preventable treaty shopping is stipulated by Martin and Jalia,

[14] (2007, July 1). netherlands - uganda income tax treaty ... - Uganda Revenue Authority. Retrieved September 15, 2018, from https://www.ura.go.ug/openFile.do?path=//webupload//upload//download//staticContent//RGTMENU//458//462_Netherlands-Uganda_DTA.pdf

[15] (n.d.). AGREEMENT. Retrieved September 15, 2018, from http://www.chinatax.gov.cn/n810341/n810770/c1152919/part/1152921.pdf

[16] (n.d.). Basic International Taxation Vol I by Roy Rohatgi - The Africa Tax .... Retrieved September 15, 2018, from http://www.africataxjournal.com/wp-content/uploads/2018/04/Basic-International-Taxation-Vol-I-by-Roy-Rohatgi-eBook.pdf

2016 as they note that the vast majority if investment from the Netherlands into uganda appears not to originate from, given that it enables a zero rate on dividends (Martin and Jalia, 2016).

Furthermore, according to an interview conducted by Martin and Jalia 2016, a Uganda Revenue Authority (URA) official stated that *"the ones claiming (reduced taxation) under the DTAs are many, about one per day. The worst culprits are mauritius and a lot of companies trading in uganda have headquarters in Mauritius"*. With Uganda's booming mobile communications and oil, gas sector, this has attracted several companies that have a treaty with Uganda but have been structured via third countries with more favourable treaties, for example, Bahti Airtel is headquartered in India, but its investment is structured via the Netherlands, MTN is headquartered in South Africa with its investment structured via Mauritius (Kalinaki 2014 & MTN Group Plc 2014).

2.2.2 Tax treaties with low tax jurisdictions -Avoidance of capital gains tax

Uganda levies capital gains tax. The Income Tax Act of Uganda states that the income of the immovable property is taxed where it is situated and a credit is allowed in the country of residence[17]. The rules of immovable property vary from DTA to DTA.

This article focuses its analysis on the Double Taxation Agreement (DTA) between Uganda and Netherlands. The treaty was signed on 31 August 2004 and came into force on the 1 January 2007 in the Netherlands, and 1 July 2007 in Uganda.

In this treaty context, Article 13(1) of this treaty states that gains derived by a resident of a contracting state from the alienation of immovable property referred to in Article 6 and situated in the other contracting state may be taxed in that other State[18]. Article 13(2) of such treaty gives the source state the right to tax capital gains derived from a Permanent Establishment (PE) located in that state.

Article 13(3) is a special rule in respect of gains derived from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft.

Article 13(4) of this treaty looks at gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3, shall be taxable only in the Contracting State of which the alienator is a resident, article 13(5) of this treaty states that Notwithstanding the provisions of paragraph 4, a Contracting State may, in accordance with its own laws; including the interpretation of the term "alienation", levy tax on gains derived by an individual who is a resident of the other Contracting State from the alienation of shares or "jouissance" shares or "jouissance" rights in a company whose capital is divided into shares and which, under the laws of the

[17] (2012, October 19). The Income Tax Act Cap.340 4 - Uganda Revenue Authority. Retrieved August 16, 2018, from https://www.ura.go.ug/Resources/webuploads/INLB/DT%20Laws%202014.pdf
[18] (2007, July 1). netherlands - uganda income tax treaty ... - Uganda Revenue Authority. Retrieved August 16, 2018, from https://www.ura.go.ug/openFile.do?path=//webupload//upload//download//staticContent//RGTMENU//458//462_Netherlands-Uganda_DTA.pdf

first-mentioned Contracting State, is a resident of that State, and from the alienation of part of the rights attached to the said shares or rights, if that individual holds shares in the issued capital of a particular class of shares in that company.

As later will be discussed under sections 2.3 of this article, some of the anti-avoidance rules that Uganda should be incorporated in all of its tax treaties.

In general, most African countries do not include some of the anti-avoidance rules in their tax treaties. This has led to Multinational Enterprises (MNEs) incorporating conduit companies in low- tax jurisdictions like in Mauritius and then later are used to dispose-off their shares in assets located in an African state so that these sale proceeds appear to be derived from such jurisdictions hence the avoidance of capital gains tax[19].

There are several MNEs in Uganda that have changed ownership, sold off their shares and the resultant proceeds of this disposals have not been taxed by Uganda Revenue Authority (URA); the likes of Shell Uganda Limited to Vivo Energy, Zain Uganda to Celtel Uganda Limited. This is further illustrated well in the case of Celtel Uganda Limited vs Uganda Revenue Authority (Civil Appeal No.22 Of 2006, 2010)[20]. The facts of the case was that; specific reference is made to a case Zain International BV vs the commissioner general of URA, where Zain Africa BV sold its shares in Zain Africa to Bharti Airtel international. All the three companies are incorporated and resident in the Netherlands. Zain Africa BV had equity interests in 26 Dutch companies among which was Celtel Uganda holding BV that owned 99.99% of Celtel Uganda Ltd.

The URA issued assessments arising out of a disposal of shares, which were indirectly held by Zain international BV in Celtel Uganda ltd. Zain BV applied to court seeking a declaration that the URA lacked jurisdiction to tax since Zain BV was resident in the Netherlands. They argued that even if taxation was allowed under domestic law, under the Netherlands-Uganda tax treaty, Uganda had no taxing right (Commissioner General URA Vs Zain International BV, 2014; Kalinaki, 2014).

The court of appeal ruled that Uganda had the jurisdiction to tax citing section 88(5) of Uganda's Income-tax Act, which provides that:

> "Where an international agreement provides that income derived from sources in Uganda is exempt from Ugandan tax or is subject to a reduction in the rate of Ugandan tax, the benefit of that exemption or reduction is not available to any person who, for the purposes of the agreement, is a resident of the other contracting state where

[19] (2016, May 23). Africa/International/OECD - OECD's Action Plan on Tax Base Erosion .... Retrieved August 18, 2018, from https://www.ibfd.org/IBFD-Products/Journal-Articles/Bulletin-for-International-Taxation/collections/bit/html/bit_2016_06_int_1.html

[20] (2011, December 10). ZAIN INTERNATIONAL BV VS COMMISSIONER GENERAL AND URA. Retrieved August 18, 2018, from http://www.ugandalawlibrary.com/ull/lawlib/case_display.asp?Key=7058&parties=ZAIN+INTERNATIONAL+B+V+VS+COMMISSIONER+GENERAL+AND+URA&judge=Hon+Justice+Mwangushya+Eldad&case_number=HCT-00-CV-MC-0096-2011+&case_date=10%2F12%2F2011+12%3A00%3A00+PM

50% or more of the underlying ownership of that person is held by an individual or individuals who are not residents of that other Contracting State for the purposes of the agreement."

This provision deprives Uganda to tax gains realised by the foreign investors o sales of Uganda - based assets.

In Uganda's tax policy changes 2018/2019 which came in force on the 1st of July 2018, there has been an amendment of Sections 79 of the Income Tax Act by inserting Sections 79(ga) that reads '*derived from a direct or indirect changes of ownership by fifty percent or more of a person other than an individual, a government, a political subdivision of a government and a listed institution located in Uganda*'

1. Abuse of tax sparing provisions in the tax treaties

It was noted that treaty shopping is encouraged by the tax sparing provisions that many Africans countries apply in an effort to encourage investors[21]. A research study conducted by SEATINI and ActionAid Uganda in 2014, quotes Uganda's Minister for Finance, Planning and Economic Development Mayanja Nkangi in 1993 announcing that the government would embark on negotiating double taxation agreements with identified major trading partner. The minister had stated that the purpose of the treaties was to ensure that the effectiveness of current incentives is not eroded by the absence of complementary tax treaties because in the absence of any complementary tax holidays with the home countries foreign investors, the revenue foregone by reducing a company's tax liability in uganda represents a revenue gain by the ministry of finance in the home country.

What could possibly be inclined to such reasoning was that by including the tax sparing provisions in a treaty, the treaty partner would agree to a credit for taxes due but foregone by Uganda due to investment incentives, thus ensuring that the benefit from the tax incentives accrued to the multinational investors at whom they were targeted. Uganda's legislation makes it forthwise that major investment partners' foreign income is exempted from taxation. Hence, the lower withholding tax and other restrictions on source taxation in uganda's treaties effectively act as tax incentives, lowering the overall cost for firms from these countries of investment in Uganda[22].

Martin Hearson and Jalia Kangave (2016) in one of their interviews quotes a Ugandan government official to have stated that nobody comes to invest in Uganda because of the existence of the tax treaty. Uganda's second biggest source of investments was from Australia which has no treaty with Uganda. The current new investments in Uganda's oil industry have largely come from French

[21] (2001, July 1). Tax incentives for foreign direct investment - part I : recent trends and .... Retrieved August 18, 2018, from https://www.ibfd.org/IBFD-Products/Journal-Articles/Bulletin-for-International-Taxation/collections/bit/pdf/bifd070101.pdf

[22] (n.d.). A Review of Uganda's Tax Treaties and Recommendations for Action .... Retrieved August 18, 2018, from http://www.ictd.ac/publication/a-review-of-uganda-s-tax-treaties-and-recommendations-for-action/

company Total, and the Chinese National offshore oil corporation and neither based countries have a tax treaty with Uganda. Later on, in June 2014, Uganda spendended all its ongoing treaty negotiations. This implies that the country should have by now be asking a question reflected upon by Martin Hearson (2014) "How much should Uganda constrain it's right to levy tax now and in the future in reference to the current economic situation and economic policy".

C. OECD BEPS initiative recommendations on countering treaty abuse and lessons drawn Uganda

The final report on BEPS Action 6 of 2015[23] identifies treaty abuse, and in particular treaty shopping as one of the most important BEPS concerns. Action 6 (prevent treaty abuse) describes the work to be undertaken in this area. This 2015 final report is organised into three Sections, Section A included anti-abuse provisions that provided safeguards against the abuse of treaty provisions, Sections B contains revisions to the titles and preamble of the OECD Model tax convention to clarify that the intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion and avoidance including through treaty shopping arrangements, and Sections C identifies tax policy considerations relevant to the decision to enter into a tax treaty with another country.

In the final report on Action 6 of 2015, the OECD makes recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances. In order to determine the best way to prevent the granting of treaty benefits in inappropriate circumstances, the OECD found it useful to distinguish between two types of cases that is;

- Cases were a person tries to abuse the provisions of the domestic laws using treaty benefits. OECD Recommends that in these cases, treaty shopping must be addressed through domestic anti abuse rules and;
- Cases where a person tries to circumvent limitations provided by the treaty itself, the OECD Recommends that this should be addressed through treaty anti- abuse rules using the following three approaches as explained further below;

The first approach is a clear statement that the contracting states, when entering into a treaty, wish to prevent tax avoidance and, in particular, intend to avoid creating opportunities for treaty shopping will be included in tax treaties.

The second approach is a specific anti-abuse rule based on the Limitation On Benefits (LOB) provisions included in treaties concluded by the United States and a few other countries (the LOB rule) will be

[23] (2015, October 5). Preventing the Granting of Treaty Benefits in Inappropriate - OECD.org. Retrieved September 15, 2018, from http://www.oecd.org/tax/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report-9789264241695-en.htm

included in the OECD Model. Such a specific rule will address a large number of treaty shopping situations based on the legal nature, ownership in and general activities of the residents of a contracting states.

The third approach addresses other forms of treaty abuse, including treaty shopping situations that would not be covered by the LOB rule (such as certain conduit financing arrangements), tax treaties should include a more general anti-abuse rule based on the Principal Purpose Test (PPT) rule. This rule is intended to provide the clear statement that the contracting states intend to deny the application of the provisions of their tax treaties when transactions or arrangements are entered into to obtain the benefits of those provisions in inappropriate circumstances.

The OECD acknowledges that both the LOB and PPT rules each have strength and weaknesses and may not be appropriate for all countries. The OECD further advises that these rules may be adapted to specificities of individual countries and the circumstances of the negotiation of tax treaties. For instance, some countries may have domestic anti-abuse rules, or the courts of some countries may have developed various interpretative tools that effectively address various forms of domestic law and treaty abuses, and these countries might not require the general treaty anti-abuse provision.

The OECD recommends at a minimum; however, countries should agree to include in their tax treaties an express statement that their intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. OECD report further mentions that this intention could be implemented by either,

- using the combined LOB and PPT approaches earlier described in this section,
- the inclusion of the PPT rule, or
- the inclusion of the LOB rule, supplemented by a mechanism, such as restricted PPT rule for conduit financing arrangements or domestic anti-abuse rules or judicial doctrines that would realise a similar result that would counter conduit arrangements that were not already dealt with in the tax treaties.

The Discussion Draft on Action 6 of 2014 describes the terms of LOB provisions and these include,

- A resident of a contracting state should not be entitled to treaty benefits unless it is a qualified person, which is defined by reference to the nature or attributes of various categories of persons.
- A person is entitled to the benefits of the tax treaty, even if it is not a qualified person if, subject to certain exceptions, the relevant income is derived in connection with the active conduct of a trade or business in that person's residence state. This derivative benefits test permits certain entities owned by the residents of other states to obtain treaty benefits that these residents would have obtained had they invested directly.
- The discretionary relief in that, even if a taxpayer does not qualify for tax benefits, the taxpayer may request to be treated as a qualified person. In this

case, the competent authority of a contracting state may grant treaty benefits where the other provisions of the LOB provision would otherwise deny these benefits.

Essentially, the LOB provision requires that treaty benefits, such as reduced withholding rates, are available only to persons that meet the specific tests of having some genuine presence in the treaty state.

For african countries to effectively encounter treaty shopping, it is important that the correct provisions, depending on the specific circumstances, are enacted. In principle, African countries should ensure that the preamble to future tax treaties that they negotiate or older tax treaties that they renegotiate should refer to the fact that the purpose of the tax treaty is not to give rise to opportunities for non-taxation or reduced taxation by way of tax evasion or avoidance, including through treaty shopping.

It should be noted that some African states like Uganda, show a limited form of LOB provisions in their domestic tax laws. In particular Section 88(5) of the Ugandan Income Tax Act (Chapter 340) states that the benefits of a tax treaty are not available to a resident enterprise in a partner state where 50% or more of the underlying ownership of that enterprise in a partner state is controlled by individuals who are not resident in the partner state. The application of this domestic provision to a tax treaty, where there is no such provision in the tax treaty, may give rise to disputes as sections 88(2) of the Uganda Income Tax Act clearly provides that international agreement entered into by the government of Uganda with any foreign state prevails over the provisions of the Uganda income tax Act. In this respect, IMF[24] advises that if developing countries adopt LOB provision in their domestic law, they should also adopt the provision in their tax treaty to prevent concerns regarding treaty override arising.

In the similar respect, the new amendments of Uganda's Income tax that were effective July 2016 substituted Sections 88(5) of Uganda's Income Tax Act and now reads;

> Except for a public listed company, where an international agreement concluded by the government of Uganda with another contracting state provides that incomes derived by a person resident in such other contracting state from sources in uganda is exempt from ugandan tax or is subject to a reduction in the rate of, ugandan tax, the benefit of that exemption or reduction shall not be available to any person who;
>
> a) receives the income in capacity which is other than that of a beneficial owner , within the meaning accorded to that term by the relevant international agreement, and who does not have full and unrestricted ability to enjoy that income and to determine its future use and;
>
> b) does not possess economic substance in the country of residence.

[24] (n.d.). IMF -- International Monetary Fund Home .... Retrieved September 21, 2018, from http://www.imf.org/

PPT rule, as earlier stated above , the minimum standard to protect against treaty shopping was the inclusion in the tax treaties a PPT rule alone or a PPT rule in conjunction with an LOB rule. The use of a PPT test as a general measure to counter treaty shopping, this could be possible for african countries, especially those that do not have the **g**eneral anti-avoidance rule (GAARs) that could serve a similar purpose. In this regards , Ghana has a GAAR under Sections 34 of the income tax act 896 of 2015 which clearly defines tax avoidance to include any arrangement whose main purpose is to reduce or avoid tax liability[25].

The greatest influence of the treaty PPT test is seen in the United Kingdom, where it requires that treaty benefits are denied if one of the principal purposes of the transaction is to avoid taxation by taking advantage of treaty benefits. In addition, Netherlands over the last two years has changed its treaty policy with regards to developing countries, which revealed a proactive approach to use PPT to counter treaty abuse. The Netherlands has also renegotiated tax treaties with 23 other developing countries among which include Ethiopia, Ghana, Kenya and Zambia, each of which contains a PPT anti-abuse provision[26].

It should, however, be noted that the tests such as the PPT rule which rely upon the concepts of *purpose* and *intention* are normally difficult for tax administrations to administer and for taxpayers to comply with, as they require proof of intent. It is on this note that African countries should rely on the LOB provisions to counter the abuse of tax treaties. Furthermore, the OECD recommends african countries for the use of two specific anti- abuse provisions in regards to certain types of income that is should;

a. Ensure that tax treaties they conclude contain the equivalent of article 17(2) of the both the OECD and UN Model, which is aimed at personal service companies used by entertainers and athletes to avoid source state taxation;
b. Include the equivalent of article 13(4) of the OECD model in the tax treaties that they conclude, which allows states to tax gains derived from the sale of shares in real estate holding companies to counter the use of such companies in avoiding taxation of gains on the underlying real estate. In this regards, If Uganda had had such provision in the netherlands Uganda Income tax treaty (2004), it would have had a clear cut claim in Zain International BV (2011).

For African countries that wish to expand their treaty networks, but are not sure of whether to conclude a tax treaty or terminate the abusive tax treaties that are in place, the OECD BEPS initiatives has identified tax policy considerations that states should consider before deciding to conclude a tax treaty with a given state or to terminate a tax treaty if changes to the domestic law of a treaty

[25] (n.d.). income tax act, 2015 act 896 - GRA. Retrieved September 17, 2018, from http://www.gra.gov.gh/docs/info/dtrd/INCOME%20TAX%20ACT%202015%20(ACT%20896).pdf
[26] (2015, June 23). Netherlands renegotiates tax treaties with developing nations to add .... Retrieved September 16, 2018, from https://mnetax.com/netherlands-renegotiates-tax-treaties-ethiopia-ghana-kenya-zambia-to-add-antiabuse-clause-hopes-add-clause-23-treaties-9530

partner raise concerns regarding those base erosion and profit shifting OECD. The OECD, however, recognises that there may be non-tax factors that can result in the conclusion of a tax treaty and that each country has a sovereign right to decide to conclude a tax treaty with any country with which it decides to do so.

In 2014, Uganda announced that it had suspended all its ongoing treaty negotiations pending a review of the treaty terms that it should seek in such negotiations[27]. This gives Uganda a good opportunity to re-evaluate all its tax treaties concluded to determine those that give rise to risks of base erosion and profit shifting and especially those that lack anti-abuse provisions, those with zero or low withholding tax rates and those that are open-ended tax sparing provisions[28]. Such tax treaties should be renegotiated to ensure an improved redistribution of taxing rights. Taking into account of the cost, and the time involved in such negotiations, African countries like Uganda may have to consider to adhering to the Multilateral Instrument proposed by the OECD under Action 15 (this will be discussed in detail under Sections 4 of this article).

In summary, the key issues that Uganda can draw from this BEPS Action **6:** Prevent treaty abuse is;

- To have the general anti-avoidance rule (GAARs) in their domestic provisions like it's for the case of Ghana and many other countries. Moreso, these GAARs should be well aligned with the recommended treaty PPT rule so that the possibility of any conflict is removed.
- To reevaluate all its tax treaties concluded to determine those that give rise to risks of base erosion and profit shifting and especially those that lack anti-abuse provisions, those with zero or no WHT rates and those that are open-ended tax sparing provisions.

II. BEPS Action 7: Prevent artificial avoidance of the Permanent Establishment (PE) Status

In September 2017, OECD issued a public discussion draft titled Additional guidance on attribution of profits to Permanent Establishments (Discussion Draft) that mandated the development of changes to the definition of 'Permanent Establishment' ('PE') in article 5 of the OECD Model Tax Convention ('MTC') to prevent the artificial avoidance of PE status through the use of ***commissionaire*** arrangements to avoid Article 5(5), and through reliance on the specific activity exemptions of Article 5(4).

The question of whether or not a PE exists in a country is a common tax treaty issue that most tax authorities must deal with when examining International Taxation matters. Under virtually all bilateral tax treaties, business profits earned by the resident of one

[27] (2014, June 6). Govt suspends Double Taxation pacts - Daily Monitor. Retrieved September 16, 2018, from http://www.monitor.co.ug/Business/Govt-suspends-Double-Taxation-pacts/688322-2338432-dkw4jwz/index.html

[28] (n.d.). A review of Uganda's tax treaties and recommendations for action. Retrieved September 16, 2018, from http://eprints.lse.ac.uk/67868/1/Hearson_A_Review_of_Uganda_Tax.pdf

country are taxable in the other source country only if the business is carried on through a PE located in that other country and the profits attributable to the PE, for example, the requirement for a PE is a minimum threshold that must be satisfied before a source country ca tax residents of the other treaty country on their business profits derived from that country[29]. It's important for countries to be aware of the differences in the definition of a PE as per the OECD and UN model.

The OECD model defines a PE as a fixed place of business through which the business of an enterprise is wholly or partly carried on, and includes a place of management, branch, office, factory, workshop, mine, well, quarry; as well as building sites and construction or installation projects which last for more than a given number of months. The OECD model provides a twelve month test period for building or construction sites, while the UN model provides for a six months test period and extends the definition to cover assembly projects, as well as supervisory activities in connection with building sites and construction, assembly or installation projects. The UN model also adds the furnishing of services by an enterprise through employees or other personnel as constituting a PE if such activities continue for a total of more than 183 days in any twelve-month period commencing or ending in the relevant fiscal year. There general exceptions of this rule of the amount of time for services like shipping and air transport, it is argued that the provisions of services should be treated the same way as other business activities and therefore constitutes a PE for purposes of a DTA.

This article also looks at the OECD BEPS initiatives to counter avoidance of a PE status and also give a highlight of what Uganda domestic tax laws can draw these initiatives.

In Uganda's domestic tax laws, PE definition does not differ much from the UN model definition. Under the Income Tax Act of Uganda, a branch is defined as; a taxable entity to mean (a) permanent establishment, in the case of a treaty signed between Uganda and another country; or (b) a definition found in section 78 of the Income tax act.

This Section 78 of Uganda's Income Tax Act defines a branch to mean

> A place where a person carries on business and includes; A place where a person carries on business through an agent, other that a general agent of independent status acting in the ordinary course of business as such; A place where a person has , is using or is installing substantial equipment or substantial machinery for ninety days or more; or A place where person is engaged in a construction, assembly or installation project for 90 days or more , including a place where a person is conducting a supervisory activities in relation to such a project;'

The OECD noted that the concept of a PE has been subjected to criticism from both MNEs that abuse it by compartmentalising it and developing countries that wish to extend it so as to reclaim their tax jurisdiction. The

[29] (n.d.). Taxation of Income & Consumption in Uganda: the law and practice. Retrieved August 25, 2018, from http://catalogue.library.ucu.ac.ug/cgi-bin/koha/opac-detail.pl?biblionumber=46514

OECD also acknowledges that the current PE definition is insufficient to address base erosion and profit shifting strategies in the changing international environment, as its standards are ineffective in equably allocating taxing rights between source states and the residence states[30]. In general, the OECD's approach to addressing the base erosion and profit shifting concerns regarding PE is limited to; the concept of a PE which is largely based on physical presence in a state not putting in consideration of the existence of electronic business models where transactions can be carried out without physical presence, Article 7(2) of the OECD Model upholds the separate legal entity principle even though the current modern MNEs often operate as a single unified enterprises that are managed from a central location by managers who are responsible for the enterprise as a whole[31].

It has been widely reported that Multinational Enterprises (MNEs) have found it simple to avoid the creation of PE due to the narrow definition of a PE contained in the existing tax treaties in Uganda. Take an example of the DTA between Uganda and Netherlands, the treaty in the PE definition, it excludes activities of a PE which are 'preparatory or auxiliary nature', activities of storage or display of goods or merchandise and activities which involve 'collecting information' from taxation, among others. This hence restricts the amount of taxes that can be collected such PEs whose activities are excluded in the PE definition.

Uganda's economy is currently undertaking oil exploration activities which has attracted several MNEs from Netherlands and Denmark among others. The current concern in Uganda is on the taxation of these oil exploration activities. The treaty signed with Uganda and Netherlands include a special oil exploration PE to tax the profits from such activities, the threshold for which is a minimum presence in the country of thirty days. However, the risk here is that these oil service providers will always structure to avoid PE risk or status.

The two weakness identified in PE definition with in Uganda's tax treaties;

1. Firstly, the absence from most of them of the UN service PE provision, which expands the PE threshold to encompass service providers who are physically present in the country but do not operate from a 'fixed base';
2. Secondly, the weakness is in the length of time a construction site must be in place before it meets the PE definition that is six months construction however some chinese companies have proved that they can do things in three months (lesser period) (Martin and Jalia 2016).

[30] (2017, September 15). Base Erosion and Profit Shifting (BEPS) BEPS Action 7 ... - OECD.org. Retrieved August 25, 2018, from https://www.oecd.org/ctp/transfer-pricing/Compilation-public-comments-attribution-profits-to-permanent-establishments-2017.pdf

[31] (n.d.). Source versus Residence - All Arts Belastingadviseurs. Retrieved August 25, 2018, from http://www.allarts.nl/filelib/file/vienna-sofc-sandlermolenaar.pdf

A. OECD BEPS initiatives to counter avoidance of the PE status and lessons drawn Uganda

3.1.1 Countering avoidance of the status of a PE using commissionaire arrangement

The BEPS Action 7; 2015 Final report loosely defines A *commissionaire* arrangement as an arrangement through which a person sells products in a given State in its own name but on behalf of a foreign enterprise that is the owner of these products. Through such an arrangement, a foreign enterprise is able to sell its products in a State without having a permanent establishment to which such sales may be attributed for tax purposes; since the person that concludes the sales does not own the products that it sells, it cannot be taxed on the profits derived from such sales and may only be taxed on the remuneration that it receives for its services (usually a commission).

These commissionaire arrangements have been a major preoccupation of tax administrations in many countries, as shown by a number of cases dealing with such arrangements that are litigated in the OECD countries. In most of the cases that went to court, according to BEPS Action 7; 2015 Final report, the tax administration's arguments were rejected.

The October 2014 BEPS public discussion draft indicated that changes were needed to the wording of Art. 5(5) and 5(6) of the OECD Model in order to address *commissionaire* structures and similar arrangements. As a matter of policy, where the activities that an intermediary exercises in a country are intended to result in the regular conclusion of contracts to be performed by a foreign enterprise, that enterprise should be considered to have a sufficient taxable nexus in that country unless the intermediary is performing these activities in the course of an independent business[32]. Furthermore, the report on Action 7 recommends that; article 5(5) be amended to provide that, subject to Article 5(6), an enterprise has a PE in a contracting state where a person acts in that state on behalf of the enterprise ' and , in doing so, habitually concludes contracts, or habitually plays a principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise,' and the contracts are neither in the name of the enterprise, or for the transfer of goods or services by the enterprise; and article 5(6) to be amended to provide that, although a PE will not be deemed to exist under article 5(5) if the person acting in a contracting state for the enterprise is doing so in the ordinary course of its business as an independent agent, a person will not be considered to be an independent agent if it acts 'exclusively or almost exclusively on behalf if one or more enterprises to which it is closely related'[33].

[32] (2015, October 5). Preventing the Artificial Avoidance of Permanent Establishment Status .... Retrieved September 21, 2018, from http://www.oecd.org/ctp/preventing-the-artificial-avoidance-of-permanent-establishment-status-action-7-2015-final-report-9789264241220-en.htm

[33] (2017, September 15). BEPS Action 7 Additional Guidance on Attribution of Profits to .... Retrieved August 30, 2018, from https://www.oecd.org/tax/transfer-pricing/beps-discussion-draft-additional-guidance-attribution-of-profits-to-permanent-establishments.pdf

In the same report, OECD recommends that, as a matter of policy, where the activities that an intermediary exercises in a state are intended to result in the regular conclusion of contacts to be performed by the foreign enterprise, that enterprise should be considered to have a taxable presence in that state, unless the intermediary performs the activities in the course of an independent business.

3.1.2 Splitting of contracts by contractors to circumvent PE time limits

Article 5(3) of the OECD model provides for a special PE rule for construction , installation projects and building sites that last for more than 12 months period. In the action 7(2015 final report), It has been cited out that the twelve months threshold has given rise to abuses; it has sometimes been found that enterprises (maily contractors or subcontractors working on the continental shelf or engaged in activities connected with exploration and exploitation of the continental shelf) divided their contracts up into several parts, each covering a period less than twelve months and attributed to a different company which was , however, owned by the same group. In order to address these concerns, article 5 of the OECD Model (2014) recommends that such abuses can be countered by the application of the legislative or judicial anti- avoidance rules, countries concerned with this issue can adopt solutions in the framework of bilateral negotiations.

Article 5(3) of the UN models differs from the OECD model in that us covers not only building sites, construction and installation projects which are covered in article 5(3) of the OECD model, but also ' assembly projects or supervisory activities in connection therewith'. The time limit to avoid PE status is also restricted in the UN Model, in that such projects or activities constitute a PE if they last more than six months, in contract to the 12- months time limit in the OECD model. Uganda's tax treaties concluded with Mauritius, the netherlands, south africa and United Kingdom follow the UN model. However it would be better for Uganda to negotiate shorter time limits considering that some construction activities undertaken by chinese companies can be completed in a shorter period of three months Hearson and Jalia (2016).

3.1.3 Splitting of service contacts to avoid the status of PE

The exception in Article 5(3), which applies to construction sites, has given rise to abuses through the practice of splitting up contacts between closely related enterprises[34].

The issue of splitting service contracts is a big concern in african countries. Multinational enterprises MNEs who engage in such services activities of the provision of the services of engineers or consultants often argue that their activities are of a temporary nature hence tend to avoid the status of PE. This is so in cases by MNEs if an enterprise fragraments its activities amony related en-

[34] (2015, October 5). Preventing the Artificial Avoidance of Permanent Establishment Status .... Retrieved September 14, 2018, from http://www.oecd.org/ctp/preventing-the-artificial-avoidance-of-permanent-establishment-status-action-7-2015-final-report-9789264241220-en.htm

terprises of if it uses related non resident enterprises to carry out connected projects.

The commentary on Article 5 of the OECD Model 2014 recommends that legislative or judicial anti avoidance rules be applied to counter such abuses. The commentary on Article 5 also suggests an alternative Service PE provision that states may include in their tax treaties.

As earlier seen most Uganda tax treaties were conclude based on provisions of Article 5 (3)(b) of the UN model , which sets out a special PE service provision that covers the furnishing of services, including consultancy services, by an enterprise of a contracting state through employees or other personnel engaged by the enterprise if those activities continue, on the same or connected project, for an aggregate period of more than 183 days in any 12 months period. However the effectiveness of the provisions of Article 5 (3) (b) of the UN model depends on whether tax authorities can detect the presence of the service provider for more than 183 days in the relevant state. This 183 days time limit can easily be manipulated.

In Uganda right now, several audits have been done on some of these MNEs who recruit foreign specialists in the field of telecom oil and gas sectors and at the end of their short term contracts (the 183 days time limit), these specialists (employees) are not taxed on incomes earned in Uganda. When the tax authority Uganda Revenue Authority (URA) issued Additional assessments on these MNEs as they had an obligation to withhold from these employees, instead they made appeals to Uganda's Tax Appeal Tribunal (TAT). Todate there is no decided case in Uganda's TAT on the 183 days limit to set precedence for other future cases on the matter. Much as audits have been done in this regards, no tax revenues are have yet been yielded on this matter (no data documented). This clearly shows that the 183 days limit can easily be manipulated.

In SEATINI Uganda report, a recommendation was made that Uganda's DTAs negotiated should adopt a shorter period in order to collect tax from persons who might source a lot of income from Uganda with in a period less than 90 days and move back to their jurisdictions without paying taxes in Uganda. Its is evident that uganda has made steps to negotiate time limits that are less than 183 days. This is evident in the tax treaties Mauritius and uganda income tax treaty (2003)[35], Netherlands and Uganda Income tax treaty (2004)[36] provides for a four-month time limit with regard to the furnishing services.

Even through article 5(3)(b) of the UN model can be helpful in preventing splitting of service contracts in that services for the same or connected service provider are aggregated within counting the number of days that the services are performed in the source country, there still abuses since the provision does not take in account services provided by

[35] (2003, September 19). ibfd - mauritius - uganda income tax treaty - Uganda Revenue Authority. Retrieved September 14, 2018, from https://www.ura.go.ug/openFile.do?path=//webupload//upload//download//staticContent//RGTMENU//458//461_Mauritius_DTA.pdf

[36] (2007, July 1). netherlands - uganda income tax treaty ... - Uganda Revenue Authority. Retrieved September 14, 2018, from https://www.ura.go.ug/openFile.do?path=//webupload//upload//download//staticContent//RGTMENU//458//462_Netherlands-Uganda_DTA.pdf

related enterprises with respect to the same or connected projects[37]. There manys cases in Uganda where MNEs in uganda are a subsidiary to a parent company based in other jurisdictions and this parent company offer or provide services such as legal, information technology,recruitment, management, technical services to this subsidiary in uganda and in most cases these services do not require the parents employees to be present in uganda for a long period of time. This leaves the tax authority to tax Withholding tax (WHT) on only payments made by the Uganda subsidiary to the parent company (as per the ugandan domestic law, WHT is only on payments made). However in most cases these subsidiary present in their books of accounts that they have never made payments to the parent company for the services offered hence no withholding tax will apply for this case. It's also difficult for the tax authority to know or ascertain that these subsidiaries have made payments to the parent companies as these subsidiaries will keep reporting accruals in regards to the services offered by the parent companies. In order to prevent such abuses, this calls for effective exchange of information on such related enterprises by the tax administration of the relevant countries.

In order to address the abuse of the status of a PE when contracts are split between closely related enterprises, the OECD BEPS Final Report on Action 7 of 2015 recommends that the Principal Purpose Test (PPT) rule (as explained earlier in detail under section 2 of this article), which will be added to the OECD Model following the adoption of the OECD Report on preventing treaty abuse (see sections 2 of this article), should address the BEPS concern related to such abuses.

It should however be noted that Article 4, of the OECD model, makes exclusions in the PE definition and these include;

a) The use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
b) The maintenance of stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
c) The maintenance of the stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
d) The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or collecting information, for the enterprise;
e) The maintenance of the a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity;
f) The maintenance of the a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e).

In this respect, the artificial avoidance of PE- excluded activities have not been discussed in details in this article.

[37] (n.d.). Tax base erosion and profit shifting - part 2 : a critique of som .... Retrieved September 14, 2018, from https://www.ingentaconnect.com/content/sabinet/cilsa/2016/00000049/00000001/art00006

Uganda has lessons to draw from BEPS Action 7: Prevent artificial avoidance of the Permanent Establishment (PE) Status. According to Martin Hearson and Jalia kangave (2016), Uganda's domestic Law definition of a PE appears to be based on model tax treaties, but compared with the laundry list that the model treaties on what constitutes a PE, Uganda's domestic definition is actually much narrower . There is a strong need for Uganda's domestic tax laws to incorporate for example the new provisions of PE definition;

- to widen the definition of a branch as stated under Sections 78 of the Income tax Act rather than modelling it on the tax treaty permanent establishments provision at all;
- to take in consideration of the 90 - day or lower period for construction sites and service PEs.
- For splitting of contacts, Uganda's domestic provisions should constitute the PPT rule.

III. BEPS Action 15: Development of Multilateral Instruments (MLI) to modify Bilateral Tax Treaty

The OECD / G20 BEPS Action 15 provides for development of a Multilateral Instrument (MLI) to modify bilateral tax treaties. This Action 15 deliverables span three different areas: recommendations for domestic law taking the form of best practices and model domestic rules, other reports, as well as changes to the OECD Model Tax Convention and internationally agreed guidance on Implementation. The main objective of a multilateral instrument would be to modify existing bilateral tax treaties, in synchronized and efficient manner, to implement treaty measures developed in the course of the BEPS project, without a need to individually renegotiate each treaty with in the 3000+ treaty networks OECD, 2014 report[38].

The MLI provides a number of benefits to mention a few; an innovative approach to address the rapidly evolving nature if the global economy and the need to adapt international rules quickly: will produce synchronised results that would save resources and improve clarity if BEPS- related international tax treaty rules: and the MLI will avail an opportunity for developing countries to fully benefit from the BEPS project. For developing countries, the practical problems are encountered when addressing BEPS project from within the bilateral tax treaty system alone and more so they find it more difficult to conclude double tax treaties, to interest other countries in tax treaty negotiation, and their tax treaty expertise is often more limited. The multilateral instrument therefore offers the best opportunity to ensure developing countries reap the benefits of multilateral efforts to tackle BEPS: Furthermore the report out that some of the measures developed in the BEPS projects are multilateral in nature and some of the provisions would be much more effective if implemented through a multilateral instruments.

[38] (2015, October 5). Developing a Multilateral Instrument to Modify Bilateral ... - OECD.org. Retrieved September 3, 2018, from http://www.oecd.org/tax/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties-action-15-2015-final-report-9789264241688-en.htm

In a general overview, the MLI consists of a preamble and seven parts that contain 39 Articles; Part I (Articles 1 to 2) provides for guidance on the scope and interpretation of the terms, Part II to VI (Articles 3 to 26) deal with the modifications to be made to the covered tax treaties and Part VII (Article 27 to 39) contains the provisions of the instrument which notably lays out implementation process, describes the signatures and ratification procedure, lists the provisions that may be subject to reservation, and affirms the entry into force and into effect of the provisions of the MLI.

This article aims to give an insight on what an MLI is all about, what modifications to be made to the covered tax treaties, and assess whether Uganda should or should not sign the MLI and how the MLI will change the tax treaty of Uganda in future.

A. The Minimum Standard Provisions

BEPS Actions 6 and 14 include minimum standard tax treaty- related measures which have been incorporated in the MLI under Parts III and V and from which the signatories may opt in and opt out in limited circumstances. OECD, 2014 report states that the MLI is expected to cover the tax treaty measures developed in the course of the OECD BEPS Project. These treaty measures that are expected to be covered the following BEPS Minimum Standards include;

- The BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances) include two minimum standard which requires the adoption of rules in bilateral tax treaties that effectively address treaty shopping. Namely;

First, Article 6 (1) requires countries to include in their tax treaties a clear statement, that the States that enter into a tax treaty intend to avoid creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty- shopping arrangements.

Second, Article 7 requires countries to incorporate in the tax treaties a mechanism preventing treaty abuse satisfying the minimum standard with the implementation of either, a (i) a combination of a 'Limitation-On-Benefits' (LOB) rule and a 'Principal Purpose Test' (PPT) rule; (2) a PPT rule, or (3) a LOB rule supplemented by a mechanism that deals with conduit arrangements, such as a restricted PPT rule applicable to conduit financing arrangements in which an entity otherwise entitled to treaty benefits acts as a conduit for payments to third-country investors.

B. Non - minimum standard provisions

Other provisions contained in Parts II to VI of the MLI do not constitute minimum standards, this means that signatories have more flexibility in their implementation, as they may discretionarily opt out of these provisions or opt into these provisions. These provisions under MLI are as follows;

- Articles 3 to 5 of Part II deal with hybrid mismatches resulting from the final report BEPS Action 2.
- Articles 8 to 11 of Part III provides measures related to the prevention of

treaty abuse which were not characterised as a minimum standard in the Final Report on BEPS Action 6

- Articles 12 to 15 of Part IV deal with Permanent Establishments measures resulting from the final report of BEPS Action 7, which seeks to amend existing tax treaties to counter the artificial avoidance of Permanent Establishments status through; commissionaire arrangements and similar strategies (Article 12 of the MLI), specify activity exemptions (Article 13 of the MLI), and splitting-up of contracts (Article 14 of the MLI). Article 15 of the MLI provides a definition of the new notion of 'Person closely Related to an Enterprise'.
- Article 17 of Part V provides a mechanism for signatories to implement a corresponding adjustments mechanism in the Mutual Agreement Procedure (MAP) article of their covered Tax Agreement.
- Articles 18 to 26 of Part VI provides for mandatory binding arbitration of the Mutual Agreement Procedure cases in which the content authorities are unable to reach agreement within a fixed period of time. This development was announced in the final report BEPS Action 14.

In the next discussion, will look at how the MLI works sections 4.3 of this article,

C. How the MLI works

In November 2016, over 100 jurisdictions concluded negotiations on the ***Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*** *("Multilateral Instrument" or "MLI")* that will swiftly implement a series of tax treaty measures to update international tax rules and lessen the opportunity for tax avoidance by multinational enterprises. The MLI already covers over 75 jurisdictions and will enter into force on 1st July 2018. Signatories include jurisdictions from all continents and all levels of development. A number of jurisdictions have also expressed their intention to sign the MLI as soon as possible and other jurisdictions are also actively working towards signature[39].

The OECD shared information on how the MLI will work and the steps for countries to follow in the the application process of the multilateral instrument[40]. The OECD further offers a five - step approach to taxpayers, tax authorities and tax court to assess whether a given provision in a given existing tax treaty may be impacted by the MLI, a further step will consist of interpreting the so impacted provision[41].

The MLI offers concrete solutions for governments to close the gaps in existing international tax rules by transposing results from

[39] (n.d.). Multilateral Convention to Implement Tax Treaty Related ... - OECD.org. Retrieved September 8, 2018, from http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm

[40] (n.d.). Applying the MULTILATERAL INSTRUMENT Step-by-Step - OECD.org. Retrieved September 8, 2018, from https://www.oecd.org/tax/treaties/step-by-step-tool-on-the-application-of-the-MLI.pdf

[41] (n.d.). Applying the MULTILATERAL INSTRUMENT Step-by-Step - OECD.org. Retrieved September 11, 2018, from https://www.oecd.org/tax/treaties/step-by-step-tool-on-the-application-of-the-MLI.pdf

the OECD/G20 BEPS Project into bilateral tax treaties worldwide. The MLI modifies the application of thousands of bilateral tax treaties concluded to eliminate double taxation. It also implements agreed minimum standards to counter treaty abuse and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies[42]. The MLI is still open for additional Signatories and the jurisdictions interested in signing the MLI are invited to contact the OECD Secretariat.

It should be noted that the entry of the MLI is considered at;

(1) The level of the MLI itself ; Article 34 of the MLI states that the MLI's provisions will enter into force only upon ratification under domestic law of the MLI by at least five signatories. Once the fifth signatory has ratified the MLI and deposited its instrument of ratification with the OECD, the MLI will enter into force on the first day of the month following the expiry of three calendar months beginning on the date of depositing the ratification. and,

(2) The level of the parties to a given tax treaty; the entry into force of the MLI for a given treaty is subject to the signing of the MLI by both contacting countries to this tax treaty. Therefore two situations: first situation being , if both parties to a tax treaty sign the MLI, and the MLI is itself already in force, it shall enter into force with respect to a particular signatory on the first day of the month following the expiry of three calendar months beginning on the date such signatory deposits its instrument of ratification, acceptance or approval: Second situation being, if one or both parties have not signed the MLI, the latter will not enter into force and will not affect the provisions of a given tax treaty.

D. Should Uganda sign or not sign the MLI?

The feasibility study done concludes that despite potential challenges, MLI is a promising way to quickly implement treaty-related BEPS measures. It was noted in the Action 15, BEPS 2015 Final report that some features of the current tax treaty system facilitate BEPS**.** The interrelationship between domestic tax laws and the international tax framework is akey pillar in supporting the growth of the global economy. However, as globalisation has changed the way business is done, the gaps and frictions that were always present in the existing bilateral tax treaties have grown more important. Existing tax treaty provisions are sometimes exploited, in some cases in conjunction with domestic law rules, so that large amounts of income are not subject to tax in any jurisdiction. Moreover, the existing bilateral tax treaties vary widely in their details, including when the differences are not necessary to reflect specificities in the economic relations between the two contracting states. Rather, certain differences in detail appear to be due to the fact that treaties have been negotiated over a long

[42] (n.d.). Multilateral Convention to Implement Tax Treaty Related ... - OECD.org. Retrieved September 8, 2018, from http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm

period of time, and in some circumstances these differences create opportunities for BEPS, which are then exploited by taxpayers[43]. OECD, 2014 report made an emphasis that developing an MLI is desirable and the benefits are numerous while burdens can be addressed or avoided.

Based on the MLI information revealed by the OECD thus far, the MLI likely would override the relevant parts of existing bilateral treaties. However, given the optionality in the MLI, this would require that participating countries and jurisdictions specify at the MLI's ratification which provisions of the MLI they would opt into and out of. With the help of notifications by such countries, the OECD would then carry out a matching exercise and publicize information on which clauses in which treaties have actually been modified[44].

On the 4th November 2015, Uganda became the 90th jurisdiction to join the most powerful multilateral instrument against offshore tax evasion and avoidance. The Convention provides for all forms of administrative assistance in tax matters: exchange of information on request, spontaneous exchange, automatic exchange, tax examinations abroad, simultaneous tax examinations and assistance in tax collection. It guarantees extensive safeguards for the protection of taxpayers' rights. By signing the Convention, Uganda takes a further step in fighting tax evasion and avoidance, building on its participation in the Global Forum on Transparency and Exchange of Information for Tax Purposes, which it joined in 2012.[45]

A Global Forum official Godfrey Donal as he made remarks at the Kampala Serena Conference Center on a two-day international workshop on information exchange stated that 'stated that , Uganda is a thorough performer in Africa in terms of information exchange.We are impressed at the progress. Uganda has met all its targets in terms of the number of requests, Donal stated, adding, We hope Uganda can take this experience to other African countries'.[46] it was however noted that Uganda has fairly limited experience in respect of incoming Exchange Of Information (EOI) request but it's considered by it's EOI partners to be an important partner[47]. There is no research yet done in Uganda to determine the impact of this

[43] (2015, October 5). Developing a Multilateral Instrument to Modify Bilateral ... - OECD.org. Retrieved September 3, 2018, from http://www.oecd.org/tax/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties-action-15-2015-final-report-9789264241688-en.htm

[44] (n.d.). Multilateral instrument to implement BEPS treaty-related ... - PwC. Retrieved September 8, 2018, from https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-multilateral-instrument-to-implement-beps-recommendations.pdf

[45] (n.d.). Uganda becomes the 90th jurisdiction to join the most ... - OECD.org. Retrieved September 11, 2018, from http://www.oecd.org/countries/uganda/uganda-becomes-the-90th-jurisdiction-to-join-the-most-powerful-multilateral-instrument-against-offshore-tax-evasion-and-avoidance.htm

[46] (n.d.). uganda hailed for information sharing - Uganda Revenue Authority. Retrieved September 11, 2018, from https://www.ura.go.ug/readMore.do?contentId=999000000000893&type=readMorePageDwnldAsPDF

[47] (n.d.). Global Forum on Transparency and Exchange of Information for Tax .... Retrieved September 11, 2018, from https://read.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews-uganda-2016_9789264266209-en

information received by URA and its impact on tax revenue collections.

As earlier cited out in this article , Uganda's existing treaties still had issues that needed to be addressed for example ; treaty shopping through the Dutch treaty, the weak Permanent Establishment provisions etc all these identified issues needed to be addressed in order to enhance tax revenue collections with in the country. More so with the current oil industry that is developing in Uganda has already attracted an influx of foreign expatriates and companies (Permanent Establishments) in this industry. This hence calls for strong legislations (domestic laws) that will tax these Permanent Establishments to avoid tax revenue loss.

In conclusion, drawing from all my earlier discussions, in the author's opinion, Uganda should sign the MLI as this creates an opportunity for Uganda to strengthen it's existing tax treaties for example widen its PE provisions which would expand the tax base of Multinationals enterprises operating in Uganda , more so the six and four month thresholds in Uganda's treaties may not be short enough in the era where as one Finance ministry official pointed out, 'the chinese can do things in three months' (Hearson and Jalia 2016) etc. More so MLI come with several advantages, First, they provide for broad mutual assistance, and on a multilateral ,which, basis for example,would permit joint assessment of the multinational by a consortium of tax authorities (Hearson and Brooks 2010).

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