THE MULTILATERAL INSTRUMENT AND DOMESTIC RESOURCE MOBILISATION IN EAST AFRICA

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A Critical Comparison of the Multilateral Instrument with the East African Community and African Tax Administration Forum, model Double Taxation Agreements

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Table of Contents

	Acronyms	i
	Executive Summary	ii
1	INTRODUCTION	1
1.1	Background and Rationale of the Paper	1
1.2	Objectives of the Working Paper	2
1.3	Methodology	3
2	FINDINGS AND RECOMMENDATIONS	4
2.1	Overview of the Multi-Lateral Instrument (MLI)	4
2.1.1	Description of the MLI	4
2.1.2	Operation of the MLI	4
2.1.3	Structure of the MLI	7
2.2	Comparative analysis of the MLI with the East African Community and ATAF model DTAs	8
2.2.1	Hybrid Mismatches	8
2.2.2	Treaty Abuse	8
2.2.3	Permanent Establishment	9
2.2.4	Dispute Resolution	10
2.2.5	Mandatory Arbitration	11
2.3	Analysis of the Base Erosion and Profit Shifting and the Digital Economy	12
2.4	Implication of the MLI clauses on domestic revenue mobilisation in East Africa	13
2.4.1	Case study on Impact of MLI in Africa	13
2.4.2	Suitability of the MLI for African Countries and specifically the East African region	13
2.4.3	Reasons that make MLI not the best vehicle to address risks related to double taxation in Africa	16
3	POLICY RECOMMENDATIONS	20
	Annex	21
	References	22

Acronyms

BEPS	Base Erosion and Profit Shifting
CTA	Covered Tax Agreements
DTA	Double Taxation Agreement
EAC	East African Community
LOB	Limitations On Benefits
MLI	Multilateral Instrument
MoFPED	Ministry of Finance Planning and Economic Development
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
PE	Permanent Establishment
PPT	Principle Purpose Transaction
RO	Representative Offices
URA	Uganda Revenue Authority

Executive Summary

The paper is set out to provide an overview of the Multilateral Instrument (MLI), its clauses versus the East African Community (EAC) DTA model and the ATAF DTA model. In addition, an analysis of the Base Erosion and Profit Shifting (BEPS) and the digital economy is made. The paper further assesses the implication of MLI on domestic revenue mobilisation in Africa with emphasis on EAC.

The MLI was designed to implement tax treaty measures to prevent Base Erosion and Profit Shifting. Different elements of the MLI are analysed in an overview in subsequent sections. These include the description of MLI, its structure and operation.

The comparative analysis of the MLI and the EAC DTA model and the ATAF DTA model is anchored on five major areas. These include hybrid mismatch, treaty abuse, Permanent Establishments, dispute resolution and mandatory arbitration. This section highlights the provisions which the African model DTAs can adopt, in bid to curb BEPS.

The MLI recognizes the digital business environment, which has made the tax collector's job difficult, in terms of taxing profits made by digital companies in jurisdiction of operation. It is therefore highlighted as an action plan in the BEPS measures, as discussed in **section 2.3** of the paper.

In terms of implication of MLI on domestic revenue mobilisation, the paper analyses the suitability of the MLI for African Countries and specifically the East African region. Further analysis is made on reasons that make MLI not the best vehicle to address risks related to double taxation in Africa.

The paper recommends that, great care and caution have to be taken before signing the MLI so as to prevent the endangerment of national economic interests. Therefore African countries need to adopt a wait-and-see approach.

1 Introduction

1.1 Background and rationale of the paper

The need for countries to fund their development priorities through domestically raised revenue has recently gained popularity across the globe. Countries across the world; developed and developing are tightening their tax systems in order to close loopholes that have often facilitated tax evasion and avoidance especially by multi-national companies. Despite the fact that countries have made efforts to tighten their tax systems, there is a growing treaty network which companies have also taken advantage of. While tax treaties are meant to prevent double taxation of companies and individuals, they result in double non-taxation hence loss of revenue especially for the developing countries.

In view of the above, on 30th November 2011, the East African Community member states signed the EAC model Double Taxation Agreement (EAC-DTA). The DTA provides a well-balanced and reliable structure for the fair, just and predictable taxation of all cross-border income and activities and can be used as a guideline when negotiating double tax avoidance treaties with other countries outside the EAC. In the same vein, in 2012, the African Tax Administrations Forum (ATAF) developed a model DTA to serve as a guideline for African Tax Administrations negotiating DTAs either amongst themselves or with countries outside Africa.

Similarly, in 2015, the OECD finalized an action plan of 15 actions to curtail Base Erosion and Profit Shifting (BEPS). These measures are intended to ensure that profits of multinational enterprises are taxed where the economic activities generating those profits are performed and where value is created *(OECD, 2013).* The OECD BEPS Project, which is considered the most far-reaching set of reforms to international corporate taxation since the system was set up in the 1920s, impact on three main areas of the international tax system: Internationally agreed guidance on international tax principles for example OECD transfer pricing guidelines; domestic law provisions and administrative polices; and changes to tax treaties (Double Taxation Agreements).

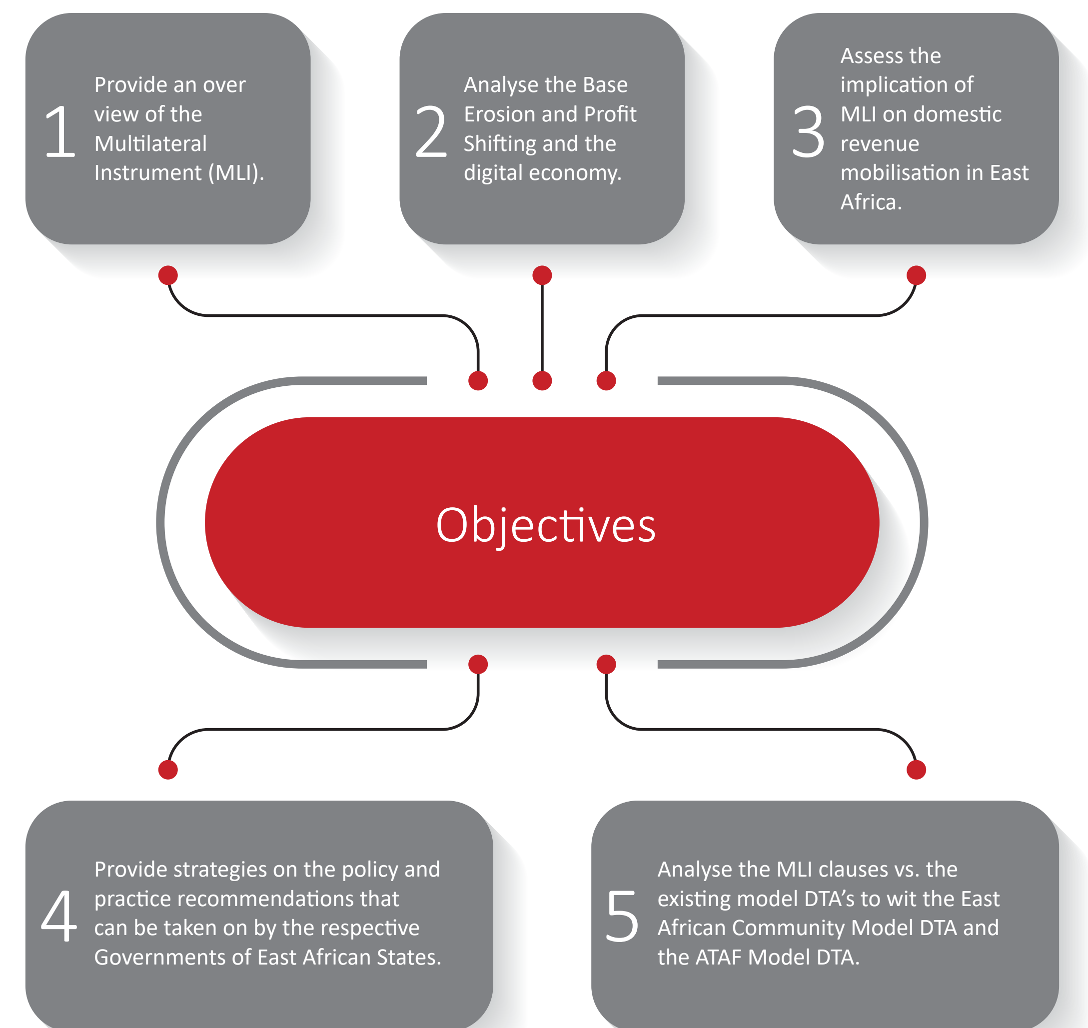
Most tax treaties tend to favour capital-exporting countries over capital-importing countries.

Tax treaty rules generally restrict the right of ***"source"*** countries in favour of the ***"residence"*** countries of taxpayers *(predominately developed capital exporting countries)*. Most tax treaties are based on OECD Model Tax Convention on Income and on Capital, which tend to favour capital-exporting countries over capital-importing countries. Developing countries tend to be more in favour of the United Nation's Double Taxation Convention between Developed and Developing Countries, which favours capital-importing countries over capital exporting countries, in that it generally imposes fewer restrictions on the tax jurisdiction of source countries *(Arnold and McIntyre 2002, pg 109).*

Several BEPS Action Plan measures require updating these tax treaties, however to achieve this requires changes to thousands of bilateral treaties. To avoid a massive, unwieldy, and expensive renegotiation process, Governments developed a multilateral instrument to implement tax treaty-related measures in a swift, coordinated and consistent manner enabling the simultaneous renegotiation of thousands of Double Taxation Agreements (DTAs). The ***"Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting,"*** widely referred to as the Multilateral Instrument, or MLI was developed by an Ad Hoc Group endorsed by the G20 Finance Ministers and Central Bank Governors, involving 99 states *(including developing countries),* as well as four non-state jurisdictions and seven international or regional organisations as observers *(OECD 2016, para 6).*

On 31st December 2016, the MLI was opened for signature for all interested countries to join, including developing countries that were not part of the OECD BEPS Project *(OECD 2016 in para 7).* A signing ceremony was held on 17 August, 2017 where 71 jurisdictions signed the MLI. African countries that have signed the MLI are listed in the Annex.

1.2 Objectives of the working paper



1.3 Methodology

The approach to the study involved in-depth desk reviews and expert interviews. A number of documents were reviewed including MLI, explanatory notes to the MLI, Toolkit for Application of the Multilateral Instrument for BEPS Tax Treaty Related Measures, The EAC DTA, the ATAF modal DTA, Agreement on double taxation and the prevention of fiscal evasion with respect to taxes on income among others.

Expert interviews were held with Ministry of Finance Planning and Economic Development, Uganda, Uganda Revenue Authority, International Tax section, Cristal Advocates among others.

2 Findings & Recommendations

2.1 Overview of the Multilateral Instrument (MLI)

This section describes the MLI, its operation and the structure.

2.1.1 Description of the MLI

The MLI is described as, a one treaty between numbers of parties designed to implement Tax Treaty measures to prevent Base Erosion and Profit Shifting. The MLI provides a means to update treaties, whether they were developed based on the OECD or UN model. However it maintains a significant amount of flexibility in how it is implemented. Countries can pick and choose which provisions of the MLI to adopt in their existing treaties *(called Covered Tax Agreements, or CTAs)* that they both chose to be modified.

2.1.2 Operation of the MLI

The MLI operates to modify tax treaties between two or more Parties to the Convention. It does not function the same way as an amending protocol to a single existing Treaty, which would directly amend the text of the Covered Tax Agreement; instead, it will be applied alongside existing tax treaties, modifying the application in order to implement the BEPS measures. The MLI modifies CTAs between parties where both parties have made a notification that they wish to modify the agreement. The MLI is open to both countries that are members of the BEPS Inclusive Framework and those that are not. It covers the two treaty-related ***"minimum standards"*** which countries that join the BEPS Inclusive Framework are committed to implement; these concern preventing treaty abuse *(Action 6[1])* and improving dispute resolution *(Action 14)*. However, countries signing up to the BEPS Inclusive Framework are not obliged to use the MLI as the mechanism for meeting these minimum standards; they can update their tax treaties individually.

The MLI also addresses three treaty related ***"best practice"*** areas which are voluntary for members of the BEPS Inclusive Framework. These concern Hybrid Mismatches *(Action 2)*, preventing the granting of treaty benefits in inappropriate circumstances *(Action 6)*, and Preventing the Artificial Avoidance of Permanent Entity Status *(Action 7)*. Over time it is expected that there will be convergence of national best practices and these may become minimum standards in the future. *(Danone and Salome, 2017)*.

The MLI is open to both countries that are members of the BEPS Inclusive Framework and those that are not.

1. *Of the MLI.*

The complexity of the MLI regarding the practical application and interpretation are major concerns for developing countries.

Countries that sign the MLI have several options in how to apply it; first they must first come up with a list of the DTAs they would like to be covered. The list can be provisional until the country ratifies the MLI. This provides an opportunity for parties to discuss and negotiate the changes before the list is confirmed. The intention is that the MLI is to apply to the maximum number of DTAs, however parties may choose to exclude some treaties, for example if they were recently renegotiated or are under separate renegotiation to implement the BEPS measures.

Countries have flexibility to opt out completely or partially of individual provisions with respect to all or some of its treaties. Each provision therefore only applies between the parties to a CTA where neither of them has made a reservation to opt out of it. Reservations can be subsequently withdrawn, or replaced over time. However, once a party has ratified the MLI it cannot add further reservations. Several articles include optional provisions which only apply if both parties have chosen to include it.

After signing the MLI, states are required to ratify it and it comes into force three months after ratification. It is thus expected that a significant number of the signatories to the MLI will lodge their instruments of ratification with the OECD in time to be effective from 1st January, 2019. The modifications to the CTAs only apply following ratification by both parties. Any party may withdraw from the MLI at any time, but this would not affect the modifications already made. However countries can revise DTAs subsequently *(OECD 2016 MLI, Art 30)*, or enter into new ones that diverge from the MLI.

Some countries only included a small number of their DTAs in the initial signing of the MLI, but indicated that they would bring more treaties in after bilateral discussions. In addition, some countries took a conservative approach at signature, but are considering a more expansive approach at ratification *(KPMG, 2017)*.

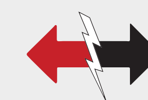
The OECD is the depository of the MLI, and has the responsibility to collect and make public notifications about the effect of the MLI on the CTAs. Where a provision of the MLI applies, it will override the provisions of the CTA to the extent that they are incompatible. However, it should also be noted that the MLI does not directly revise the wording of CTAs. Rather, it has to be applied alongside them, modifying their application in order to implement the BEPS measures *(OECD 2016, para 13)*. Countries may produce consolidated versions of CTAs as modified by the MLI, but they are not required *(Lewis A 2016)*. The extent to which CTAs are affected by the MLI depends both on the ***"opt in"*** and ***"opt outs"*** and reservations made by each State and on the underlying wording of existing provisions.

General criticisms and concerns about the MLI and the BEPS project are that, developing countries *(beyond the major emerging economies in the G20)* had little or no involvement in its development and that it does not reform the underlying source-residence split in international tax rules *(BMG, 2016)*. There are also practical questions about whether the MLI will be effective, since many countries have opted out of certain provisions. The complexity of the MLI and the various uncertainties regarding the practical application and interpretation of the MLI are also major concerns for developing countries.

However to note is the fact that the G20 commissioned the OECD to prepare a report on the impact of BEPS on developing countries which was issued in 2014. The two part report highlighted different BEPS issues which are particularly important for developing countries to include:

BEPS Issues

Excessive payments to related parties related to loans services and intangibles.



Abuse of double tax treaties to obtain unintended tax benefits.

Supply chain structures designed to shift commercial risks and associated profits to low tax jurisdictions.

Use of offshore structures to avoid tax on gains related to assets located in the relevant jurisdiction.

Difficulties in obtaining information to enforce legislation, particularly transfer pricing rules.

Pressure to implement wasteful tax incentives to attract investments.

In 2016, a new body was established to assist developing countries combat BEPS.

Thus in 2016, a new body was established to assist developing countries combat BEPS; the Platform for Collaboration on Tax (PACT) which brings together the OECD, UN, World Bank and IMF.

Since its establishment the platform engaged extensively with the developing countries and produced several toolkits to assist the developing countries in implementing the BEPS actions and address their issues of capital gains on indirect transfers of assets and wasteful tax incentives *(Cristal Total Solutions)*.

This makes the MLI potentially a useful mechanism for developing countries to tackle ***"treaty shopping"*** and other treaty-related profit shifting.

In June 2014, the Government of Uganda put a stop to the negotiation of Double Taxation Agreements in order to set clear guidelines to guide the negotiation of future treaties and renegotiation of selected treaties. Among the treaties for re-negotiation was the Uganda-Netherlands Double Taxation Agreement. Though the re-negotiations between the two countries finally set off in September 2019, it was a requirement by the Netherlands Government that the Government of Uganda signs on to the MLI before the process of re-negotiation can commence, which Uganda did not comply with and Netherlands was left with no option other than to agree to the re-negotiations. The two countries carried out the first stage of the re-negotiation process wherein some provisions of the MLI were borrowed and used in some of the Articles of the DTA.

2.1.3 Structure of the MLI

The Articles of the MLI and the relation between each Article and each Action of the BEPS project under which recommendations for tax treaty related BEPS measures were represented are shown below.

	Articles of the MLI	BEPS Measure
PART 1	**Scope and interpretation of Terms** **Article 1:** Scope of the Convention. **Article 2:** Interpretation of Terms.	
PART 2	**Hybrid Mismatches** **Article 3:** Transparent Entities. **Article 4:** Dual Resident Entities. **Article 5:** Application of Methods for Elimination of Double Taxation.	**Action 2:** Neutralising the effects of Hybrid Mismatch Arrangements *(Article 4 also comes from Action 6).*
PART 3	**Treaty Abuses** **Article 6:** Purpose of the Covered Tax Agreement. **Article 7:** Prevention of Treaty Abuse. **Article 8:** Dividend Transfer Transactions. **Article 9:** Capital Gains from Alienation of Shares or interests of Entities deriving their value principally from immovable property. **Article 10:** Anti-abuse rule for permanent Establishments situated in third jurisdiction. **Article 11:** Application of Tax Agreements to restrict a party's right to tax its own residents.	**Action 6:** Preventing the granting of Treaty Benefits in inappropriate circumstances.
PART 4	**Avoidance of Permanent Establishment Status** **Article 12:** Artificial avoidance of Permanent Establishment Status through Commissionaire Arrangement and similar strategies. **Article 13:** Artificial avoidance of Permanent Establishment status through the specific Activity Exemptions. **Article 14:** Splitting of Contracts. **Article 15:** Definition of a person closely related to an enterprise.	**Action 7:** Preventing the Artificial Avoidance of Permanent Establishment Status.
PART 5	**Improving Dispute Resolution** **Article 16:** Mutual Agreement Procedure. **Article 17:** Corresponding Adjustments.	**Action 14:** Making Dispute Resolution mechanisms more effective.
PART 6	**Arbitration** **Article 18 - Article 26**	**Action 14:** Making Dispute Resolution mechanisms more effective.
PART 7	**Final provisions** **Article 27 - Article 39**	**Action 1[2]:** Report on addressing the tax challenges of the Digital Economy *(the 2015 Report).*

2. Action 1 has no MLI provision. It is up for discussion in 2020.

2.2 Comparative analysis of the MLI with the East African Community and ATAF model DTAs.

The BEPS measures that form the basis of the MLI, are found in Articles 3 to 17 and cover hybrid mismatches, treaty abuse, avoidance of permanent entity status, dispute resolution and mandatory arbitration. This section outlines each of these measures and gives recommendations for developing countries. More detail on each of the Articles is given below.

2.2.1 Hybrid Mismatches

Part II of the MLI relates to Action 2 of the BEPS Project which deals with ***"neutralising the effects of hybrid mismatch arrangements."*** Both the East African Community and ATAF modal DTA are silent on the same.

Hybrid mismatch arrangements occur when two countries interpret the same entity or transaction differently for tax purposes, which can result in double taxation, or non-taxation.

Use of hybrid entities may not be the highest priority for developing countries.

Hybrid entities are treated as a taxable corporation in one jurisdiction and as a transparent (non-taxable, or ***"pass through"*** entity in another, resulting in double taxation or non-taxation). Article 3 of the MLI provides that transparent entities are only entitled to treaty benefits such as reduced withholding tax at source if they are treated as taxable entities by the treaty partner. Use of hybrid entities may not be the highest priority for developing countries, however it is important that they protect their taxation rights as source states, therefore it is important that this provision is adopted.

Article 4 of the MLI provides dual resident entities.

Treaty residency are determined by a mutual agreement procedure (MAP). Contracting Jurisdictions are not obligated to successfully reach an agreement and in absence of a successful mutual agreement, a dual resident entity is not entitled to treaty benefits. Entities claim residence of both treaty countries to gain a tax advantage. The place of effective management tie breaker test was easily manipulated for tax avoidance purposes. For developing countries it is advisable that developing countries adopt this provision, with an option for states which wish to do so, to keep the place of effective management as the sole criterion.

Article 5 - Application of methods for elimination of double taxation.

Option	
Option A	Deny exemption but provide a tax credit for such payments.
Option B	Deny exemption for dividends treated as deductible in the payer state, but allow a tax credit for any tax paid attributable to that income.
Option C	Use the tax credit method based on the OECD model provision (for both income and capital).

Hybrid instruments treated as debt in one country and as equity in another, may result in double deduction outcomes. In option C, it is advisable that the developing countries adopt the credit method and urge treaty partners to allow them to do so.

2.2.2 Treaty Abuse

This part of the MLI evolves from Action 6 of the BEPS Report which deals with preventing treaty abuse. Both the East African Community and ATAF model DTA are silent on the same.

Treaty abuse entails the use of treaty shopping schemes by residents of a non-treaty country to obtain treaty benefits that are not supposed to be available to them. This is mainly done by interposing a conduit company in one of the contracting states so as to shift profits out of the treaty states. The key recommended counteracting mechanisms are:

1. A general anti-abuse provision, in the form of a ***"principal purpose test"*** (PPT).
2. A combination of the PPT rule with a specific ***"limitation-on-benefits"*** (LoB) provision.
3. A LoB provision supplemented by a mechanism that deals with conduit arrangements, such as a restricted PPT that applies to conduit financing arrangements.

The PPT being the only approach that can satisfy the minimum standard on its own, it is presented as the

default option and most countries that have signed the MLI so far have opted for this approach. African countries should also adopt this approach, as well as the other articles related to treaty shopping.

Article 6 of the MLI provides for a new preamble language expressing intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance. Developing countries should adopt this preamble language.

Article 7 of the MLI provides three options:

- A combined approach consisting of a Limitation on Benefits (LOB) provision and a Principal Purpose Test (PPT).
- A PPT alone (default option).
- An LOB provision, supplemented by specific rules targeting conduit financing arrangements.

African countries should adopt the PPT rule since it is the only measure which satisfies the minimum standard on its own, and it applies by default.

Article 8 of the MLI provides for Anti-abuse rules (e.g. minimum holding period) for benefits provided to dividend transfer transactions. There is a challenge to the effect that there is Treaty abuse through use of dividend transfer schemes by arranging for a temporary increase in shareholding, shortly before a dividend declaration to access lower withholding tax rates. African countries should adopt since both the East African Community and ATAF model DTA are silent on the same.

Article 9 - Capital gains from alienation of shares or interests of entities deriving their value principally from immovable property. Anti-abuse rule with respect to capital gains realized from the sale of shares of entities deriving their value principally from immovable property. Indirect transfers – where MNES avoid capital gains tax by incorporating conduit companies in low tax jurisdictions to dispose shares in assets located in source countries. African countries should adopt since both the East African Community and ATAF model DTA are silent on the same.

Article 10 - Anti-abuse rule for permanent establishments situated in third jurisdictions. Treaty benefits denied if an item of income attributable to a PE in a third jurisdiction if tax in the PE jurisdiction is less than 60% of the tax that would be imposed in the residence state. Withholding tax limits in a tax treaty abused by income attributed to a permanent establishment (PE) (such as a branch) in a low tax rate in the third country. African countries should adopt this especially those with BEPS challenges.

Withholding tax limits in a tax treaty abused by income attributed to a permanent establishment (PE) (such as a branch) in a low tax rate in the third country. To preserve the right to tax its resident, countries often include a ***"saving clause"*** in their DTAs that allows the country to tax its residents as if the treaty had not come into effect. However these clauses are often interpreted as contrary to treaty provisions (in that they amount to treaty over-ride). African countries should adopt since both the East African Community and ATAF model DTA are silent on the same.

2.2.3 Permanent Establishment

This part of the MLI evolves from Action 7 of the BEPS Report Action Plan which recommended best practices in preventing the artificial avoidance of "permanent establishment" (PE) status. The PE concept relates the taxation nexus via ***"a fixed place of business through which the business of an enterprise is wholly or partly carried on."*** Typically PEs include branches, factories, mines, and places of management, lengthy construction projects and places where a dependent agent habitually concludes contracts on behalf of the enterprise.

In Action 7 of the BEPS Reports the OECD notes that the PE concept has been under attack for years, both from multinationals that abuse it by artificially compartmentalizing their business to avoid meeting PE definitions (such as by dividing construction projects into smaller parts), and from developing countries that want to extend its parameters to reclaim their tax jurisdiction. The OECD acknowledged that the current definition of a PE is not sufficient to address BEPS strategies in the changing international tax environment, and that its standards were ineffective in equitably allocating taxing rights between source and residence States. This paper recommends that developing countries adopt these articles in the MLI.

Article 12 - Anti avoidance of PE status through commissionaire arrangements and similar strategies can be incorporated in the CTAs. Companies often use commissionaire arrangements to avoid PE status by setting up local distribution arms which contract with customers, while the goods and services are provided by the parent company. Commissionaire arrangements are generally only valid in civil law countries, so for common law countries they may not be a major concern. Nevertheless there could be cases where commissionaire proxies are employed to escape PE status. Developing countries should adopt this provision as it improves the current definition of a PE.

Article 13 - Artificial avoidance of PE status through the specific activity exemptions clarifies that the activities should only fall outside the definition of a PE if they are ***"of a preparatory or auxiliary character."*** Article 13(1) offers countries two options of achieving this (or they may choose neither).

Option A applies to modify the article 5(4) exceptions such as storing or keeping goods for display or delivery, purchasing goods or collecting information so that each of them will be made subject to the proviso of being ***"of a preparatory or auxiliary character"*** *(OECD 2016 MLC, Art 13(2)(a)).*

Option B, allows parties to retain these exceptions without making them subject to the proviso *(OECD 201 MLC, Art 13(3)).* Article 13(4) of the MLI also contains an anti-fragmentation clause. PE status can be circumvented by claiming that the business activities are preparatory and auxiliary in nature, or fragmenting them.

Option A is the only one that makes it possible for a host state to decide that a fixed place of business for the exceptions such as storing or keeping goods for display or delivery, purchasing goods or collecting information may constitute a PE if the activity can be regarded as not merely "preparatory or auxiliary." It is thus recommended that developing countries adopt Option A. It is recommended that developing countries should adopt the anti-fragmentation rule.

Article 14 - Splitting-up of contracts. Anti-contract splitting rule which would apply to deemed PE provisions (e.g. building sites, construction or installation projects). Construction projects split up into smaller contracts to avoid PE status adopt.

It is important that developing countries adopt this provision against splitting up of contracts.

Article 15 - Definition of a person closely related to an enterprise. Article 15 contains a definition of the term, based on common control, or direct or indirect ownership of more than 50% of the beneficial ownership. Article 15 denies a tax benefit when a person is closely related to an enterprise for the purposes of Articles 12, 13 and 14 of the MLI. The concept of ***"closely related to an enterprise"*** is used in the above articles. African countries should adopt this Article if they have adopted the articles above.

2.2.4 Dispute Resolution

Under Action 14 of the BEPS Project, the OECD emphasized the need to effectively resolve treaty disputes as new domestic law and treaty-based anti-abuse rules are susceptible to conflicting interpretation. Both the ATAF model and EAC Multilateral DTA under articles 25 and 26 provide for the Mutual Agreement Procedure (MAP), as the means for resolving tax treaty disputes.

Developing countries may want to retain the flexibility to apply their own approach to intra-group transactions.

Article 16 of MLI sets out the basis for MAP; who can access the MAP process, and the timelines and processes it should follow. It is important that developing countries that wish to sign the MLI review their treaties to determine which ones do not contain the relevant provisions, so that they can list them as CTAs for purposes of the MLI. However, effectively implementing MAP also requires resources, empowerment of competent authorities, and development of mutual trust among competent authorities.

Article 17 addresses the risk of double taxation when one state makes a transfer pricing adjustment; requiring the other treaty state make a ***"corresponding adjustment."*** This is not a minimum standard for BEPS Inclusive Framework members, thus countries are allowed to reserve the right not to apply this article if it makes other arrangements. Developing countries have however long been reluctant to provide the corresponding adjustment, insisting on

flexibility to apply their own approach to intra-group transactions. The obligation to accept an adjustment could be used to pressurize weaker countries to apply transfer pricing methods which they consider inappropriate. Developing countries may want to retain the flexibility to apply their own approach to intra-group transactions. It is thus recommended that developing countries make the reservations not to apply Article 17 of the MLI and rather choose that their competent authorities endeavor to resolve the case under the mutual agreement procedure in their covered agreements.

Article 16 - Mutual Agreement Procedure. Article 16's objective is to improve dispute resolution, making it more effective. The article aims to ensure the consistent and proper implementation of tax treaties, including the effective and timely resolution of disputes regarding their interpretation or application through the MAP. Need to effectively resolve treaty disputes as the initiatives to address BEPS would lead to the development of a broad range of new domestic law and treaty-based anti-abuse rules, which may be susceptible to conflicting interpretation. African countries that wish to sign the MLI, review their treaties to determine which ones do not contain the relevant provisions; so that they can list them as covered tax agreements for purposes of the MLI.

Article 17 - Corresponding adjustments. Contracting jurisdictions to provide for a corresponding adjustment with the aim of avoiding double taxation. When one state makes a transfer pricing adjustment there can be a danger of economic double taxation if the other state's assessment disagrees. Considering the challenges of using the arm's length principle to prevent transfer pricing, as well as the practical difficulties involved, developing countries may want to retain the flexibility to apply their own approach to intra-group transactions. It is thus recommended that developing countries make the reservations not to apply article 17 of the MLI and rather choose that their competent authorities shall endeavor to resolve the case under the mutual agreement procedure in their covered agreements.

2.2.5 Mandatory Arbitration

Mandatory binding arbitration is presumed to provide means of ensuring that tax treaty disputes are resolved through Mutual Agreement Procedure. Articles 18 to 26 of the MLI provide for Mandatory binding arbitration. The aim of the provisions is to implement mandatory binding arbitration, reflecting the commitment by some countries to provide for mandatory binding arbitration in their bilateral tax treaties. However neither the ATAF model nor EAC Multilateral DTA provide for mandatory binding arbitration.

Article 25(5) of the OECD MTC provides for arbitration as an extension of the MAP. The purpose of arbitration is to provide resolution for specific issues that prevent the competent authorities from reaching a satisfactory resolution of the case.

Arbitration provides resolution for specific issues that prevent the competent authorities from reaching a satisfactory resolution of the case.

In Action 14 of the OECD BEPS Project, the OECD notes that the business community and a number of countries consider that mandatory binding arbitration is the best way of ensuring that tax treaty disputes are effectively resolved through MAP. Thus the agreement to a minimum standard in Action 14 to make MAP more effective, was complemented by a commitment by a number of countries to adopt mandatory binding arbitration. However, there is no consensus among all OECD and G20 countries.

Many developing countries find the confidentiality of arbitral proceedings unacceptable. The secrecy involved makes it difficult for countries to draw on the experience gained in a given case or to monitor the fairness and effectiveness of the arbitration process.

The emphasis placed on confidentiality over transparency makes it difficult to develop confidence in the system since taxpayers cannot ascertain if the same decision would be applied in other similar cases. There is also concern about the limited guidance on the criteria for selecting arbitrators *(OECD 2016 MLC, Art 20).*

There is skepticism in entrusting decisions involving millions of dollars to a secret and unaccountable procedure of third-party adjudication. For developing countries with limited arbitration experience, the process could turn out to be unfair to them when disputes occur with more experienced countries that have had many MAP cases.

Having noted that both the ATAF model nor EAC Multilateral DTA do not provide for mandatory binding arbitration it is advisable that developing countries should not opt for mandatory binding arbitration when they sign the MLI, until the process is opened up to full transparency with reasoned decisions based on principles that can guide other taxpayers and tax authorities.

2.3 Analysis of the Base Erosion and Profit Shifting and the digital economy

The internet has brought about significant changes to the global economy. In particular it has changed the business models in retail; the world's biggest retailers such as Amazon and Alibaba, no longer operate shops.

Entertainment and information services that were once provided via physical media i.e books, newspapers, compact disc, tapes can now be provided via the internet. New businesses have emerged as companies such as Facebook and Google have explored ways to leverage information derived from users who often don't make direct payment for the service that they use. The methods by which these companies generate their income fall into two broad categories to which:

- Sales of goods or services via the internet to customers who may be private individuals or other businesses.
- Free-to-use, internet-based services where the provider generates most of its revenue by selling advertising and/or data to third parties.

In all this, the provider accumulates data about its users which becomes a key asset of the business enhancing its ability to target more goods and services at users.

Criticism arose that companies like the Amazon and Facebook do not pay ***"fair"*** amounts of tax in jurisdictions where they have a significant online presence. The reason for this is that the current tax system (Africa) evolved to cope with a 'brick and mortar' economy where goods and services were usually provided to customers from a fixed base; a shop, cinema, office etc.

The new digital business environment has made the tax collector's job much more difficult this is best illustrated by example. Consider the case where there is person B a customer in Country W who enjoys video games. Person B purchases and downloads two video games online: The first game is sold by a company which is registered in country W for tax purposes. It pays income on its profits in country W and charges person B VAT 15% on his purchase. But the company he buys from the second game is based in Country Y, which is low tax jurisdiction. It pays no income tax or VAT to the Country W Revenue Authorities, even though the game is bought, downloaded and played in Country W. This illustrates businesses providing goods or services in a jurisdiction but not paying taxes on profits made there.

Under BEPS Action 1, (Tax challenges arising from digitalization) issued in 2015 OECD being the principal body, drove forward the attempt to create a unified global approach to taxing the digital economy. It has repeatedly highlighted the risk of countries acting individually and inconsistently which could result in damaging double economic taxation or leave opportunities for profits to escape tax. In October 2019, the OECD secretariat issued a proposal to the 130 governments participating in the Inclusive Framework (the global alliance implementing the BEPS actions). This proposal is intended to form the basis for consensus around how to allocate profits and its hoped to achieve this by the middle of 2020. *(Cristal Total Solutions)*

The OECD proposal focuses on digital and consumer business and does not recommend the adoption of a revenue based approach. Instead the proposal aims to create a basis for jurisdictions to tax profits arising from digital business where these do not create a permanent establishment/branch under the existing domestic laws or tax treaties. Where the arm's length principle is not considered to give a reasonable allocation of profits it will be possible to use the

formula based approach, and this could include consideration of profits generated within a group of companies, rather than within a single corporate entity. The proposal acknowledges the importance of achieving simplicity and predictability. The need for agreements between multiple jurisdictions where a digital business is active is also emphasized.

2.4 Implication of the MLI clauses on domestic revenue mobilisation in East Africa

2.4.1 Case study on impact of MLI in Africa

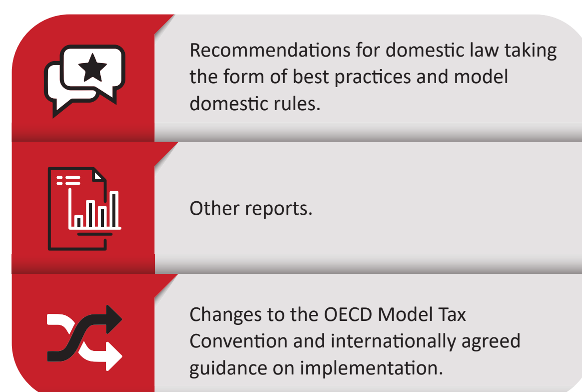
Currently 11 jurisdictions in the Africa region have signed the MLI but only one, Mauritius has ratified the MLI and deposited their instruments of ratification with the OECD. It follows that 10 jurisdictions can change their initial MLI positions before ratifying the MLI. The MLI will be effective in the Africa region in 2019 because one of the countries have ratified and deposited their instruments of ratification with the OECD. The Africa region could be affected by the MLI as from 2020 depending on the timing of the ratification process. For instance the MLI will be in force in Mauritius effective 01.02.2020[3]. With that position there is no single country in Africa which has effectively adopted the MLI therefore at this point there is no case study available where a developing country's adoption of the MLI has not yielded to the expected outcome or has led to negative results.

If we take a case study of Egypt as one of the African countries that has signed the MLI, but has not adopted the MLI. Egypt submitted a list of 56 tax treaties entered into by Egypt and other jurisdictions that Egypt would like to designate as Covered Tax Agreements (CTAs) i.e. tax treaties to be amended through the MLI. Together with the list of CTAs, Egypt also submitted a provisional list of reservations and notifications (MLI positions) in respect of the various provisions of the MLI. The definitive MLI positions will be provided upon the deposit of its instrument of ratification, acceptance or approval of the MLI. This certainly constitutes an unprecedented moment for Egypt in international taxation.

2.4.2 Suitability of the MLI for African Countries and specifically the East African region.

1. Changes to the OECD Model Tax Convention are intended to ultimately produce changes to the network of bilateral tax treaties that form a key component of the broader international tax architecture. G20 Leaders endorsed the BEPS Action Plan, and committed to take the necessary individual and collective actions in order to tackle BEPS.

The 15 BEPS Action Plan deliverables span three different areas:



Tax treaty-related issues are agreed to be a key focus of BEPS concerns. The development of a multilateral instrument to tackle these treaty-based BEPS issues first of all requires agreement on the substance of the tax treaty measures required to respond to BEPS. Working groups are making steady and important progress towards this goal. Indeed, the first outputs are being made public at the same time as this report, while other outputs are expected by 2015.

2. A Multilateral negotiation can overcome the hurdle of cumbersome bilateral negotiations and produce important efficiency gains. Given the decades-long process for bilateral treaty negotiations, a multilateral instrument represents the only way to address treaty-based BEPS concerns in a swift and coordinated manner. The current network of bilateral treaties involves substantial complexity because each treaty is a legally distinct instrument, and its relationship to other bilateral treaties is undefined. As a result,

3. https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

PREAMBLE OF THE TAX TREATY

Desiring to further develop their economic relationship and to enhance their co-operation in tax matters, intending to conclude a convention for the elimination of double taxation with respect to taxes on income without creating opportunities for non-taxation or reduced taxation through evasion or avoidance…

lawyers, tax administrators, and courts spend a lot of energy interpreting each individual treaty, especially when treaties differ in small ways. This problem would become more severe if varied anti-BEPS measures were included in thousands of new bilateral protocols to existing treaties.

The multilateral instrument will instead produce synchronized results that would save resources and improve the clarity of BEPS-related international tax treaty rules. These benefits are in addition to the simple reality that only a multilateral instrument can overcome the practical difficulties associated with trying to rapidly modify the 3000+ bilateral treaty network. The multilateral instrument can provide developing countries with the opportunity to fully benefit from the BEPS Project. For developing countries, the practical problems that are encountered in trying to address BEPS from within the bilateral tax treaty system alone are even more relevant than for developed countries. Developing countries find it more difficult than other countries both to conclude double tax treaties, and to interest other countries in tax treaty (re) negotiation, and their tax treaty negotiation expertise is often more limited than in the governments of developed economies.

3. A Multilateral Instrument therefore offers the best opportunity to ensure that developing countries reap the benefits of multilateral efforts to tackle BEPS. In a multilateral negotiation, similarly-minded developing governments may co-operate, pooling their expertise to be efficacious in the negotiating process. Case in point is Uganda whose new Double Taxation Policy model was to a large extent tailored and amended according to the guidance of the Multilateral Instrument on clauses like the Preamble of the Tax Treaty, that now reads; "Desiring to further develop their economic relationship and to enhance their co-operation in tax matters, intending to conclude a convention for the elimination of double taxation with respect to taxes on income without creating opportunities for non-taxation or reduced taxation through evasion or avoidance…", Permanent Establishment Status by widening the definition and scope, issue on Dividend Transfer transactions which introduced the holding rate and the period of holding, and the Withholding Tax rates.

4. Some issues are much easier to address multilaterally than in bilateral instruments. The bilateral treaty architecture was not originally designed to address high levels of factor mobility and global value chains. For example, globalisation substantially increases the need to resolve multi-country tax disputes. Although competent authorities within tax administrations have expressed interest in the possibility of developing a multilateral mutual agreement procedure (MAP) to resolve such multi-country disputes, some countries foresee legal constraints in the absence of a hard law instrument authorising multilateral MAP. Other countries do not believe they can use MAP to resolve cases that touch on issues not explicitly addressed in their existing bilateral tax treaties in the absence of an international law instrument that provides that authority. These and other legal obstacles that arise in implementing multilateral MAP can easily be addressed in the context of the multilateral instrument.

5. A Multilateral Instrument can increase the consistency and help ensure the continued reliability of the international tax treaty network, providing additional certainty for

business. In contrast to amendments to thousands of bilateral tax treaties, a targeted Multilateral Instrument to address BEPS would be much more likely to produce consistent results. The multilateral nature of the instrument would focus the attention of a large number of highly qualified treaty negotiators on a single document that could incorporate the language deemed most appropriate by all concerned countries. In addition, having a single text, instead of thousands of similar but slightly varying texts, would be more likely to produce consistent interpretation across jurisdictional boundaries. As a result, a common international understanding would develop about the meaning of the text of the provisions of the Multilateral Instrument. By addressing a number of contested questions surrounding international tax rules in a definitive way, a Multilateral Instrument can restore clarity and ensure future certainty for the status of a variety of important rules that business relies upon to be able to invest with confidence cross-border.

Allowing countries to tailor their commitment under the instrument in pre-defined cases can help in swift implementation.

6 Flexibility, respect for bilateral relations, and a targeted scope are key to success. The benefits of swift implementation, improved consistency, certainty, and efficiency, can only be achieved if bilateral specificities and tax sovereignty are fully respected, so that the process does not bog down or involve too few countries. Allowing countries to tailor their commitment under the instrument in pre-defined cases can help address these concerns. On the other hand, in order to feel comfortable moving ahead in tackling BEPS, countries will want assurance that other countries are tackling BEPS simultaneously. Parties could therefore commit to a core set of provisions as part of a Multilateral Instrument, but then have the possibility to opt-out, opt-in or choose between alternative – and clearly delineated – provisions with respect to other issues covered by the instrument. Negotiations would thereby accommodate bilateral specificities, reinforce governmental policy goals, and reassert tax sovereignty in the face of globalisation.

7 At the same time, a level playing field will require broad participation. Some provisions of the treaty-based portion of the BEPS Project require broad participation in order to successfully address BEPS concerns. Thus, to ensure a level playing field and fairly shared tax burdens, flexibility and respect for bilateral relations will need to be balanced against core commitments that reflect new international standards that countries are urged to meet and for which the Multilateral Instrument is a facilitative tool.

8 The tax treaty-related BEPS measures set out in the MLI have the potential to reduce vulnerability to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no corresponding economic activity.

9 The MLI is designed so that it can modify any DTA, whether it is based on the OECD or the UN Model Conventions.

10 The MLI can strengthen source taxation, especially by addressing treaty shopping, and abuse of the taxable presence requirement in the definition of a permanent establishment (PE).

11 The provisions can preserve source taxation by ensuring that profits are taxed where the economic activities generating those profits are performed and where value is created. Case in point is the new digital economy where the proposal aims to create a basis for jurisdictions to tax profits arising from digital business where these do not create a PE/ Branch under existing domestic laws or tax treaties.

12 Considering the costs and time involved in re-negotiating treaties, the MLI provides the easiest and less costly method of updating treaties.

13 Reliance on bilateral negotiations to introduce the BEPS measures would cause uncertainties, delays and expenses and would tend to disadvantage developing countries.

2.4.3 Reasons that make MLI not the best vehicle to address risks related to double taxation in Africa

1 Interests of developing countries:
Considering that the outcomes of the BEPS project and their ultimate inclusion in the MLI largely addresses concerns of OECD countries; it remains to be determined whether the taxing rights of source countries will be protected. Although the MLI, can apply to all DTAs whether based on the OECD or UN models and although the UN established a sub-committee to monitor and facilitate input in the BEPS process from developing countries and to consider BEPS implications for the UN model, the UN Committee of Tax Experts played only a marginal role in the BEPS project *(UN Sub-committee on BEPS).*

The process of drafting the MLI took a relatively short period, therefore it has been criticized.

Even though the BEPS Project is intended to ensure the alignment of tax with economic activities and value creation, the BEPS outcomes only provide patch-up remedies to weaknesses in the existing tax system, and not a more coherent and comprehensive revision to international tax and DTA rules that would comprehensively protect source taxation *(The BMG 2016, at 4)*. The compressed timeframe with which the BEPS Project was carried out has also been criticized for putting extraordinary pressure on the consensus-driven process at the OECD, which risks ***"creating a false consensus around vague standards that have not been adequately considered"*** Also, the process of drafting the MLI took a relatively short period, and it has been criticized for covering mainly the ***"bare bones"*** of the structural issues rather than the details of its content and that the consultation process was minimal *(Arnold B 2016, at 683).* This leaves developing countries concerned as to whether the MLI will be instrumental in alleviating their BEPS concerns especially if Parties opt out of articles that are pertinent to developing countries. Case in point is Mauritius that reserved their right not to apply on the LOB and PPT on the Article of Prevention of Treaty Abuse which is pertinent to developing countries like Uganda.

2 Concerns arising from the flexibility of the MLI. The measures in the MLI have great potential to improve existing tax treaty rules, especially if adopted uniformly. Although the minimum standards in the BEPS Project are supposed to be implemented by all countries that are part of the OECD Inclusive framework, the mechanism for the application of the minimum standards in the MLI provides a certain level of flexibility on how the minimum standards will be implemented by States, since they can opt out of some provisions. This flexibility implies that it is possible for a country to sign the MLI and still opt out of the BEPS minimum standards for example those in Article 7 (dealing with preventing Treaty Abuse), on the basis that it intends to negotiate an alternative meeting the minimum commitments. The advantages of the MLI would be more effective if it is introduced quickly and as uniformly as possible. However, if countries opt out of some of the provisions, it may result in the continuation or even proliferation of the tax planning strategies that the MLI is intended to restrict. Where states are free to choose different ways to achieve the treaty related BEPS minimum standards, as long as they endeavour to find a satisfactory solution bilaterally with the other contracting states. This may result in a loss of the advantages of the envisaged MLI *(Arnold B 2016 at 684).* It will result in a more complex and non-uniform structure of anti-abuse provisions in DTAs *(The BMG 2016 at 4).*

3 Ideally, one would have expected that countries would list all their DTAs as CTAs under the MLI. Comprehensive and coherent implementation of the BEPS project proposals would imply that all countries would adopt both the minimum standards and the recommended best practices, even though further improvements

may be considered and could be subsequently negotiated *(The BMG 2016 at 5).* From that premise, one would have expected that all the OECD and G20 countries, which initiated the BEPS project and were actively involved in formulation of the proposals, would then lead in full implementation of the MLI. Some of these countries (such as Switzerland, Netherlands, the UK, the US, Ireland) have an extensive network of DTAs that have been used in international treaty shopping schemes; and they have notoriously availed themselves as hubs for tax planning strategies for their own residents and for MNEs based in other countries *(The BMG 2016, at 5).* Failure by these countries to comprehensively adopt the treaty-based minimum standards in the MLI, such as those relating to preventing artificial avoidance of PE status, would create major gaps and inconsistencies in the tax treaty system.

4. The approach taken by countries signing the MLI jurisdictions with respect to reservations varies. Some countries, such as Switzerland, have reserved their right not to apply most of the provisions, other jurisdictions, have chosen to apply several of them. Ideally, a decision to opt out of any of the other MLI provisions should only be made after very careful consideration, supported by strong reasons. The ability to opt in and opt out of provisions could open a means for a country to sign the MLI, just for one benefit — opting in to mandatory binding arbitration in resolving cross-border disputes under existing DTAs *(The BMG 2016, at 4).* This selective or partial adoption of MLI provisions by developed countries is very concerning for developing countries which are not very sure of what to opt in or out of, and are skeptical that this approach may inevitably create more gaps and mismatches between tax rules applied by different countries, it would encourage tax arbitrage, generate disputes; and thwart the BEPS Project.

5. Complexity: The MLI entails a complicated reservation and option mechanism. It is highly technical, and the arrangements governing its application to CTAs are complex. Some of this complexity is due to the difficulty of reconciling divergences between the states, while aiming to ensure consistency in the final text. The Explanatory Statement to the MLI may also lead to increased complexity in interpretation, adding a new layer of interpretative sources for the treaty provisions which may be challenging to apply *(Silberztein C & Tristram J 2016 at 353).* One of the biggest challenges of the MLI will depend in large part on the OECD and participating jurisdictions' ability to distinguish between which treaty provisions have been modified and which remain the same *(Lewis A 2016).* To resolve some complexities, the OECD has developed a Toolkit to facilitate the Application of the MLI *(OECD Toolkit for MLI).*

6. The uncertainties that the MLI creates: When countries negotiate DTAs, the articles they agree upon are often interconnected. The negotiation process may result in various concessions that are covered in other articles. The MLI creates uncertainties where it impacts on this interconnectivity and the equilibrium reached by the contracting countries during the negotiation, which may lead to situations which would have never been accepted in bilateral situations. Uncertainty also arises where the MLI may modify a provision that is fundamentally connected to other provisions of DTAs which may not be covered in the MLI. For example, the MLI deals with preventing artificial avoidance of PE status in article 5 of DTAs, which is fundamentally connected to the attribution of profits to PEs in article 7 of DTAs which was not dealt with in the BEPS Project *(Silberztein and Tristram, 2016, pg 353).*

This connectivity of these articles is concerning to many developing countries, since many of them have not adopted the OECD's approach of attributing profits to PE which recognises the economic differences between the PE and subsidiaries by adopting a ***"functionally separate entity"*** between the PE and the head office when pricing transactions between them on an arm's length basis, without regard to the actual profits of the enterprise of which the PE is a part. This implies that non-actual management expenses, notional interest and royalties from head office may be charged on the PE *(Deloitte 2013).* This approach differs from the UN model which, denies the

Parliaments will need a lot of guidance and explanation on the treaty-related BEPS measures and on how the MLI operates.

deduction of such notional expenses. Many developing countries have not adopted the OECD's approach because of concerns that it may be detrimental to their tax revenue if deductions for notional internal payments are allowed that exceed expenses actually incurred by the taxpayer.

7. Administrative capacity: Many developing countries do not have experience in multilateral conventions, even though there is an increasing number of African countries that have signed the OECD Multilateral Convention on Mutual Assistance in Tax Matters. Significant work in administrative capacity will be required for developing countries to engage with and benefit from the MLI. These matters are compounded by the complexity of the length and complexity BEPS Reports which are relevant to understanding the provisions of the MLI.

8. Parliamentary approval before ratification: The MLI is an unprecedented procedure, which in many countries will require parliamentary approval before ratification. Parliaments will need a lot of guidance and explanation on the treaty-related BEPS measures and on how the MLI operates. Parliaments may require detailed analyses of the projected impact on bilateral trade and investment flows. Further, they may want to see analyses of the impact of each opt-in/opt-out combination for every DTA modified by the MLI *(Lewis A 2016).*

9. There is no information in the public domain on whether and to what extent countries which have negotiated the MLI have been briefing the advisers to parliamentary committees responsible for the ratification process to bring them up to speed with developments. Such information may be helpful for developing countries, as they embark on getting parliamentary approval.

11. Language: Many countries require that legislation presented to their respective parliaments be in the native language. The MLI is so far available only in English and French *(OECD 2016 MLC, Art 32(2)).*

An increasing number of DTAs are concluded in a variety of languages; for instance in Arabic and Chinese *(Arnold B 2016 at 686).* Where questions of interpretation arise in relation to CTAs concluded in other languages or in relation to translations of the Convention into other languages, it may be necessary to refer back to the English or French texts *(OECD 2016 MLC, Art 32(2)).* The OECD has already begun creating official texts in a number of common languages, but it is unclear if ratification will have to wait for those translations to be completed *(Lewis A 2016, at 2).* Another challenge for the MLI is whether parliaments will have to wait for the OECD to complete its work on PE profit attribution matters, because some parliaments will not ratify an incomplete agreement *(Lewis 2016, pg 2).*

12. Global acceptance of the MLI: There are concerns about the global acceptance of the MLI due to the manner in which it was developed. The content of the MLI evolves from the BEPS project whose agenda did not initially include the interests of developing countries. Although non-OECD/G20 countries were later allowed to join on an equal footing, under the inclusive framework, the content of the MLI substantially covers concerns of OECD countries. Global acceptance of the MLI, was also hampered by the fact that whereas the

United States of America was part of the ad hoc group that developed the MLI, it did not sign up *(PWC 2016 at 2).* The reason given is that ***"the bulk of the Multilateral Instrument is consistent with U.S. tax treaty policy that the Treasury Department has followed for decades."*** For example all US treaties have a LOB provision to prevent treaty shopping, a saving clause and an arbitration provision.

13 Concerns about the OECD becoming a world tax organisation: Since the OECD is the secretariat and the Depositary of the MLC, there are concerns that the OECD is indirectly establishing itself as a de facto international tax organisation, despite continuing calls from developing countries for the establishment of a truly representative body under UN auspices. Thus, many developing countries view MLI with suspicion.

3 Policy Recommendations

Any change in a country's tax laws and DTAs has an influence on its trade and commerce vis-a-vis its economic relations with other countries. Hence, great care and caution has to be taken before signing the MLI so as to prevent the endangerment of national economic interests *(Singh, 2011, pg 1).*

Although the MLI has great potential to protect source countries' tax bases by ensuring that treaty-related BEPS measures are implemented quickly and consistently among states, inconsistent implementation of the measures would lead to increased double taxation and a negative impact on cross-border trade and development, which is contrary to the objectives of the BEPS Project.

With all the administrative and political challenges the MLI elicits, as well as the complexities and uncertainties that prevail, it is advisable for developing countries that were not that engaged with the BEPS process or not part of the Ad Hoc group that developed the MLI, to adopt a wait-and-see approach, while they learn how the process evolves.

This would allow countries with a limited treaty network and limited treaty negotiating capacity to consider the provisions that other countries are choosing, and to understand the treaty policy considerations that are pertinent for their specific circumstances, so that they can make informed decisions *(Lewis, 2016 pg 2).* It is also important to note that although at the signing of the MLI, many countries' initial positions were conservative in that they opted out of certain provisions, it is not yet clear whether that will be their final position.

The MLI allows countries to change their positions before ratification. It is therefore important for countries to monitor other countries positions, as these can change any time until ratification *(KPMG, 2017).*

Clearly the MLI elicits many unanswered questions and more questions and challenges will arise when the MLI is applied in developing countries should therefore heed the caution of the IMF warning to countries that have treaty negotiation incapacities not to rush into signing new DTAs if they are not sure whether its provisions are in their favour.

The OECD BEPS Action 6 also points to the importance of identifying the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country. Even though these cautions were provided with respect to DTAs, they are still relevant with respect to the MLI.

Until developing countries have developed clear policy guidelines that inform why they negotiate particular treaty provisions, they should not be too quick to sign the MLI, as they could opt into or out of provisions that may not be in their favour.

Annex

Status of the MLI by African Countries as at 1st October 2019.

S/N	Country	Year of Signing
1	Algeria	Intends to sign
2	Egypt	7 June 2017
3	Senegal	7 June 2017
4	Burkina Faso	7 June 2017
5	Ivory Coast	24 January 2018
6	Nigeria	17 August 2017
7	Cameroon	11 July 2017
8	Gabon	7 June 2017
9	Kenya	Intends to sign
10	Mauritius	5 July 2017
11	Morocco	25 June 2019
12	South Africa	7 June 2017

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