PMRC POLICY ANALYSIS: ZAMBIA’S DOUBLE TAXATION AGREEMENTS

TOWARDS OPTIMISED TAX REVENUE COLLECTION
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**Message from PMRC**

PMRC’s vision is “Unlocking Zambia’s potential”. We recognize that it is only discussion and debate on social and economic policy issues critical to poverty reduction that ultimately leads to policy reform to support a robust and thriving economy.

We achieve our Vision by:
- Producing high quality, relevant and timely policy analysis, policy monitoring, and reform proposals
- Promoting and encouraging an informed public debate on critical social and economic policy issues.

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**INTRODUCTION**

On the 4th of February, 2014, Zambia signed a Double Taxation Agreement (DTA) with the United Kingdom and Northern Ireland. Zambia currently has approximately 22 such Double Taxation Agreements (DTAs) with foreign nations.1 While these Agreements are said to play an important role in attracting much needed Foreign Direct Investment (FDI) to developing countries like Zambia, the extent to which DTAs actually achieve this goal has been brought into question. Furthermore, the significant negative impacts of DTAs on tax revenue mobilisation of developing countries have also attracted international attention. This policy analysis seeks to clarify what is meant by double taxation agreements; discuss the origin and guiding principles underpinning DTAs and thereafter analyse Zambia’s latest double taxation agreement with the United Kingdom and its possible implications on national development.

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1. Zambia has DTAs with: Canada, China, India, Ireland, Mauritius, Netherlands, South Africa, Seychelles, Switzerland, United Kingdom, Denmark, Finland, France, Germany, Italy, Japan, Kenya, Norway, Romania, Sweden, Tanzania and Uganda (IMF, 2013)
This analysis is pivotal and highly timely due to the growing network of such treaties and the significant threat they pose to tax revenue bases, particularly in developing countries like Zambia. There is also global debate over the effectiveness of the Organisation for Economic Cooperation and Development’s (OECD) Model Treaty on Double Taxation with its focus on permanent residence in determining tax jurisdiction and the United Nations (UN) model with its emphasis on the source principle. The importance of clarity in these matters is further heightened by Zambia’s urgent need for resources to finance poverty reduction and developmental projects. Poverty levels in Zambia remain persistently high with 60.5% of the population living in poverty. The country has also witnessed an increasing reliance on costly debt financing, with an increase in Zambia’s external debt to over US$4.5 billion in April 2014, from US$3.5 billion as at December, 2013. Domestic and external debt ceilings have also been increased in the recent past (2013-2014), positioning the country for greater debt accumulation. The pertinent role of taxation in providing sustainable finance has thus risen to the fore. Although the Zambian Government has recently re-stated its commitment to strengthening domestic tax revenue mobilization, these efforts may be significantly hampered if sufficient attention is not paid to analysing the impact of DTAs to on-going developmental efforts.

Zambia’s Rising Debt and Poverty Levels

DTAs date back to 1899 when the first bilateral treaty was signed between Austria-Hungary and the then Prussia. They gained popularity following World War II, when Western European States sought to attract capital and technological investment for post-war reconstruction. With increased international flows these nations realised the need to minimize the possibility of the two or more countries levying similar taxes on the same income or capital belonging to an individual/enterprise operating in the two states (double-taxation). Various states thus agreed that double-taxation posed a threat to international trade, hence the need for bilateral double-tax agreements. Through DTAs, states decide how they will allocate taxing rights between themselves.

DOUBLE TAXATION AGREEMENTS: ORIGIN AND GUIDING PRINCIPLES

A Double-Taxation Agreement or Treaty is generally defined as “a contract signed by two countries (referred to as the Contracting States) to avoid or alleviate (minimise) territorial double taxation of the same income by the two countries.” These agreements are therefore essentially a tool intended to promote international trade and investment by eliminating double-taxation.

5. ACCA:www.accaglobal.com/content/dam/acca/global/.../sa_apr12_plf_dta.pdf

Adapted by PMRC from Ministry of Finance (2013), Living Conditions Monitoring Survey (LCMS) (2010)
The OECD designed a model to assist country-pairs in negotiating DTAs. The Model seeks to eliminate double-taxation by ensuring that contracting states harmonise definitions of important concepts, clarify which taxes are covered by the agreement and outline mechanisms to be used for removal of double-taxation where it occurs. By harmonising definitions, possible contradictions and conflicts arising from use of different definitions of the same concept and different tax rules are avoided. The initial OECD model was designed to mainly suite negotiations between developed countries that shared fairly similar economic characteristics and thus similar economic benefits from the Agreements. However, DTAs now increasingly involve negotiations between developed and developing countries. This has led to the development various other Model Tax Treaties including the United Nations (UN); Southern African Development Community (SADC); and Common Market for Eastern and Southern Africa (COMESA) Model Treaties. The OECD and UN models are however currently the most popular models. The UN Model, has become the most prominent alternative to the OECD Model and seeks to ensure that the needs of developing countries are better addressed in negotiations between developed and developing countries.

Two fundamental principles are usually referred to in discussing the basis of Double-Tax Treaties: 1) The principle of residence and 2) the principle of source. These principles determine a country’s jurisdiction or control over tax income. The OECD Model has tended to emphasise the residence principle, while The UN Model has placed greater focus on the source principle, which favours higher tax revenues for developing countries.

### The OECD VS. UN Model

<table>
<thead>
<tr>
<th>OECD MODEL</th>
<th>UN MODEL</th>
</tr>
</thead>
</table>

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<table>
<thead>
<tr>
<th>THE PRINCIPLE OF RESIDENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Principle of Residence: this principle states that “all income of persons domiciled or normally resident in a country is subject to that country’s income tax.” This implies that regardless of the source from which income originates, the basis for taxation is residence or nationality of the tax-payer. A country’s residency jurisdiction however depends on the definition of residency adopted in the agreement (e.g. physical presence in a state for more than 183 days constitutes residency in the OECD Model).</td>
</tr>
</tbody>
</table>

Source: Policy Monitoring and Research Centre (PMRC) from definitions in Irish (1974)
The Principle of Source: requires that “all income originating in a country, regardless of to whom such income accrues, is subject to that country’s income tax.” This principle places greater importance on the location where revenue is generated from (source) and can also be described as being based on the relationship between the ‘income (tax object) and the taxing state’.

**ZAMBIA’S DTA WITH THE UNITED KINGDOM: POTENTIAL BENEFITS AND CHALLENGES**

As earlier indicated, Zambia recently signed a DTA with the United Kingdom that repealed the initial, 1972 DTA between the two countries. Some of the drivers behind the renegotiation of the 1972 Treaty was a desire to strengthen the legislation vis-a-vis provisions for curbing tax avoidance and evasion and to incorporate aspects of the UN Treaty, which are more in favour of the source principle (e.g. refine certain key definitions which limited Zambia’s taxing rights).

The DTA between Zambia and the UK consists of 30 Articles, which can be sub-divided into 7 major parts consistent with the OECD/UN Tax Models (Figure 2 below summarises the major elements of the Agreement).

**Part I: Scope of Convention**

Article 1 specifies who the treaty applies to namely: residents of either or both the Contracting States (Zambia, the UK or both); while Article 2 specifies which taxes the DTA applies to. These are direct taxes on income and tax on capital; indirect taxes such as Value-Added Tax (VAT) are excluded.

**Part II: Definitions**

Provides general definitions of terms used within the agreement (Article 2) but more importantly, provides detailed definitions of two key concepts used in the Agreement; resident and permanent establishment. Article 4, defines the term resident as any person liable to pay tax in a State on account of that person’s domicile, residence, place of incorporation, place of management or any other similar criteria. The definition excludes persons who only have a source of income in that state.

Article 5 provides the critical definition of a “permanent establishment” which is defined as a fixed place of business where all or part of the business of an enterprise is carried on. This includes: a place of management, a branch, an office, a mine or gas well etc. The definition excludes certain facilities such as those used for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise.

**Part III: Taxation of Income**

Details how various types of income will be taxed including:
- Income from Immovable Property (Article 6)
- Business Profits (Article 7)
- Shipping, Inland and Waterways Transport and Air Transport (Article 8)
- Associated Enterprises (Article 9)
- Dividends (Article 10)
- Interest (Article 11)
- Royalties (Article 12)
- Capital Gains (Article 13)
- Income from Employment (Article 14)
- Director’s Fees (Article 15)
- Entertainers and Sportspersons (Article 16)
- Pensions and Annuities (Article 17)
- Government Service (Article 18)
- Students and Business Apprentices (Article 19)
- Professors and Teachers (Article 20)
- Other Income (Article 21)

Source: Policy Monitoring and Research Centre (PMRC) from definitions in Irish (1974)
Overview

The Policy Monitoring and Research Centre (PMRC) believes that certain important benefits could potentially arise from Zambia’s recent DTA with the UK. However, the overall costs to Zambia are likely to significantly outweigh the benefits.

The overall adverse effect is due to the significant loss of tax revenue likely to arise from the emphasis on residence principle over the source principle in determining tax jurisdictions of countries as well as used Treaties for tax avoidance and evasion. Following recent international discussions on Base Erosion and Profit Shifting (BEPS) there are repeated concerns that the global economic structure has significantly changed from the state it was in when the residence principle was conceptualized and thus limiting the effectiveness of ‘residence inclined’ tax treaties.

Part IV: Taxation of Capital: specifies how various kinds of capital (e.g. represented by: movable and/or immovable property, ships and aircrafts etc.) shall be taxed in the Treaty.

Part V: Elimination of Double-Taxation: details the methods to be used for elimination of double-taxation.

Part VI: Special Provisions: provides for special provisions which include provisions:

- Relating to non-discrimination and unfair treatment of residents of either state in applying the provisions of the Treaty (Article 24);
- for mutual agreement procedures (Article 25);
- For exchange of information between States relevant for administration and enforcement of the Agreement (Article 26);
- For the Competent Authorities (Revenue Authorities) to assist each other in recovery of tax revenue claims (Article 27) and
- Maintaining the tax privileges of members of diplomatic missions and consular posts hence exempting them from tax impositions from this Agreement.

Part VII: Final Provisions: This section specifies when the Agreement will enter into force, its duration and conditions for termination. Although the Agreement was signed on the 4th of February, 2014, it shall only come into force when stipulated procedures by both States are completed and written notification is given to enforce the Agreement.

Concerns over intangible assets (brands, goodwill) and virtual trade (online trader such as e-bay, amazon, etc.) not being captured by the residence principles have also arisen in the recent past with incidence in the UK forcing the UK’s House of Commons to question whether some online traders such as Yahoo, Amazon among others should not pay taxes on sales derived from the UK market. The changing global economic architecture and the relevance of the OECD model treaty is also a discussion in the “Paying Taxes 2014 Report” which states that:

“The world’s tax systems need to be reformed. In reforming tax systems and designing tax policies around the world, there is a need to ensure that the differing perspectives and priorities of the various stakeholders are understood ... tax systems around the world need to be updated to meet modern needs.”

The most urgent need of the Zambian Government is to finance its own development; and tax revenues constitute the largest and most sustainable revenue source for funding development projects. Conversely, DTAs such as the latest UK-Zambia DTA are likely to constrain developmental efforts by lowering tax revenue inflows.

Source: Policy Monitoring and Research Centre (PMRC) (2014)

Constrained Development from Limited Taxes

This analysis shall begin by examining the stated benefits of DTAs which drive developing countries, like Zambia to sign them and the extent to which Zambia is likely to enjoy these benefits. The analysis shall thereafter consider the challenges that have arisen from DTAs particularly from the emphasis on the residence principle over the source principle.

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14. Defined as “Base erosion and profit shifting (BEPS) refers to tax planning strategies that exploit gaps and mismatches in tax rules to make profits ‘disappear’ for tax purposes or to shift profits to locations where there is little or no real activity but the taxes are low resulting in little or no overall corporate tax being paid” (OECD, http://www.oecd.org/tax/beps-frequentlyaskedquestions.htm) Downloaded on 2/4/2014.

The primary objective of DTAs is to “facilitate the international flow of capital, technology and services” by eliminating the unfair tax burden that may be placed on taxpayers engaged in international trade through double taxation (which may be Juridical or Economic double taxation).17 Egger et al. (2006: 902) observe that “One of the most visible obstacles to cross-border investment is the double taxation of foreign-earned income.” DTAs are thus signed with the expectation that they will attract increased FDI flows between nations. This goal particularly constitutes a significant driver to entry into these agreements for developing countries like Zambia, which face limited access to capital and technology and hence seek to attract foreign investment. Increased FDI flows are critical for increased capital formation, expansion of tax bases, job-creation and technological transfer. However The extent to which DTAs actually attract investment, particularly to developing countries such as Zambia, has been the subject of much debate.

In some cases, the argument has been found to hold credence. Barthel et al. (2009) for instance, found that DTAs increased FDI flows by between 27% and 31% in a sample which held broad representations of both developed and developing countries. Neumayer (2009)8, whose study was more specific to developing countries similarly, found that DTAs were effective in attracting FDI flows but only to middle, not low – income developing countries.

However, Davies (2003) and later, Blonigen and Davies (2004) in a study on FDI flows between the US and its Contracting States found that DTAs have no positive impact on inward and outward flows of FDI.19 Recent studies by Baker (2012), 20Hearson (2013) and McGauran (2013)21 also conclude that DTAs have no substantial impact on attracting FDI from developed to developing countries.

This, they contend, is due to the fact that developed countries necessarily ensure that they do not impose a double-tax burden on enterprises operating abroad.22 Developed countries also ensure that measures are taken to prevent tax evasion, regardless of the host country’s treaty status. This therefore removes the key incentive for locating in countries where treaties are in place as the economic benefit and risk that the treaties would otherwise create for Multi-National Corporations (MNC’s) is removed.

Baker’s argument is supported by the case of the United States where individuals and enterprises operating in foreign countries are entitled to foreign tax credits on foreign source incomes regardless of whether there is a treaty with the host country.23 Similarly, the UK itself also provides for unilateral tax relief where double-taxation would otherwise occur.24 This implies that even without treaties, US based companies would be protected from double-taxation. However, the extent of relief provided for in the case of contractual arrangements in non-treaty states is only to the extent that would be possible if a treaty was in place.

Beyond that, the burden would be borne by the investor in terms of domestic taxes of that state. This could thus prove a disincentive for investing in non-treaty states as investors may be subject to higher payments.

An UNCTAD (2009) report also argues that DTAs provide more comprehensive protection against double-taxation as they have greater permanence than domestic tax credits which may easily be changed at will. The study thus concludes that DTAs contribute to the overall investment climate and create business opportunities hence have a positive effect on attracting investment. While it is clear that no consensus has yet emerged on the overall impact of DTAs on FDI, it is generally acknowledged that DTAs alone do not lead to increased FDI flows. The flow of FDI to countries is based on a set of variables ranging from the policy framework for foreign investment socio-economic and political stability, economic determinants such as market size and cost of inputs as well as factors such as the presence of investment incentives and availability of resource factors (e.g. natural resources) necessary for such investment.

17. Juridical Double-Taxation, occurs when “the same income is being taxed twice in the hands of the same taxpayer.” For example, dividends may be subjected to withholding tax in a source country but then be further subjected to taxation in the country of residence of the shareholder through tax assessment. Economic Double-Taxation on the other hand entails the same income being taxed twice in the hands of two tax-payers. DTAs primarily serve to eliminate international juridical double taxation but some treaties also seek to reduce the incidence of economic double taxation.
19. Barthel, F., Buess, M. and Neumayer, E. (2009), The Impact Of Double Taxation Treaties On Foreign Direct Investment: Evidence From Large Dyadic Panel Data, Contemporary Economic Policy, Western Economic Association International however, points to the limitations of their sample size in this study
A second key benefit advanced for signing of DTAs is that they provide legal and fiscal stability hence allow businesses to forecast the maximum tax rate to be incurred and tax exemptions applicable to them.26 UNCTAD (2009:19) states that “the single most important advantage of a tax treaty is the relative certainty it offers to investors with respect to their tax position”.

This is particularly important with regards to developing countries whose tax systems are regarded as less stable than those of developed nations.

Aside from the Development Agreements between the mines and government which had a built-in stability period in which agreed mining taxes would not be changed, Zambia’s fiscal legislative environment has not been an exception to instability. Zambia’s DTA with the UK may thus provide greater assurance of tax stability investors. Article 29, for instance, states that the DTA can only be terminated 5 years after it has been in force. Moreover, since the initial agreement between Zambia and the UK remained in force from 1972 to 2014, investors would be assured of the relative permanence of the agreement.

While this would be beneficial for investors, it underlines the crucial importance of ensuring that necessary research and consultations are undertaken prior to entering into DTAs as they tend to be semi-permanent. Furthermore, although the overall content and time stability are assured, their relative permanence makes them less responsive to the evolving economic architecture and practices. For example while UK investments encompasses online trade which results in various forms of income, the DTA does not explicitly address this form of trade hence from the outset is not in tune with the dynamics of international trade.

DTAs also allow contracting states to clarify taxation rights between themselves. For instance, Article 1 and 2 of Zambia’s DTA defines the persons to whom the DTA applies and taxes covered while Articles 3, 4 and 5 clarify which definitions shall be used for major concepts within the Agreement. This helps to avoid possible conflicts between states which may otherwise arise from individual states wholly relying on their own internal tax systems and rules which may be guided by different principles27. Harmonised legislation further reduces on the administrative strain by either state from consulting various pieces of legislation and similarly reduces administrative work for investors.

25. UNCTAD. (2009). The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries. UNCTAD Series on International Investment Policies for Development
DTAs further seek to ensure that nationals investing in the other Contracting State are treated with the same fairness and equity vis-à-vis taxation, as the citizens of that Contracting State. This is provided for under Article 24 of the UK/Zambia DTA, which seeks to address the most common types of discrimination that may arise. Article 24, 1 for instance states that nationals of a Contracting State shall not be subjected in the other State to taxation or requirements that are more burdensome than those placed on nationals of that other State. This Article is important because discriminatory tax regulations can significantly deter foreign investors. A foreign investor would for instance find it difficult to compete with a local company if the tax requirements (e.g. amount of taxes and procedures) he faced were much higher than those of the local company. Nevertheless, the extent to which Zambians will benefit from this Article is also limited as few Zambians have the financial capacity to invest in the UK.

Another major objective of DTAs is to reduce tax evasion and avoidance. DTAs therefore incorporate anti-tax avoidance clauses which allow countries to share information about taxpayers operating in either state and thereby ensure taxing rights are preserved.

The recently signed DTA between Zambia and the UK, for instance incorporates “Article 26: Exchange of Information” which allows tax administrators in Contracting States to exchange information for carrying out of the provisions of the Agreement. Saunders (2014) calls this “the most important anti-tax avoidance weapon” as it allows states to share information on taxpayers especially where information relates to issues of tax fraud. Article 27 further allows for assistance in recovery of revenue claims by either State, which is another important clause as it allows countries to recover tax claims even where individuals flee to the next state where the other State may otherwise have lacked the jurisdiction to pursue them.

Another important Article relating to curbing of tax avoidance and evasion is Article 9 which relates to “Associated Enterprises”.

**Role of DTA in Harmonising Legislation of Different Countries**

**AVOIDANCE OF TAX DISCRIMINATION**

DTAs as further seek to ensure that nationals investing in the other Contracting State are treated with the same fairness and equity vis-à-vis taxation, as the citizens of that Contracting State. This is provided for under Article 24 of the UK/Zambia DTA, which seeks to address the most common types of discrimination that may arise. Article 24, 1 for instance states that nationals of a Contracting State shall not be subjected in the other State to taxation or requirements that are more burdensome than those placed on nationals of that other State. This Article is important because discriminatory tax regulations can significantly deter foreign investors. A foreign investor would for instance find it difficult to compete with a local company if the tax requirements (e.g. amount of taxes and procedures) he faced were much higher than those of the local company. Nevertheless, the extent to which Zambians will benefit from this Article is also limited as few Zambians have the financial capacity to invest in the UK.

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**REDUCTION OF TAX AVOIDANCE AND EVASION**

DTAs allow countries to exchange tax information and provide assistance to each other in recovery of tax claims. Anti-tax avoidance clauses such as these have become increasingly important due to the rise of tax avoidance and evasion and associated losses in revenues.
For instance, Mopani Copper Mines drew media attention in 2011 for its reported involvement in tax avoidance practices. Mopani was reported to have been engaged in selling copper and cobalt to its related company, Glencore, registered in Zug, Switzerland, at a lower price than the price on the London Metal Exchange (LME rate). Simpere would then re-sell the copper at a much higher price from Switzerland. Switzerland is famous for its attractive tax regime hence these profits were ultimately taxed at a lower rate than would have been the case in Zambia. The overall effect of Mopani’s action was to declare lower profits in Zambia hence be liable to pay much lower taxes. Through Article 9, ZRA will now be able to readjust profits to suit the market price and deduct taxes from that sum; in cases where it suspects tax avoidance practices.

Simpere (2010) pointed out that the case of Mopani was not an isolated one but that various other mines in Zambia were engaged in similar practices. Zambia Sugar drew similar media attention for its supposed involvement in tax avoidance practices. The collective impact on development of such actions is that Zambian tax revenues are significantly reduced resulting in limited funding across various critical sectors e.g. education, health, agriculture etc. In recognition of these challenges, the Zambian Government, through the 2014 Budget Address has also taken further steps, additional to the DTA Article 9, to address issues of avoidance by introducing withholding taxes on profits distributed by branches of foreign companies.

While these provisions in DTAs are made with the expectation that they will contribute positively to reduced tax avoidance and evasion, strong arguments have also been raised against DTAs as creating opportunities for tax avoidance and reducing tax bases. McGauran (2013) for instance writes “DTAs are shown to play a negative role in eroding tax bases”. McGauran (2013:7) further points out that lack of or very low withholding tax (WHT) rates on passive income lead to profit shifting by business, which in turn reduces the taxable base in countries of operation.

A point, which she states, is acknowledged by the OECD itself. Some FDI is thus deliberately routed through countries which have low tax rates from treaties in order to avoid and evade taxes.

However, even with Article 26 on exchange of information, the capacity of most developing countries to utilize the information and to have regulations that support use of such information to prosecute tax evaders is limited. Zambia for instance, has had no transfer pricing documentation rules, with only very recent indications that some are soon to be published. Thus even if Zambia received information from UK on possible transfer pricing Zambia may have no basis to legally utilize it if such rules are not in place. The credibility of information from developing countries is also highly questioned and notwithstanding the global nature of Multi-National Corporations (MNCs), is normally incomplete. It also takes a long time to prosecute international fraud cases with an average transfer pricing case taking 3-4 years to conclude making it difficult for developing countries to dedicate resources to gathering information and following up cases.

Another important draw back from such clauses is that they negatively impact on FDI flows, off-setting their beneficial impact.

**Human Resource Limitations**

Another challenge posed by Articles such as the exchange of information clause, is that they will involve time costs and human effort which may require tax administrators to suspend their own work relating to domestic taxes in order to provide information or assist in recovery of tax claims of the other state. Such requirements tend to be detrimental particularly to developing countries like Zambia where the tax staff to tax population ratio is relatively low at a 0.099 ratio. Conversely, advanced and more efficient technology in locating information and recovering taxes in the UK, gives it a greater advantage over Zambia, which will lose more time in search of information.

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32. (ibid, 2010)
The central point of contention surrounding DTAs is that they tend to lead to a substantial and yet unnecessary loss of critical development financing for third world countries.\(^{35}\) Tax losses largely occur through foregone withholding taxes. Withholding taxes are particularly important to developing countries like Zambia which are net FDI recipients as they are easier to collect and also play an important role in curbing tax avoidance and evasion (as they are withheld at source before the company has the opportunity to re-route them).\(^{36}\) A report by The Center for Research on Multinational Corporations (SOMO) shows that in 2011, Zambia lost approximately EUR 1 million (US$1.3 million) through foregone withholding taxes on interest and dividends alone; excluding taxes on royalties and losses through tax avoidance and evasion. It is therefore probable that much more revenue is lost on aggregate from all the DTAs. Other Third World Nations have similarly lost significant tax flows (See table on page 19).

The loss in tax revenue is largely due to the fact that initial DTAs were based on the principle of reciprocity. This principle assumes that: “due to the reciprocity of FDI flows, benefits offered to investors from the contracting partner in one country should, in theory, be compensated by the same benefits given to that country’s own investors in the other contracting state.”\(^{37}\) While this principle applied and continues to apply to developed countries it has limited application to DTAs between developed and developing countries which have significantly different economic conditions. Due to the lower economic position of developing countries, capital flows “almost exclusively in one way – to developed countries.”\(^{38}\)

### Country Ranking Comparing Lost Withholding tax on Interest and Dividends

<table>
<thead>
<tr>
<th>Treaty Partners (X)</th>
<th>GDP (million EUR)</th>
<th>% to GDP</th>
<th>Tax lost (million EUR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ethiopia**</td>
<td>1,174</td>
<td>NO DATA</td>
<td></td>
</tr>
<tr>
<td>Mongolia</td>
<td>629,1</td>
<td>NO DATA</td>
<td></td>
</tr>
<tr>
<td>Kenya</td>
<td>24,167</td>
<td>NA (YET)</td>
<td></td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>135,17</td>
<td>0,10%</td>
<td>133</td>
</tr>
<tr>
<td>Venezuela</td>
<td>227,487</td>
<td>0,09%</td>
<td>195</td>
</tr>
<tr>
<td>Serbia</td>
<td>32,935</td>
<td>0,05%</td>
<td>16</td>
</tr>
<tr>
<td>Ukraine</td>
<td>118,778</td>
<td>0,03%</td>
<td>38</td>
</tr>
<tr>
<td>Croatia</td>
<td>44,92</td>
<td>0,02%</td>
<td>8</td>
</tr>
<tr>
<td>Philippines**</td>
<td>611,565</td>
<td>0,02%</td>
<td>29</td>
</tr>
<tr>
<td>Argentina</td>
<td>320,616</td>
<td>0,02%</td>
<td>55</td>
</tr>
<tr>
<td>Moldova**</td>
<td>5,032</td>
<td>0,01%</td>
<td>1</td>
</tr>
<tr>
<td>Indonesia**</td>
<td>684,703</td>
<td>0,01%</td>
<td>56</td>
</tr>
<tr>
<td>Mexico</td>
<td>829,023</td>
<td>0,01%</td>
<td>71</td>
</tr>
<tr>
<td>Brazil</td>
<td>1,170,217</td>
<td>0,01%</td>
<td>143</td>
</tr>
<tr>
<td>Egypt**</td>
<td>154,987</td>
<td>0,01%</td>
<td>10</td>
</tr>
<tr>
<td>Ghana**</td>
<td>21,177</td>
<td>0,01%</td>
<td>2</td>
</tr>
<tr>
<td>Malaysia</td>
<td>206,969</td>
<td>0,005%</td>
<td>10</td>
</tr>
<tr>
<td>Zambia**</td>
<td>13,805</td>
<td>0,004%</td>
<td>1</td>
</tr>
<tr>
<td>Macedonia, FYR</td>
<td>7,504</td>
<td>0,003%</td>
<td>0</td>
</tr>
<tr>
<td>Belarus</td>
<td>36,629</td>
<td>0,003%</td>
<td>1</td>
</tr>
<tr>
<td>Bosnia and Herzegovina</td>
<td>13,002</td>
<td>0,002%</td>
<td>0</td>
</tr>
<tr>
<td>Zimbabwe**</td>
<td>1,041</td>
<td>0,001%</td>
<td>0</td>
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<tr>
<td>Thailand</td>
<td>248,469</td>
<td>0,01%</td>
<td>3</td>
</tr>
<tr>
<td>Pakistan**</td>
<td>151,133</td>
<td>0,01%</td>
<td>2</td>
</tr>
<tr>
<td>Georgia**</td>
<td>10,327</td>
<td>0,001%</td>
<td>0,09</td>
</tr>
<tr>
<td>Sri Lanka**</td>
<td>42,533</td>
<td>0,0004%</td>
<td>0,18</td>
</tr>
<tr>
<td>Bangladesh***</td>
<td>21,419</td>
<td>0,0004%</td>
<td>0,34</td>
</tr>
<tr>
<td>Armenia**</td>
<td>1,366</td>
<td>0,0003%</td>
<td>0,01</td>
</tr>
<tr>
<td>Jordan</td>
<td>20,73</td>
<td>0,0003%</td>
<td>0,02</td>
</tr>
</tbody>
</table>


\(^{36}\) Weyzig, F. (2013). IOB Study: Evaluation Issues in Financing for Development Analysing effects of Dutch corporate tax policy on developing countries Commissioned by the Policy and Operations Evaluation Department (IOB) of the Ministry of Foreign Affairs of the Netherlands


\(^{38}\) Calculations are partial and conservative and exclude tax evasion and avoidance amounts hence are expected to be much higher.
In the case of Zambia’s renegotiated treaty with the United Kingdom, it is evident that priority is still given to the country of residence (namely, the UK). This is most evident in two regards: firstly is the definition of a Permanent Establishment and secondly, in the thresholds on taxable income by Zambia. With regards to the definition of a permanent establishment, some improvements are observed from the 1972 Treaty but in terms of thresholds for rates of taxable incomes, these have remained constant for dividends and interest but have worsened in the case of royalties, when compared to terms in the original treaty (See Figure on the right).

### Comparisons between selected Articles in 1972 and 2014 Treaty

<table>
<thead>
<tr>
<th>Article/Aspect of Treaty</th>
<th>1972 Treaty</th>
<th>2014 Treaty</th>
<th>Implication</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Title &amp; Preamble</strong></td>
<td>- Title focuses on double-taxation, no mention of tax evasion</td>
<td>- Title mentions both avoidance of double taxation and prevention of tax evasion</td>
<td>- Recognition of predominance of tax avoidance and importance of curbing it</td>
</tr>
</tbody>
</table>
| Permanent Establishment (PE) (Article 9)  | 1) Defined as a fixed place of business including: a) A place of management 
  b) A branch 
  c) An office 
  d) A factory 
  e) A workshop 
  f) A mine, quarry or other place of extraction of natural resources 
  g) A PE further includes services of public entertainers or athletes and supervisory activities in construction etc. carried on within the Contracting State. | a. The definition is extended to include: 
  - An installation or structure used for extraction services e.g. consultancy services which are carried out for more than 183 days. | The 1972 Treaty had a narrow definition of PE which limited Zambia’s taxing rights to taxing services offered only by entertainers and athletes and not other services. The 2014 DTA expands the definition allowing for services in general to be taxed in Zambia particularly if they operate for more than 6 months. |
| Business Profits (Article 7)  | In determining profits of a PE, deductions allowed as expenses are business and administrative expenses. Other expenses, which would not be deductible if the PE were a separate enterprise, are excluded. | -Elaborates on expenses not to be deducted from those of the PE. These include amounts paid to the head office or any other offices of the PE, royalties, fees, commissions or investment payments. | This is a positive change which strengthens the previous anti-tax avoidance mechanism. It limits possibilities of profit shifting. |
| Dividends (Article 10)  | Dividends paid by a company which is resident in Zambia to a resident of the UK may be taxed in the UK. 
  -The 1972 DTA allowed Zambia to tax dividends at 15% except where they accrue to a recipient directly or indirectly controlling at least 25% of the voting rights in the company, in which case they would be taxed at 5%. | -The 2014 DTA introduces the concept of a beneficial owner in specifying conditions under which the source country may apply taxes. 
  -The 2014 Agreement restricts Zambia to a 5% WHT except where dividends are paid out of income from immovable property like mines or investment vehicles whose income are exempted from tax, in which case dividends are taxed at 15%. | Ownership of most foreign companies operating in Zambia tends to exceed 25% hence 1972 DTA would have limited most of Zambia’s WHT to 5%. The new provisions of 15% WHT on immovable property may secure Zambia higher WHT. This should, however be extended to include other income sources proven relevant to Zambia e.g. services. 
  -The inclusion of the beneficial owner concept in 2014 DTA and other anti-tax avoidance mechanisms are also positive measures. |
| Interest (Article 11)  | Restricts WHT on interest by Zambia to 10% | -Restricts withholding tax to 10% by Zambia but allows Contracting States to settle by mutual agreement the application of this limitation. 
  -Excludes governments, political subdivisions or local authorities from paying tax in the Source Country (Zambia). | -The maximum WHT allowed remains the same at 10% but 2014 DTA allows for negotiation of this tax limit by the revenue authorities. This may disadvantage Zambia as the percentage received may reduce due to weak negotiation skills. 
  -The 2014 DTA strengthens anti-tax avoidance provisions through an anti-tax avoidance clause and the beneficial owner concept. |
| Royalties (Article 13)  | -Limits WHT on royalty payments to 15% for Zambia. | -Lowers WHT on royalties to 5% for Zambia and allows for negotiation by the revenue authorities in deciding the final amount. 
  -Adds an anti-tax avoidance article | Disadvantages Zambia as it reduces the maximum WHT on royalties and further implies that depending on the negotiations, Zambia may receive less than 5% WHT |
| Exchange of Information (Article 20)  | -Provides for exchange of information between revenue authorities for purposes of execution of administrative duties and prevention of tax avoidance or evasion. | -Similarly provides for exchange of information between revenue authorities but clarifies that information released shall not be at variance with existing laws of that state. | This has the benefit of curbing tax avoidance and evasion but may discourage FDI unless all other countries at international level agree to share information. |
| Assistance in recovery (Article 27)  | -Does not explicitly state this | -Provides for revenue authorities to assist each other in collection of revenue claims. | Beneficial especially in cases where a taxpayer flees to a country where Zambia lacks jurisdiction to prosecute. However, also involves diversion of human, capital and time resources from domestic revenue collection to assisting partner countries. |

Source: PMRC; summarised from 1972 and 2014 Zambia/UK DTA

39. This concept was introduced in the 1977 OECD Model to “clarify what was, meant by the term ‘paid to a resident’ and provides that to qualify for the benefits of the DTA it is not enough that the immediate recipient of interest is a resident of the other state, the resident must also be the beneficial owner of the interest.” (www.hmrc.gov.uk/manuals/ intmanual/virm154060.htm)
PERMANENT ESTABLISHMENT (PE): ITS DEFINITION, RATIONALE AND IMPLICATION

The definition of a permanent establishment (PE) is pivotal because a country’s ability to tax enterprises is highly dependent on whether an enterprise has a permanent establishment in that State or not. In Article 7, for instance, profits of an enterprise from one Contracting State (e.g. UK) can only be taxed in another state (e.g. Zambia) if the enterprise has a permanent establishment in the other State (i.e. Zambia) and profits are attributable to that permanent establishment. However, if what the British enterprise operates in Zambia does not constitute a “permanent establishment” (e.g. facilities used solely for storage, display or delivery) then the Zambian Government has no right to tax it.

The rationale given for this Article is that there are some business enterprises which carry out transactions in other states for only a brief time that would be negatively affected if required to pay taxes on profits in the country in which they transact only briefly and then also required to pay taxes in the residence country. DTAs thus exempt enterprises with no PE in the Contracting State from paying taxes there and only require them to pay taxes in their country of residence. This is in turn argued to encourage international trade.40

While the importance of Article 5 in protecting enterprises from excessive tax burdens is not in dispute, it works to the detriment of Zambia in two regards. Firstly, the clause presents an opportunity for avoidance of tax by companies which may ensure that they operate in the country for less than 183 days (or approximately 6 months) in each year and then leave strategically before the expiration of this time period to avoid tax payments; only to return again in the following fiscal year. Fortunately, this aspect may be limited in the case of larger companies which cannot close down after a short duration, but even in this case, they may change name in order to ‘appear’ as a new entity. The clause, however, represents an improvement from the 1972 treaty as it allows consultancies to be taxed.

This Article could potentially disadvantage Zambia in that due to Zambia’s relatively weak monitoring mechanisms and human resource limitations, routine checks to ensure that facilities are strictly being used for storage, display etc. and not for trade may not be possible. This implies that British companies seeking to avoid taxes may claim to be merely carrying out storage exercises or displaying goods etc. and hence not liable to pay tax when in actual fact they may fully operational as a permanent establishment liable to tax in Zambia. In 2010, The Zambia Revenue Authority (ZRA) had 1380 staff members, which translated into a tax staff to population ratio of 0.099, falling below the world average of 0.82.41 This is illustrative of the difficulties that may ensue in trying to consistently monitor companies which have laid claim to these exemptions.

Furthermore, Article 5, Section 4 (d) that exempts enterprises that maintain a fixed place of business in Zambia solely for the purpose of purchasing products from Zambia for resale elsewhere, from paying taxes may also lead to loss of income for Zambia. This is because companies which purchase these commodities at a low price locally usually resell them at very high prices abroad and yet this Article prevents Zambia from realizing any revenue from this transaction.


Local Vs. DTA Rates of Selected DTA’s that Contracting State (UK).

Due to the fact that this income is taxed in the country of residence (UK in this example), the Agreement seeks to restrict the extent to which it is taxed at source (Zambia), particularly when it accrues to a beneficial owner in the country of residence. The tax locally applied to such residents and enterprises is Withholding Tax (WHT) hence the Agreement limits the extent to which it can be levied, to the following:

i. Tax on Dividends is limited to 5% of the gross amount (against the Zambian non-treaty rate of 15%).

ii. Withholding tax on interest is limited to 10% (against the Zambian non-treaty rate of 15%) and

iii. Tax on royalties is limited to 5% (against Zambian non-treaty rate of 15%). The new 5% withholding tax on royalties is a significant reduction from the 10% in the 1972 Treaty.

While Zambia is limited to these percentages, the basic income tax rate for the UK stands at 20% implying that UK based companies will be exempted from the amount of tax paid to Zambia but the difference, which is larger, accrues to the UK.

The British Government would exempt this company from paying 5% already paid in Zambia hence would tax the company 15%.

The British Government would thus benefit 3 times as much from tax revenues than the Zambian government.

While it is not in dispute that the UK would be entitled to a share of this tax revenue because it supplies the productive capacity of capital and technology, questions of equity arise in terms of the way in which this revenue is shared with the source country which also plays a key role. Fortunately, the general treatment of tax on incomes in the Agreement is that incomes shall be taxable only in the country where they arise unless the employment was exercised in the other country. Thus in Articles 14-21 referring to taxation of incomes from employment, director’s fees, incomes relating to entertainers and sportsmen; the place where the income was derived from is entitled to the tax. The exception is pensions and annuities which are to be taxed in the country of residence as opposed to the country where they are derived from. The reason for the departure from the usual pattern of emphasising residence is unclear but is demonstrative on an acknowledgement of the validity of taxing at source.

The ultimate effect of the emphasis on country of residence is to increase revenues of the country of residence and to reduce the revenues of the source country by limiting incomes to minimal taxation at source and in some cases completely exempting them from being taxed. It is therefore commendable that the UN Model Convention provides for a greater reliance on the source principle for Treaties between developed and developing countries. However, the OECD Model still seems to hold sway in most international agreements. The major reasons for advocacy for the Source Principle for developing countries stem from the fact that:

- Only a small percentage of their populations draw foreign incomes and
- They have weaker administrative capacity to determine foreign source income accruing to residents.

The source principle is however not favoured by other countries because it is said to undermine the fairness of the tax system.

### TAXABLE INCOME

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Dividends</td>
<td>15%</td>
<td>5% (except when accruing to immovable property when taxed at 15%)</td>
<td>5%</td>
<td>5%</td>
<td>15%</td>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>Interest</td>
<td>15%</td>
<td>10%</td>
<td>10%</td>
<td>10%</td>
<td>15%</td>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>Royalties</td>
<td>20%</td>
<td>5%</td>
<td>5%</td>
<td>10%</td>
<td>15%</td>
<td>0%</td>
<td></td>
</tr>
</tbody>
</table>
This is through the failure to tax foreign incomes of residents thus creating an incentive for companies to invest abroad which is detrimental to goals of national development. However, the extent to which taxpayers are incentivized to invest in other countries would largely depend on tax rates (and other factors earlier indicated) prevailing in the foreign nations in question. Moreover, even residents investing abroad would still be required to pay taxes there - negating any arguments on equity.

**PERSISTENCE OF DTAs**

In 2011, there were over 2,970 DTAs in place globally and 60% of these were entered into in the last 20 years. Baker (2012) notes that over 50% of these treaties are between developed and developing or transitional countries.

There are various reasons why developing countries continue to sign DTAs. These include the following:

1. **Weak Bargaining Power:**

Countries with weaker bargaining power tend to accept detrimental terms in DTAs in the hope of securing capital and technological investments and also in fear of losing foreign aid from developed countries. This seems evident in Zambia’s renegotiated treaty with the UK. While the Zambian Government yielded to several detrimental clauses including the reduction of withholding tax on royalties from 10% to 5%, the UK seems to have made few concessions. Furthermore, the positive alterations made to the 1972 DTA such as the inclusion of services e.g. consultancy services in the definition of PE’s (Article 5 (3 (b))), while positive seem less weighty than what Zambia has foregone. Moreover, the improvements made also seem largely attributable to concessions already gained at international level e.g. from the UN Model Treaty and not as a result of strengthened bargaining and negotiations by the Zambian Authorities.

This is largely consistent with Irish’s observations that developing countries usually accept most conditions in DTAs because of weak and vulnerable bargaining positions. The intense competition between developing countries for FDI also leads them to conform to existing models for fear that any negotiation would lead investors to go elsewhere. However, it is observed that while many developed countries are resistant to increasing source-based taxation, others are not. The Netherlands, for example, which have conventionally been known to disadvantage developing countries in such treaties, accepted a parliamentary motion allowing developing countries to negotiate higher WHT in June, 2011. Thus through failure to negotiate better terms, the Zambian Government may needlessly forgo taxes even where it may have gained better terms.
In view of the foregoing discussion, key recommendations that emerge are as follows:

1. Firstly, there is need for more intensive training by ZRA and Ministry of Finance officials on DTAs to enable them to have a fuller understanding of the intricacies of DTAs and related benefits and costs. Costs in terms of tax revenue lost must, for instance be measured against the overall gains made from these agreements e.g. FDI flows before they are signed. Zambia should also map out the DTAs already entered into by the other country in order to determine the indirect impact from other countries on Zambia in entering into the prospective DTAs. DTAs the principal countries sign with other countries tend to have an indirect economic impact on the principals (e.g. the DTA with UK could have other countries, who have DTAs with UK but not with Zambia, benefiting from Zambia through UK based associated firms). Furthermore, as earlier alluded to, DTAs are not the only factor that determines FDI flows and through such analysis, Zambia would be able to desist from entering into certain DTAs knowing that FDI could be attracted through other, less costly means.

2. Secondly, Zambia must strengthen its bargaining position and negotiating skills. This would be largely accomplished through the first point as a greater knowledge base would provide greater awareness to Zambia on whether Zambians truly stand to lose much from opting out of certain DTAs. In cases where more is at stake for the developed country, Zambia would be provided with greater leverage during negotiations. However, there is also need for international advocacy for removal of unfair terms from DTAs, so as to avoid victimization of weaker states through withdrawal of aid and trade from countries which cancel their DTAs.

3. Thirdly, it is cardinal that Zambia undertake a comprehensive impact assessment of all its existing DTAs in order to fully appreciate the costs and benefits of each and decide on whether to cancel or re-negotiate some of the agreements. Mongolia, in 2012, for instance cancelled its DTAs with the Netherlands, Kuwait, Luxemburg and the United Arab Emirates because these jurisdictions have been appreciated but is also shown to suffer limitations such as unfair terms from DTAs, so as to avoid victimization of weaker states through withdrawal of aid and trade from countries which cancel their DTAs.

Secondly, Zambia must strengthen its bargaining position and negotiating skills. This would be largely accomplished through the first point as a greater knowledge base would provide greater awareness to Zambia on whether Zambians truly stand to lose much from opting out of certain DTAs. In cases where more is at stake for the developed country, Zambia would be provided with greater leverage during negotiations. However, there is also need for international advocacy for removal of unfair terms from DTAs, so as to avoid victimization of weaker states through withdrawal of aid and trade from countries which cancel their DTAs.

CONCLUSION

In conclusion, it evident that even though DTAs, such as the one signed between Zambia and the UK could play a positive role in attracting foreign investment, the extent to which they are likely to achieve this is limited. This is because decisions regarding investment locations for FDI are dependent on many factors and not only the presence of DTAs. Moreover, UK firms already receive unilateral tax relief from their Government hence their investment choices are not solely dependent the presence of DTAs. Further, while assurance of stability, locked into most DTAs would play a positive role in attracting investment, this may result in prolonged loss of crucial income to Zambia - if it is trapped in an unfavorable agreement for an extended duration. Moreover, Zambia must develop a stable policy framework based on research without on relying on DTAs. The role of DTAs in curbing tax avoidance has been appreciated but is also shown to suffer limitations such as manipulation for use in tax avoidance and evasion (treaty shopping). Benefits of information sharing,
while positive may also discourage FDI if not agreed on by all countries. It is thus pertinent that countries at international level sign information sharing agreements. By and large, the greatest draw back with the UK-Zambia DTA is the loss of tax revenue at a time when Government has committed to strengthening its domestic revenue base. This revenue loss is likely to curtail poverty reduction and development efforts. Government must thus commit to undertaking extensive research on benefits and costs arising from such agreements before committing to them while investments in human capital which would enhance negotiating skills are similarly crucial.

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The Non-Governmental Organisations (NGO) Act No. 16 of 2009 was enacted by the Zambia Parliament on the 26th of August, 2009. The major objectives of this Act are to:

i. Provide for the coordination and regulation of NGOs.

ii. To establish the Non-Governmental Organisations’ Registration Board (the NGO Board) and the Zambia Congress of Non-Governmental Organisations (the Congress) and

iii. To enhance transparency, accountability and performance of Non-Governmental Organisations.

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• Producing high quality, relevant and timely policy analysis, policy monitoring, and reform proposals

• Promoting and encouraging an informed public debate on critical social and economic policy issues.
Unlocking Zambia’s Potential
Correspondence on this Policy Analysis can be sent to:
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