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# Uganda-Netherlands Double Tax Agreement

## A highlight of the key provisions

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## 1. Introduction

Significant foreign direct investment into Uganda is through the Kingdom of Netherlands via holding or intermediate entities domiciled therein that set up companies in Uganda. This can largely be attributed to the fact that Netherlands not only inked a Double Tax Agreement ("DTA") but equally has concluded a Bilateral Investment Treaty ("BIT") with Uganda. In this article, we write briefly about this BIT but largely highlight the key provisions in the Uganda-Netherlands DTA ("UG-NZ DTA).

## 2. Bilateral Investment Treaty

Uganda has a BIT with the Netherlands entered into in 2003. BITs are international agreements establishing the terms and conditions for private investment by nationals and companies of one country in another country. BITs set out substantive principles for investment protection as well as the procedures for investor state arbitration. Investors from countries that are party to BITs are able to bring claims against host countries for the contravention of investment terms.

Umbrella, Fair and Equitable and Most Favoured Nation clauses that are all embedded in BITs ensure extra protection for foreign investments in addition to the other legislative and contractual buffer tools.

The International Centre for Settlement of Investment Disputes ("ICSID") in Washington DC has already handled at least two claims brought under BITs involving the government of Uganda and International Oil Companies though both were withdrawn prior to determination and involved tax disputes. These were Total E&P Uganda BV vs. Republic of Uganda ICSID Case No. ARB/15/11 and Tullow Uganda Operations PTY LTD vs. Republic of Uganda ICSID Case No. ARB/12/34.

## 3. Double Tax Agreements

DTAs are agreements or treaties between two or more countries principally setting out the terms under which the respective countries seek to eliminate double taxation at the same time preventing fiscal evasion with respect to taxes on income and capital gains.

DTAs address double taxation in two main ways. Firstly, the respective countries to the DTA may allocate the taxing rights to ensure that either country but not both tax the underlying income. Where both countries have the right to tax this income, the DTA may set out the maximum tax rates each country can impose but also allow for a credit of the tax suffered in the other DTA contracting state.

Through the framework for exchange of information, the DTAs facilitate cooperation between the various national tax authorities as a means of combating tax evasion.

Uganda entered into a DTA with the Kingdom of Netherlands in 2004 that came into force in 2007. We understand this DTA is presently being renegotiated. We headline further below the key provisions in this DTA.

## 4. Supremacy of DTA provisions

Tax treaties generally override the provisions of domestic legislation. Section 88(1) of Uganda's Income Tax Act (" ITA") provides that an international agreement entered into between the Government of Uganda and the government of a foreign country shall have effect as if the agreement were contained in the ITA.

To mitigate treaty abuse, Uganda introduced an anti-treaty shopping provision in section 88(5) of the ITA that precludes entitlement to the reduced rate or exemptions provided by DTAs unless the recipient of the income is a beneficial owner or is a publicly listed company. Whether this provision can override the terms of the DTA unless the same limitation is included in the DTA is questionable.

## 5. Scope and application of the DTA

Like all other DTAs, the provisions of the UG-NZ DTA apply to taxes imposed on income and capital in either of the Contracting States being Uganda and the Kingdom of Netherlands. Other tax types such as stamp duty, value added tax, excise duty and import duties are out of scope. They are not covered by DTAs.

To benefit from these DTA provisions, taxpayers must be resident in either of the Contracting States. Residence for tax purposes is determined in accordance with the respective domestic tax laws of Uganda and the Kingdom of Netherlands.

There are instances where a taxpayer is tax resident in two jurisdictions yet for purposes of applying some provisions of the DTA, a taxpayer must be designated as tax resident in one State. This is resolved through the inclusion of tie-breaker provisions in the DTAs.

Where by reason of the UG-NZ DTA any person other than an individual is a resident of both Uganda and the Kingdom of Netherlands, that person is deemed to be resident for tax purposes only in that State in which the place of effective management is situated. Effective management is usually determined by reference to where the board meetings of a company are held being the place where the key decisions of a company are

held being the place where the key decisions are taken.

Individuals resident in both Uganda and the Kingdom of Netherlands are deemed resident for tax purposes:

- In the State they have a permanent home;
- In case they have a permanent home in both countries, they are resident only in the State of vital interests((‘the State with which his personal and economic relations are closer’);
- In case they have a centre of vital interests in both countries, they are then resident in the country in which they have a habitual abode;
- In case they have a habitual abode in both countries, they are then resident in countries they are nationals;
- If they are nationals of both countries or neither of both, residence is determined in accordance with mutual agreement procedures under the DTA between authorities.

## 6. Permanent Establishment

It is important to understand what a Permanent Establishment (“PE”) is in accordance with the provisions of the UG-NZ DTA. This is because the business profits of any enterprise under this DTA are ordinarily taxed in the country where the taxpayer is resident unless that taxpayer has a PE or taxable presence in the other Contracting State. PEs in Uganda are normally taxed in a similar way to companies. Income is computed based on generally accepted International Financial Reporting Standards financial statements with usual adjustments.

Under the UG-NZ DTA, a PE means a fixed place of business through which the business of an enterprise is wholly or partly carried on. It includes a place of management, branch, an office, factory; workshop, and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

A building site or construction or installation project in either Uganda or the Netherlands constitutes a PE if it lasts more than 6 months.

The UG-NZ DTA also provides for a service PE where there is the provision of services (including consulting services) by employees or other personnel of an enterprise for more than 4 months in any 12 month period in either of the Contracting States.

## 7. Capital gains

Under the UG-NZ DTA a resident for tax purposes of either Uganda or Netherlands may have their capital gains arising on the disposal of immovable property taxed by the other Contracting State provided the immovable property is situated in that Country. The term “immovable property” has the meaning it is given under the law of the Contracting State in which the property is situated.

Gains from the alienation of movable property forming part of the business property of a PE which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a PE (alone or with the whole enterprise) may also be taxed in that other State.

Gains arising from the alienation of an enterprises” aircrafts or ships operated in international transport or traffic are only taxable in the DTA Contracting State in which the place of effective management of the enterprise is situated. As earlier mentioned, effective management is determined by reference to where the board meetings of a company are held being the place where the key decisions of a company are taken.

For all other property disposals, the arising gains are only taxable in the Contracting State of which the alienator is resident.

## 8. International transportation

It is provided under the UG-NZ DTA that profits from the operation of aircrafts and ships in international traffic are only taxable in the Contracting State in which the place of effective management of the enterprise is situated. The place of effective management is usually where the board meetings of a company are held.

## 9. Technical fees

UG-NZ DTA does not contain any article covering technical, professional or management fees. This accordingly means that payments to a recipient in the Kingdom of Netherlands would not be subject to tax in Uganda unless the recipient has created a PE in Uganda in which case it would be taxable as business income.

## 10. Passive income

Passive income includes dividends, interest and royalties amongst other. Such income is usually taxed by way of withholding mechanism in the source country whenever the recipients are paid.

Under the UG-NZ DTA, dividends may be taxed in the jurisdictions where the payer and recipient are tax resident subject to the exceptions. If the recipient of these dividends is a beneficial owner, the rate of

taxation may not exceed 15%. Though judicial precedents continue to give varied interpretations premised on contextual circumstances, a beneficial owner in general terms is that person who has the full right to use and enjoy the income received unconstrained by a contractual or legal obligation to pass the payment received to another person.

These dividends are eligible for exemption from taxation in the payer's jurisdiction where the payee beneficially owns at least 50% of the share capital of the payer (provided the investment was made after the treaty came into force). In other cases where the payee beneficially owns less than 50% of the share capital of the payer, the rate of withholding tax is 5%.

Interest may also be taxed in the jurisdictions where the recipient is tax resident or where it arises or is sourced. If the recipient is a beneficial owner, the rate of taxation should not exceed 10%. There is an exemption from taxation provided for interest on loans granted or guaranteed by government bodies or by the central bank of the borrower's jurisdiction. This exemption is also extended to interest on loans from banks and 'financial institutions of a public character' with a duration of 3 years or more.

Royalties may also be taxed in the jurisdictions where the recipient is tax resident or where it arises or is sourced. If the recipient is a beneficial owner, the rate of taxation should not exceed 10%.

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## Contacts for this Publication

**Denis Yekoyasi Kakembo**

*dkakembo@cristaladvocates.com*

+256 751 834 168

Denis is the Managing Partner at Cristal Advocates where he also leads the energy and tax practice. He is qualified both as a Lawyer and Chartered Accountant with vast experience serving various industries in Sub Saharan Africa. Before joining Cristal Advocates, he had worked for close to 10 years with Deloitte and Touche where he started his career and rose to senior managerial positions.

At Deloitte, he lived and worked in Uganda, Kenya, Tanzania and the United Kingdom for over 6 years and subsequently became the firm's chief of staff for the Energy and Resources Industry Group seeing him play a lead advisory role in Uganda, Kenya, Tanzania, Mozambique, South Sudan, Somalia and Ethiopia.

Denis is widely published and a regular commentator in the local, regional and international media and speaker at various forums regarding the taxation and financing of energy projects as well as the protection of large capital projects within the framework of international investment law.

He holds a Master of Laws degree in Petroleum Taxation and Finance from the University of Dundee in the United Kingdom, a Post Graduate Diploma in Legal Practice and a Bachelor of Laws degree from Makerere University. ■

**Bill Page**

*bpage@cristaladvocates.com*

Bill is a Senior Advisor with Cristal Advocates. He has concentrated on working with energy companies with a particular focus on cross border transactions and M&A since 1989 and is a leading global energy and tax practitioner with wide international experience. Between 1986 and 1998, he worked in London with the UK tax authorities and Big Four accounting firms. From 1998 to 2004, he was based in Kazakhstan working across the Caspian region with Deloitte. He was in the region at the time it was developing its infrastructure for crude oil production with international investment following the collapse of the Soviet Union.

From 2004 to 2008, he worked in Russia where he led Deloitte's oil and gas industry group and established Deloitte's office in Sakhalin. He moved to East Africa in 2009 leading Deloitte's energy and resources industry group in Uganda, Kenya, Tanzania, Rwanda, Ethiopia and Mozambique. He was initially based in Kampala, Uganda later relocating to Dar es Salaam, Tanzania. Bill returned to the UK in 2014 supporting Deloitte UK teams working on outbound projects investing in Africa and was a key member of Deloitte UK's energy and resource practice until his retirement from the firm in September, 2018.

Bill is a graduate of Oxford University and completed his inspectors' training with the UK Inland Revenue in 1989. ■

**John Teira**

*jteira@cristaladvocates.com*

+256 704 493 997

John leads the public policy and advocacy practice at the firm and combines unique public and private sector experience.

Prior to joining Cristal Advocates, he had worked as a Private Secretary to the President of the Republic of Uganda. During this time, he participated in several public and private sector engagements that included advising and coordinating activities relating to oil and gas as well as infrastructural projects of national significance. John had earlier worked with the Post Bank Uganda Limited and Shonubi Musoke and Co. Advocates.

He holds a Bachelor of Laws degree from Makerere University and a Post Graduate Diploma in Legal Practice from the Law Development Centre and various other qualifications. ■

**Dickens Asiimwe Katta**

*dasiimwe@cristaladvocates.com*

+256 772 370 021

Dickens leads the oil and gas practice at Cristal Advocates. He has an in depth appreciation of Uganda's oil and gas sector having served as the maiden Company Secretary of the Uganda National Oil Company (UNOC) and the Uganda Refinery Holding Company Limited (URHC). UNOC represents the Government of Uganda commercial interests in the oil and gas sector while URHC represents government interests in the refinery project as well as managing the petrol based industrial park.

Dickens was instrumental in UNOC's formation and initial period of operation and also served as its head of Contracts, Negotiations and Advisory until May 2018. Prior to joining UNOC, Dickens was Legal Counsel at the Petroleum Directorate of the Ministry of Energy playing key legal advisory roles on the negotiation and implementation of PSAs, Joint venture and other oil and gas agreements. He was also part of the team that shepherded the process of enacting the current Ugandan oil and gas Legislations and Regulations including the local content requirements.

He is a certified project control specialist (IFP) and holds a Master of Laws Degree in Petroleum Law and Policy from the University of Dundee in the United Kingdom, a Post Graduate Diploma in Legal Practice and a Bachelor of Laws degree from Makerere University. ■

**Francis Tumwesige Ateenyi**

*ftumwesige@cristaladvocates.com*

+256 702 540 936

Francis leads the litigation and dispute resolution practice at the firm. He is an Advocate of the High Court of Uganda with expertise in oil and gas, infrastructure and dispute resolution. He has been part of teams advising on projects in Uganda, Tanzania, Mozambique and South Africa. He specializes in regulatory compliance, national content, health and safety and dispute resolution.

He joined Cristal Advocates from Kizza, Tumwesige, and Ssemambo Advocates. He previously worked with the Advocates Coalition for Development and Environment (ACODE). He also undertook a traineeship with the oil and gas division of Webber Wetzel in Johannesburg, South Africa.

He holds a Master of Laws degree in Petroleum Law and Policy from the University of Dundee in the United Kingdom and various other qualifications. ■

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## Contact us

**Cristal Advocates**
32 Lumumba Avenue
4th Floor, Padre Pio House
Lumumba Avenue

P.O. Box 1769 Kampala, Uganda
Tel: +256 (414) 671 274
Email; admin@cristaladvocates.com
www.cristaladvocates.com