

Approved for tabling.

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4/12/19.

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY
MEMBERS LAID

DATE:	04 DEC 2019	DAY: WED
TABLED BY:	Hon- Ketoo de Mofimo Chairperson	
TWELFTH PARLIAMENT THIRD SESSION:	A-Shubuko	

THE DEPARTMENTAL COMMITTEE ON DEFENCE AND FOREIGN
RELATIONS

REPORT ON THE CONSIDERATION FOR RATIFICATION OF THE
MULTILATERAL CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE
IN TAX MATTERS

CLERK'S CHAMBERS,
DIRECTORATE OF COMMITTEE SERVICES,
PARLIAMENT BUILDINGS,
NAIROBI.

DECEMBER, 2019

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ABBREVIATIONS

KRA	Kenya Revenue Authority
OECD	Organization for Economic Cooperation and Development
CoE	Council of Europe

CHAIRPERSON'S FOREWORD

Hon. Speaker Sir,

On 19th November 2019, the Leader of the Majority Party in the National Assembly tabled on the floor of the House a Cabinet Memoranda on The Ratification of The Multi-lateral Convention on Mutual Administrative Assistance in Tax Matters.

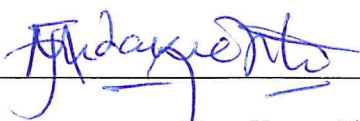
The Convention which was developed by the Organization for Economic Cooperation and Development (OECD) and the Council of Europe in 1988, is intended to promote international cooperation of exchange of information between state parties on tax matters for the better operation of national tax laws, while respecting the fundamental rights of taxpayers. Once ratified, the Convention shall become part of our Kenyan laws as provided for in Article 2(6) of the Constitution which provides that *“any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this Constitution”*.

The Committee is thankful to the Office of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its Sittings.

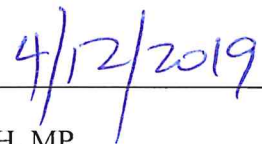
Hon. Speaker Sir,

Pursuant to Section 8(4) of the Treaty Making and Ratification Act, 2012 and Standing Order 199, it is my pleasant duty to present the Report of the Departmental Committee on its consideration of the Agreement between the Government of the Republic of Kenya and the Government of the Republic of South Africa on Defence Co-operation.

Signed



Date



Hon. Katoo Ole Metito, EGH, MGH, MP

Chairperson, Departmental Committee on Defence & Foreign Relations

EXECUTIVE SUMMARY

This report is a record of the Committee's consideration of The Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

The Cabinet Secretary Ministry of Foreign Affairs submitted a Memorandum to the National Assembly signed and dated 15th November 2019. The Memoranda and the text of the Convention were tabled on the floor and committed to the Departmental Committee on Defence and Foreign Relations for processing.

In considering the Convention, the Committee held a total of two (2) sittings, including a briefing on the Convention from the Ministry of Foreign Affairs, National Treasury and the Kenya Revenue Authority.

Pursuant to Article 118 (1)(b) of the Constitution on Public Participation and Section 8(3) of the Treaty Making and Ratification Act of 2012, the Committee placed advertisements in two local dailies, on 29th November 2019, calling for submissions of memoranda on the subject matter. The Committee received no submissions from the public.

The Committee observes that ratification of the Convention will—

- (i) assist Kenya to receive information from over one hundred and twenty jurisdictions on tax matters that is currently not accessible. This will enhance tax compliance and revenue collection;
- (ii) allow the sharing of tax information without Kenya having to enter into other bilateral agreements;
- (iii) enhance the fight against corruption, illicit financial flows including money laundering and terrorist financing as law enforcement agencies will access information that is usually not disclosed by tax payers; and
- (iv) improve Kenya's rating by the Global forum in order to enhance Kenya's capacity to attract Foreign Direct Investments and to raise its international tax profile and global positioning in the area of information and tax transparency.

The Committee recommends THAT, Pursuant to Section 8 of the Treaty Making and Ratification Act, 2012, the House APPROVES the Ratification of The Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

1.0 PREFACE

The Departmental Committee on Defence and Foreign Relations is established under Standing Order No. 216. Its mandate pursuant to SO 216 (5) with the following terms of reference;

- i) investigate, inquire into and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and Departments;*
- ii) study the programme and policy objectives of the Ministries and Departments and the effectiveness of the implementation;*
- iii) study and review all legislation after First Reading subject to the exemptions under Standing Order 101 A (4);*
- iv) study and review all legislation referred to it;*
- v) study, assess and analyse the relative success of the Ministries and Departments as measured by the results obtained as compared with its stated objectives;*
- vi) investigate and inquire into all matters relating to the assigned Ministries and Departments as they may deem necessary, and as may be referred to them by the House or a Minister; and*
- vii) make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.*

1.1 Mandate of the Committee

The Committee is mandated to consider the following subjects:

- i) Defence
- ii) intelligence,
- iii) foreign relations
- iv) diplomatic and consular services,
- v) international boundaries,
- vi) international relations,
- vii) agreements,
- viii) treaties and
- ix) Conventions.

In executing its mandate, the Committee oversees the following government Ministries, departments and or agencies, namely:

- i) Ministry of Defence
- ii) Ministry of Foreign Affairs
- iii) Ministry of East African Community & Regional Development
- iv) The National Intelligence Service

1.2 Membership of the Committee

The Hon. Katoo Ole Metito, EGH, MGH, MP (**Chairperson**)
MP for Kajiado South Constituency
Jubilee Party

The Hon. Richard Tongi, MP
(**Vice Chairperson**)
MP for Nyaribari Chache Constituency
Jubilee Party

The Hon. Major (Rtd.) Bashir Sheikh
Abdullah, MP
MP for Mandera North Constituency
Jubilee Party

The Hon. Yusuf Hassan Abdi, MP
MP for Kamukunji Constituency
Jubilee Party

The Hon. (Dr.) Lilian Gogo, MP
MP for Rangwe Constituency
ODM Party

The Hon. Charles Kilonzo, MP
MP for Yatta Constituency
Independent

The Hon. Nelson Koech, MP
MP for Belgut Constituency
Jubilee Party

The Hon. Patrick Makau King'ola, MP
MP for Mavoko Constituency
WDM-K Party

The Hon. Moses Nguchine Kirima, MP
MP for Central Imenti Constituency
Jubilee Party

The Hon. Dido Ali Raso, MP
MP for Saku Constituency
Jubilee Party

The Hon. Vincent Kipkurui Tuwei, MP
MP for Mosop Constituency
Jubilee Party

The Hon. John Lodepe Nakara, MP
MP for Turkana Central Constituency
ODM Party

The Hon. Ernest Ogesi Kivai, MP
MP for Vihiga Constituency
ANC Party

The Hon. Peter Mungai Mwathi, MP
MP for Limuru Constituency
Jubilee Party

The Hon. Caleb Amisi, MP
MP for Saboti Constituency
ODM Party

The Hon. Beatrice Nkatha Nyaga,
HSC, MP
MP for Tharaka Nithi County
Jubilee Party

The Hon. Asha Hussein Mohamed, MP
MP for Mombasa County
ODM Party

The Hon. Memusi Ole Kanchory, MP
MP for Kajiado Central Constituency
ODM Party

The Hon. Martha Wangari Wanjira,
MP
MP for Gilgil Constituency
Jubilee Party

1.3 Committee Secretariat

The Committee Secretariat has a composite of Eight (8) officers:-

- | | | |
|---------------------------|---|---------------------------|
| 1. Mr. Victor Weke Imbo | - | First Clerk Assistant |
| 2. Mr. Abdiaziz Shobay | - | Third Clerk Assistant |
| 3. Mr. Ronald Walala | - | Legal Counsel |
| 4. Ms. Grace Karanja Wahu | - | Research & Policy Analyst |
| 5. Mr. Edison Odhiambo | - | Fiscal Analyst |
| 6. Mr. Andrew Shangarai | - | Senior Sergeant at- Arms |
| 7. Mr. Yaqub Ahmed | - | Media Relations Officer |
| 8. Mr. Rodgers Kilungya | - | Audio-Recording Officer |

2.0 ANALYSIS OF THE AGREEMENT

2.1 Background

1. The Convention was developed by the Organisation for Economic Cooperation and Development (OECD) and the Council of Europe (CoE) to facilitate international co-operation for a better operation of national tax laws, while respecting the fundamental rights of taxpayers. It provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes. This co-operation ranges from exchange of information, including automatic exchanges, to the recovery of foreign tax claims.
2. In light of the effects of the 2009 global financial crisis, the Convention was amended by a Protocol passed in 2010 to open it for signature by all countries, especially developing countries.
3. Kenya signed the Convention on 8th February 2016 and its text was approved by Cabinet on 8th June 2016. Cabinet thereafter approved its submission for ratification to the National Assembly on 1st August 2019.
4. As at 27th November 2019, 135 jurisdictions had signed the Convention.

2.2 Outline of the Convention

5. **Article 1** outlines the objects of the Convention and the persons it covers. The Convention calls upon parties to provide administrative assistance to each other in tax matters, including through judicial intervention, where appropriate. Administrative assistance is said to include the exchange of information, assistance in recovery, including the preservation of property targeted for the recovery of taxes; conservancy; and service of documents.

Under the Article, Parties are obliged to provide administrative assistance with respect to both its affected residents and nationals and the affected residents or nationals of other countries.
6. **Article 2** outlines the taxes to which the Convention applies. It applies to taxes on income or profits; taxes on capital gains which are imposed separately from the tax on income or profits; taxes on net wealth; taxes imposed on behalf of a Party; taxes

on income, profits, capital gains or net wealth which are imposed on behalf of political subdivisions or local authorities of a Party; compulsory social security contributions payable to general government or to social security institutions established under public law; estate, inheritance or gift taxes; taxes on immovable property; general consumption taxes, such as value added or sales taxes; specific taxes on goods and services such as excise taxes; taxes on the use or ownership of motor vehicles and taxes on the use or ownership of movable property other than motor vehicles.

Customs duties are excluded from the Convention.

7. **Article 3** outlines the definitions of various terms used in the Convention.
8. **Chapter III (Art. 4 to 17)** outlines the forms of assistance contemplated under the Convention.
9. **Article 4** requires the sharing of information that is foreseeably relevant for the administration or enforcement of domestic laws concerning the taxes. A party may, where its national laws so prescribe, inform a requesting state that they are under an obligation to inform its resident or national of the sharing of information relating to that resident or national.
10. **Article 5** requires the sharing of information upon request in relation to specified persons or transactions, including taking steps to provide information not covered in existing tax files.
11. **Article 6** allows two or more Parties to the Convention to agree to the automatic sharing of tax information.
12. **Article 7** allows for exchange of information without request in particular incidences. Parties are under obligation to share information spontaneously where—
 - (a) It comes to their knowledge that there are grounds to believe that a Party may suffer a tax loss;
 - (b) a person obtains a reduction in or an exemption from tax in their jurisdiction which result in an increase in tax or to liability to tax in the jurisdiction of another Party;

- (c) business dealings between a person liable to tax in a Party and a person liable to tax in another Party are conducted through one or more countries in such a way that a saving in tax may result in one or the other Party or in both;
- (d) there are grounds for believing that a saving of tax may result from artificial transfers of profits within groups of enterprises; or
- (e) information forwarded by another Party has led to the unearthing of information which may be relevant in assessing liability to tax in the jurisdiction of that Party.

13. **Article 8** allows two or more Parties to the Convention to agree to conduct a simultaneous tax examination of a person in whom they have a common interest in their respective jurisdictions for purposes of thereafter exchanging any relevant information that they obtain.

14. **Article 9** allows a Party to request another for representatives of its tax authority to be present during the tax examination of a person or persons in the jurisdiction of the requested Party. Where the requested Party agrees to the request, it is to notify the tax authority of the requesting Party of the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions governing the examination. The requested Party has the final authority on the manner of conducting the examination.

The Article allows a Party to, at any time, make or withdraw a general declaration of their intention, as a general rule, not to accept requests of other Parties to attend examinations in their jurisdiction.

15. **Article 10** requires a Party that receives tax information from another Party that conflicts with information in its possession to advise the other Party of the conflict.

16. **Article 11** requires a requested Party to take necessary steps to recover tax claims of a requesting in the same manner it would recover its own tax claims provided that the two Parties have agreed to a mechanism for the enforcement of such claims, and the claims are uncontested.

Where the subject of tax recovery is a deceased person, the obligation to provide assistance in recovery is limited to the value of the estate or of the property acquired by each beneficiary of the estate.

17. **Article 12** requires a requested Party to take necessary measures to preserve property that is the subject of a tax claim even in instances where the claim is contested and there is no mechanism in place between it and the requesting Party permitting enforcement of the claim
18. **Article 13** requires a Party requesting assistance with the recovery of a tax claim to submit, together with the request—
 - (a) a declaration that the claim concerns a tax covered by the Convention and the claim is not or may not be contested,
 - (b) an official copy of the instrument permitting enforcement of the claim in the jurisdiction of the requesting Party, and
 - (c) any other document required for recovery or measures of preserving property owned by the person that is the subject of the claim.
19. **Article 14** outlines the time limits applicable to tax claims. The law of a Party that requests enforcement of tax claims is final with regard to the period beyond which a tax claim cannot be enforced.

However, the requested State is not obliged to comply with a request for assistance submitted after a period of 15 years from the date of the original instrument permitting enforcement.
20. **Article 15** provides that a Party requested to provide assistance in the recovery of a tax claim is not under an obligation to accord the recovery of the claim any special priority.
21. **Article 16** allows a Party requested to provide assistance in the recovery of a tax claim to, after informing the requesting Party, allow a person to defer payment of the claim or pay the claim in instalments if its laws or practices permit it to do so.
22. **Article 17** requires a Party, at the request of another Party to serve notices and documents, including judgments, from the requesting Party's jurisdiction relating to taxes covered by the Convention. Service of the documents is to be done in the prescribed and usual manner of the requested Party by a method prescribed by its domestic laws for the service of documents of a substantially similar nature.

The Article further dispenses with the need to accompany a document being served together with its translation unless the person being served is unable to understand the language of the document.

23. **Chapter IV (Art. 18 to 26)** contains provisions relating to other forms of assistance covered by the Convention.
24. **Article 18** outlines the information that a Party making a request for assistance under the Convention has to include in the request. The request has to include—
 - (a) the authority or agency which initiated the request;
 - (b) information to assist in the identification of the person that is the subject of the request;
 - (c) the form in which the requesting Party requires the information to be supplied in order to meet its needs;
 - (d) in the case of a request for assistance in recovery or preservation of property, the nature of the tax claim, the components of the tax claim and the assets from which the tax claim may be recovered;
 - (e) in the case of a request for service of documents, the nature and the subject of the document to be served; and
 - (f) whether the request conforms with the law and administrative practice of the requesting Party and whether it is justified in the light of the limits on the obligation to provide assistance under Article 21 of the Convention.
25. **Article 20** requires a requested Party to inform the requesting Party of its efforts to assist and the results of the efforts as soon as possible, where the request complies with the requirements of the Convention. A decision to decline a request and reasons must also be notified to the requesting Party as soon as possible.
26. **Article 21** subjects the obligations under the Convention to the rights and safeguards granted by local laws and administrative practices of a Party requested to provide assistance.

Apart from the provisions of Article 14 with regard to the time limits for enforcing a tax claim, the Convention does not impose any obligation on a Party to—

- (a) contravene its own laws or administrative practices or the laws and administrative practices of a requesting Party;
- (b) act contrary to public policy;
- (c) supply information that is protected under its laws or the laws of a requesting Party;
- (d) supply proprietary information or information the disclosure of which would be contrary to public policy;
- (e) provide assistance where it considers the taxation to be contrary to generally accepted taxation principles or to the provisions of a convention for the avoidance of double taxation, or of any other convention entered into with the requesting Party;
- (f) provide assistance for the purpose of administering or enforcing a tax provision which discriminates against its nationals in the same circumstances;
- (g) provide assistance where the requesting Party has not pursued all reasonable measures available under its laws or administrative practice and no difficulty in pursuing those measures has been demonstrated; or
- (h) provide assistance in recovery where the administrative burden involved is disproportionate to the benefit to be derived by the requesting Party.

The Article further obligates a requested Party to provide requested information whether or not such information is relevant for its own tax purposes. Additionally, a requested Party is precluded from declining a request for information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

27. **Article 22** subjects the information obtained by a Party under the Convention to secrecy and obligates Parties to protect such information in the same manner they would treat such information under their domestic laws. The information is only to be disclosed to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation

to taxes. Disclosure may only be made in public hearings or published rulings on the matters.

Where a Party has made a reservation against providing any form of assistance in relation to the taxes of other Parties they may not use any information obtained from any Party for the taxes that are the subject of the reservation. Similarly, any Party who obtains information from a Party who has made such a reservation cannot use it for a tax that is the subject of the reservation.

Where the laws of a Party which supplies information under the Convention allows for the use of the information for other purposes, it may be used by the requesting Party for such other purpose with the consent of the tax authorities of the requested Party. Similarly, transfer of such information to a third Party may only be done with the consent of the tax authorities of the requested Party.

28. **Article 23** requires commencement of any proceedings relating to measures taken under the Convention in the appropriate judicial body. In addition, any proceedings in a requesting Party that affect recovery by the requested Party are to be immediately brought to the attention of the requested Party to allow it, where necessary, to suspend its proceedings. Each Party is under an obligation to inform the other of any final decision and its implications as soon as possible.
29. **Article 24** outlines mechanisms for the implementation of the Convention. Parties are obligated to communicate with each other through their respective competent authorities which may mutually agree on the mode of application of the Convention among themselves.
30. Any conflicts that may arise from the implementation of the Convention are to be resolved by mutual agreement.

A co-ordinating body composed of representatives of the competent authorities of the Parties to the Convention is tasked with the implementation and development of the Convention under the guidance of the OECD. The co-ordinating body is empowered to recommend any action to further the general aims of the Convention, including studying new methods and procedures for increasing international co-operation in tax matters. It may also recommend revisions or amendments to the Convention. States which have signed but not yet ratified, accepted or approved the

Convention (like Kenya) are entitled to be represented at the meetings of the coordinating body as observers.

31. **Article 25** governs the language of the Convention. Request for assistance and answers are to be drawn in one of the official languages of the OECD and of the Council of Europe (English and French) or in any other language agreed bilaterally between the Contracting States concerned.
32. **Article 26** governs the costs relating to the Convention. Unless otherwise agreed bilaterally by the Parties concerned, ordinary costs incurred in providing assistance are to be borne by the requested Party and any extraordinary costs incurred in providing assistance are to be borne by the requesting Party.
33. **Article 27** acknowledges that there may be other existing arrangements for assistance and cooperation in tax matters and notes that the provisions of the Convention do not limit and are not limited by the provisions of such arrangements.
34. **Article 28** governs the signing and entry into force of the Convention. The Convention was initially open for signature by CoE member States and OECD member countries, subject to ratification, acceptance or approval and deposit of the instruments of ratification, acceptance or approval with one of the Depositaries.

It was to enter into force on the first day of the month following the expiry of three months after the ratification by five States. It entered into force in 1995.

For any Party which thereafter ratifies the Convention, it is to enter into force on the first day of the month following the expiry of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

The Article further provides that the provisions of the Convention are to have effect for assistance related to taxable periods beginning on or after 1st January of the year following the one in which the Convention entered into force in respect of a Party, or where there is no taxable period, for assistance related to charges to tax arising on or after 1st January of the year following the one in which the Convention entered into force in respect of a Party. It, additionally, allows any two or more Parties to mutually agree that the Convention shall have effect for administrative assistance related to earlier taxable periods or charges to tax.

With regard to tax matters involving intentional criminal conduct, the Article limits the application of the provisions of the Convention to the date of its entry into force in respect of a Party in relation to earlier taxable periods or charges to tax.

35. **Article 29** governs the territorial application of the Convention. Each State is allowed, at the time of signature, or when depositing its instrument of ratification, acceptance or approval, to specify the territory or territories to which this Convention shall apply. Any State may, at any later date, by a declaration addressed to one of the Depositaries, extend the application of this Convention to any other territory specified in the declaration. The Convention shall apply to any such new territory on the first day of the month following the expiry of three months after the receipt of the declaration by the Depositary.

Any declaration made under the Article may be withdrawn at any time by a notification addressed to one of the Depositaries with the rider that the withdrawal shall become effective on the first day of the month following the expiry of three months after the receipt of such notification.

36. **Article 30** governs reservations to the Convention. It allows any State, at the time of signature or when depositing its instrument of ratification, acceptance or approval or at any later date to declare that it reserves the right—

- (a) not to provide any form of assistance in relation to the taxes of other Parties;
- (b) not to provide assistance in the recovery of any tax claim, or in the recovery of an administrative fine, for all taxes or only for certain taxes;
- (c) not to provide assistance in the service of documents for all taxes or only for certain taxes;
- (d) not to permit the service of documents through the post; and
- (e) with regard to tax matters involving intentional criminal conduct, to limit administrative assistance to taxable periods beginning on or after 1st January of the third year preceding the one in which the Convention entered into force in respect of a Party, or where there is no taxable period, to charges to tax arising on or after 1st January of the third year preceding the one in which the Convention entered into force in respect of a Party.

No other reservation may be made under the Convention.

37. **Article 31** provides for the denunciation (termination) of the Convention. A Party may, at any time, denounce the Convention by notification addressed to one of the Depositaries. The denunciation shall become effective on the first day of the month following the expiry of three months receipt of the notification by the Depositary. A Party which denounces the Convention remains bound by the provisions of Article 22 in relation to secrecy for as long as it retains in its possession any documents or information obtained under the Convention.
38. **Article 32** outlines the functions of the Depositaries of the Convention as the receipt of all instruments and notifications by States and Parties and the communication of information to the Parties. Currently the two Depositaries to the Convention are the Secretary General of the OECD and the Secretary General of the CoE.

2.3 Financial Implication

39. Under the Convention, unless otherwise agreed bilaterally by the Parties concerned, ordinary costs incurred in providing assistance are to be borne by the requested Party and any extraordinary costs incurred in providing assistance are to be borne by the requesting Party.
40. In the Memorandum dated 15th November 2009 submitted by the Cabinet Secretary, the Cabinet Secretary notes that there is an annual fee of **1,200 Euros** payable by all Parties to the Convention.

2.4 Legal Implication

41. The Convention will enter into force with regard to Kenya's obligations at the expiry of three months after the date of the receipt of the country's instrument of ratification by either of the Depositaries. Upon entry into force, the Convention shall bind the country until the expiry of three months after the date of receipt of a notification of withdrawal from the Convention.

3.0 PUBLIC PARTICIPATION & STAKEHOLDER ENGAGEMENT

3.1 Call for memoranda from the public

The Committee called for interested members of the public to make written submissions for consideration. The advertisement was carried in the dailies of 29th November 2019.

There were no submissions received from the public.

3.2 Meeting with Officials from Ministries of Foreign Affairs, Officials from National Treasury, Attorney General and Officials from Kenya Revenue Authority

The Committee received the following submissions on behalf of the Kenya Revenue Authority and the Principal Secretary for National Treasury

NATIONAL TREASURY

The Principal Secretary to the National Treasury appeared before the Committee on 4th November 2019. He briefed the Committee on the contents of the Agreement and submitted as follows:-

Background

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAC) is a comprehensive multilateral instrument available to jurisdictions for tax co-operation to tackle tax evasion and avoidance. It was developed jointly by the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe in 1988.

Following the global financial crisis, the G20 London Summit in April 2009 directed that the Convention be opened for signature to developing countries to enable them benefit from the new era of transparency. This was effected on 1st June 2011 following a Protocol prepared in 2010 that allowed non-OECD members to sign the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

The OECD mandated the Global Forum on transparency and Exchange of Information for Tax Purposes to implement the Convention. The Global Forum develops and monitors

international standards on exchange of information and conducts peer reviews on the same. The peer review ensures that member jurisdictions comply with the standards of exchange of information.

The Convention is intended to promote international co-operation on exchange of information between state parties on tax matters for the better operation of national tax laws, while respecting the fundamental rights of taxpayers.

Kenya, has a limited network on Avoidance of Double Taxation Agreement and no Tax Information Exchange Agreements. This Convention, therefore would benefit the Country in accessing tax information from over 130 global jurisdictions who are signatories to the Convention.

Status of Global Forum Peer Review for Kenya

Kenya underwent the first round of Global Forum reviews in 2012 and 2016 where the country was rated as 'Largely Compliant'. The ratings assigned are, 'Compliant', 'Largely Compliant', 'Partially Compliant' and 'Non-Compliant'. Kenya is scheduled to undergo the Second Round of Reviews on Exchange of information on request in the second quarter of 2020 (April to June).

The Global Forum will be assessing the implementation of the actions recommended during the First Round Reviews, key among them being the ratification and implementation of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters for exchange of information. During the review, the ratification of the Convention will carry a significant weight in the rating of a jurisdiction, in this case Kenya. A low rating in the Global Forum reviews may negatively portray a country in the international arena and may also affect the country's capacity to attract foreign direct investments.

Jurisdictions that are Signatories to the Convention

There are 158 Global Forum member jurisdictions and 130 of them are signatories to the Convention. Kenya joined the Global Forum in 2009 and signed the Convention in February 2016. An increasing number of African countries including South Africa, Nigeria, Ghana, Mauritius, Senegal, Cameroon, Seychelles, and Uganda have signed and ratified the Convention.

Benefits of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters to Kenya

The primary benefit of the agreement is the facilitation of tax administration through sharing of information by tax authorities of all the signatories to the convention. Specifically. The ratification of this convention will assist Kenya achieve the following:-

- (i) **Combating tax evasion and avoidance, and support in tax recovery:** The Convention provides for exchange of information in order to combat tax evasion and avoidance, and also includes assistance in tax recovery, the service of documents, joint audits and performance of tax examinations abroad.
- (ii) **Acquire information not disclosed by taxpayers for quality and accurate cross border audits and investigations:** The Convention will enable KRA acquire information that is usually not disclosed by taxpayers. The information obtained will ensure the quality and accuracy of cross border audits and investigations conducted to enhance tax compliance and revenue collection.
- (iii) **Timely access of information without having to enter into bilateral agreements:** The Convention will allow sharing of information without having to enter into bilateral agreements that usually take a lot of time to negotiate and conclude.
- (iv) **Enhanced fight against corruption, illicit financial flows including money laundering and terrorist financing:** In addition to providing a valuable tool for fighting tax evasion and avoidance, the Convention will help access to information to other law enforcement agencies to fight corruption, illicit financial flows including money laundering and terrorist financing.

National Interest

The ratification of this Convention shall not affect the national interest of Kenya as the Convention is only concerned with exchange of information for tax purposes with the other parties to the Convention to enhance tax compliance.

Obligations imposed on Kenya

Upon ratification of the Convention, Kenya will be required to respond to the requests for tax information on nationals of the parties to the Convention whilst maintaining the fundamental rights of the tax payers.

KENYA REVENUE AUTHORITY

Officials from the Kenya Revenue Authority appeared before the Committee on 4th November 2019. They briefed the Committee on the contents of the Agreement and submitted as follows:-

Background

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (**hereinafter referred to as ‘the Convention’**) is a comprehensive multilateral instrument available to jurisdictions for tax co-operation to tackle tax evasion and avoidance.

The Convention facilitates international co-operation for a better operation of national tax laws, while respecting the fundamental rights of taxpayers. It provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes. This co-operation ranges from exchange of information, including automatic exchanges, to the recovery of foreign tax claims.

It was developed jointly by the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe in 1988, and amended by a Protocol in 2010 following the G20 summit in London that allowed non-OECD members to sign the Convention. The OECD mandated the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) to implement the Convention.

The Global Forum develops and monitors international standards on exchange of information and conducts peer reviews on the same. The peer review ensures that member jurisdictions comply with the standards of exchange of information relating to various aspects including confidentiality and quality of requests among other requirements.

Development of the Convention in Kenya

Kenya underwent the first round of Global Forum reviews in 2012 and 2016 where the country was rated as ‘Largely Compliant’. The ratings assigned are, ‘Compliant’, ‘Largely Compliant’, ‘Partially Compliant’ and ‘Non - Compliant’. The ratings range from ‘Compliant’ which is the highest to ‘non-Compliant’ which is the lowest.

Kenya is scheduled to undergo the Second Round of Reviews on Exchange of information on request in the second quarter (April to June) of 2020. The Global Forum will be assessing the implementation of the actions recommended during the First Round Reviews, key among them being the ratification and implementation of the Convention for exchange of information. During the review, **ratification of the Convention weighs significantly in the rating of a jurisdiction.**

A low rating in the Global Forum reviews may negatively portray a country in the international arena and may also affect the country's capacity to attract foreign direct investments. This effect would be due to the perception of Kenya being a country that is not committed to the fight against tax evasion, illicit financial flows, combating of terrorism financing and money laundering due to the low rating.

There are 158 GF member jurisdictions and 130 are signatories to the Convention. Kenya joined the Global Forum in 2009 and signed the Convention in February 2016. Kenya is a one of two Africa members of the Steering Group of the Global Forum which is the highest decision making organ of the Global Forum. Membership of the Steering Group allows Kenya to participate and influence the decisions of the Global Forum and places the country in a position of leadership in the continent in matters of international tax transparency.

An increasing number of African countries including South Africa, Nigeria, Ghana, Mauritius, Senegal, Cameroon, Seychelles, Tunisia and Uganda have signed and ratified the Convention as shown below:-

	Number	Countries
African countries that have ratified the multilateral convention	9	Cameroon, Ghana, Mauritius, Senegal, Seychelles, South Africa, Tunisia, Uganda, Nigeria
African countries that have signed but not ratified the multilateral convention	8	Mauritania, Morocco, Burkina Faso, Gabon, Liberia, <i>Kenya</i> , Benin, Cabo Verde
African countries in the process of signing the Multilateral	4	Madagascar; Togo; Angola

		of unknown activities by a hidden taxpayer. USD 1 million of compromised taxes was recuperated.
2.	Tunisia	In 2018, Tunisia received a reply from an EO partner, which confirmed the existence of an undeclared foreign bank account used to hide assets. This has generated almost USD 2 million of additional taxes.
3.	Uganda	Uganda recovered over USD 25 million in taxes as a result of EOI between 2015 – 2019, having made its first requests in 2014.
4.	Nigeria	Following a commitment to implement AEOI, Nigeria launched a Voluntary Assets and Income Declaration Scheme (VAIDS) in June 2017, which took effect from 1 st July 2017 to 31 st September 2018. The scheme yielded about 30 billion Naira (USD 82.6 million) and grew the taxpayer database from 14 million in 2016 to 19 million in 2018.
5.	South Africa	The Special Voluntary Disclosure Programme (SVDP) set up from October 2016 to March 2017 by South Africa, prior to its first AEOI exchanges in September 2017, generated 283 million of additional revenues. In total, South Africa has collected close to USD 1.5 billion from its three Voluntary Disclosure Programmes since the launch of its first VDP in 2010. South Africa also recovered USD 62 million in 2013 from one request from one taxpayer.

(Statistics from the Africa Initiative Progress Report 2018)

Benefits of the Convention

The ratification of the Convention will assist Kenya to achieve the following:-

- i. The Convention provides for exchange of information in order to combat tax evasion and avoidance, and also includes assistance in tax recovery, the service of documents, joint audits and performance of tax examinations abroad.

- ii. The Convention will enable KRA acquire information that is usually not disclosed by taxpayers. The information obtained will ensure the quality and accuracy of cross border audits and investigations conducted to enhance tax compliance and revenue collection.
- iii. The Convention is also beneficial as it allows for sharing of information without having to enter into bilateral agreements that usually take a lot of time to negotiate and conclude.
- iv. In addition to providing a valuable tool for fighting tax evasion and avoidance, the Convention may also help to further other law enforcement purposes such as fighting corruption, illicit financial flows including money laundering and terrorist financing.

4.0 COMMITTEE OBSERVATIONS


The Committee observes THAT ratification of the convention will:

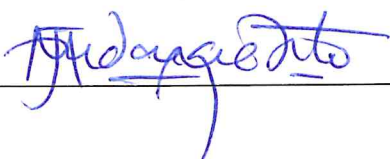
- 1. Assist Kenya to receive information from over one hundred and twenty jurisdictions on tax matters that is currently not accessible. This will enhance tax compliance and revenue collection;
- 2. Allow the sharing of tax information without kenya having to enter into other bilateral agreements;
- 3. Enhance the fight against corruption, illicit financial flows including money laundering and terrorist financing as law enforcement agencies will access information that is usually not disclosed by tax payers; and
- 4. Improve Kenya’s rating by the Global forum in order to enhance kenya’s capacity to attract Foreign Direct Investments and to raise its international tax profile and global positioning in the area of information and tax transparency.

5.0 COMMITTEE RECOMMENDATION

The Committee recommends:-

THAT, Pursuant to Section 8 of the Treaty Making and Ratification Act, the House APPROVES the Ratification of The Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 04 DEC 2019	DAY: WED
TABLED BY:	Hon. Katoo Ole Mbatia MP Chairperson
CLERK-AT THE TABLE:	A. Shikuko

Signed 

Date 4/12/2019

Hon. Katoo Ole Metito, EGH, MGH, MP (Chairperson)
Chairperson, Departmental Committee on Defence & Foreign Relations

MINUTES OF THE SEVENTY FIRST (71ST) SITTING OF THE DEPARTMENTAL COMMITTEE ON DEFENCE & FOREIGN RELATIONS HELD IN COMMITTEE ROOM 12, NEW WING, PARLIAMENT BUILDINGS ON TUESDAY, 3RD DECEMBER, 2019 AT 10.00 AM.

PRESENT

1. The Hon. Katoo Ole Metito, EGH, MGH, MP (Chairperson)
2. The Hon. Richard Tong'i, MP (Vice Chairperson)
3. The Hon. Col. (Rtd) Dido Ali Raso, MBS, MP
4. The Hon. Peter Mungai Mwathi, MP
5. The Hon. Memusi Ole Kanchory, MP
6. The Hon. (Dr.) Lilian Gogo, MP
7. The Hon. Ernest Ogesi Kivai, MP
8. The Hon. Caleb Amisi, MP

APOLOGIES

1. The Hon. Yusuf Hassan Abdi, MP
2. The Hon. Charles Kilonzo, MP
3. The Hon. Beatrice Nkatha Nyagah, HSC, MP
4. The Hon. Major (Rtd.) Bashir Sheikh Abdullah, MP
5. The Hon. Nelson Koech, MP
6. The Hon. Vincent Kipkurui Tuwei, MP
7. The Hon. Martha Wangari Wanjira MP
8. The Hon. Moses Nguchine Kirima, MP
9. The Hon. Patrick Makau King'ola, MP
10. The Hon. John Lodepe Nakara, MP
11. The Hon. Asha Hussein Mohamed, MP

IN ATTENDANCE

NATIONAL ASSEMBLY SECRETARIAT

- | | | |
|---------------------------|---|------------------|
| 1. Ms. Grace Wahu Karanja | - | Research Officer |
| 2. Mr. Ronald Walala | - | Legal Counsel |
| 3. Mr. Rodgers Kilungya | - | Audio Officer |

MIN. NO.NA/DC.DFR/2019/319:

PRELIMINARIES

The Chairperson called the meeting to order at 10.00 am and said a prayer. The agenda of the meeting was adopted as hereunder after being proposed by the Hon. Richard Tong'i MP and seconded by the, Hon. Ernest Ogesi Kivai MP.

AGENDA

1. Prayers
2. Adoption of the agenda
3. Confirmation of minutes of previous sittings
4. Substantive agenda:

- a. Meeting with CS Defence to respond to request for statement asked by Hon. Jude Njomo
- b. Briefing by the CS Defence on the draft National Peace Support Operations Policy
- c. Briefing by the Legal Counsel on the Memorandum on the ratification of the Multilateral Convention on Mutual Administrative Assistance in Tax matters

5. Any Other Business

MIN. NO.NA/DC.DFR /2019/320: CONFIRMATION OF MINUTES OF PREVIOUS SITTINGS

Confirmation of minutes was deferred to the next meeting

MIN. NO.NA/DC.DFR /2019/321: MEETING WITH CS DEFENCE TO RESPOND TO REQUEST FOR STATEMENT ASKED BY HON. JUDE NJOMO

The Committee on Defence and Foreign Relations invited the Ministry of Defence to make a presentation in regards to the question asked by Hon. Jude Njomo. The Committee was informed on the following:

1. The Ministry informed the Committee that the other ranks single accommodation project was terminated by the Ministry prior to the approval of the preliminary design and in accordance with Section 36(1) of the then Public Procurement and Assets Disposal Act, 2005 (now repealed). Section 36(1) of the Public Procurement and Assets Disposal Act, 2005, permitted the Ministry to terminate any procurement proceedings prior to entering into a contract. The total project cost at the time of termination of the procurement process had not been specifically ascertained. It was to be ascertained after the completion and approval of the detailed designs. There has been no amount of money paid out in respect to the terminated project to date.
2. The Ministry informed the Committee that it has not certified any payment to the contractors in view of Section 36(5) of the Public Procurement and Assets Disposal Act, 2005 (now repealed) which allowed the Ministry to terminate procurement proceedings prior to the signing of the contract without acquiring any liability.
3. The list of consultants, all of whom are Kenyan companies, earmarked to provide consultancy services to the project included:-
 - a. Cadplan Architects Limited
 - b. Bunei Maungu & Associates
 - c. Goro Consultants
 - d. Vekta Consultants
 - e. Edon Consultants International
 - f. Nyaundi Architects
 - g. Axis Consultants
 - h. Mathew Architects & Associates
 - i. Mwacharo & Associates
 - j. Tej E Architects
 - k. Otieno Adede Associates
 - l. Wambugu Mathews Architects

- m. Mgahu Associates
- n. Quany Man Associates
- o. Bunei & Associates
- p. Amazon Consultants
- q. Fredmar Quantity Surveyors
- r. Bee Que Consultants
- s. Otieno Odongo & Partners
- t. MAK Consulting Engineers
- u. Xenocan Consulting Engineers
- v. Charchi Githinji & Partners
- w. Keyplan Consultants
- x. Loadline Engineering Services
- y. Norkun Intake
- z. Feradon Associates
- aa. Mecoy Associates

4. The Ministry informed the Committee that it had received a payment demand from M/s Ngatia Associates Advocates for the sum of **Ksh. 66, 979, 397.53**, on behalf of the following consultants:-

a. Mwacharo & Associates Architects	– Ksh. 30, 816,082.40
b. Amazon Consultants	- Ksh. 14, 014, 200.98
c. Keyplan Consultants	- Ksh. 16, 008, 621.31
d. Feradon Associates	- <u>Ksh. 6, 140, 492.84</u>
Total	<u>Ksh. 66, 979, 397.53</u>

However, the Ministry has disputed the validity of the claims and has not settled the same. It stated the amount being demanded is for development of the plans and the site visits that the consultants undertook before signing of contract.

5. The Ministry informed the Committee that since the project was terminated prior to the contract, by virtue of the provisions of Sections 36(1) and (5) of the Public Procurement and Assets Disposal Act 2005 (now repealed), is not liable to settle any purported outstanding invoice from the consultants.
6. The Committee observed that: -
- a) There were demands for payments by consultants without undertaking any work on the projects.
 - b) The Ministry had not presented sufficient evidence on the flow of communication between the Ministry and the consultants on invitation to tender in order for the Committee to fully understand the conflict between the Ministry and consultants.
7. The Committee recommended that: -
- a) The Ministry should provide relevant information in form of the letters on invitation to tender and subsequent communication between the Ministry and the consultants after the termination of the project.
 - b) The Ministry should provide relevant information regarding the consultants attempting to seek arbitration that was not successful.

- c) The requested information should be availed to the Committee by the Ministry before the next sitting of the House. Once this is provided, the Statement will be availed to Hon. Jude Njomo.

MIN. NO.NA/DC.DFR /2019/322: **MEETING WITH CS DEFENCE ON DRAFT NATIONAL PEACE SUPPORT OPERATIONS POLICY**

The Committee was informed on the following:-

1. The Peace Support Operations Policy was developed in recognition of the need to provide efficient and effective national level management of Kenya's participation in Peace Support Operations (PSO) and ensure stakeholder ownership of its processes and activities.
2. The policy seeks to ensure that Kenya's participation in PSO is not only sustainable but brings about socio-economic development and manages conflict to create conditions for sustainable peace.
3. The policy seeks to mitigate challenges and gaps identified during implementation of Kenya's PSO to enhance Kenya's standing in the UN ranking that is commensurate to the level of the country's effort.
4. The policy also seeks to enhance stakeholders capabilities in readiness for deployment to PSOs through a whole government approach that will ensure that the Kenyan Contingent leaves behind not only a stable community but also an environmentally enhanced legacy.

MIN. NO.NA/DC.DFR /2019/323: **BRIEFING BY THE LEGAL COUNSEL ON THE MEMORANDUM ON THE RATIFICATION OF THE MULTILATERAL CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS**

The Legal Counsel informed the Committee on the following:-

1. The Convention was developed by the Organisation for Economic Cooperation and Development (OECD) and the Council of Europe (CoE) to facilitate international co-operation for a better operation of national tax laws, while respecting the fundamental rights of taxpayers. It provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes. This co-operation ranges from exchange of information, including automatic exchanges, to the recovery of foreign tax claims.
2. In light of the effects of the 2009 global financial crisis, the Convention was amended by a Protocol passed in 2010 to open it for signature by all countries, especially developing countries.
3. Kenya signed the Convention on 8th February 2016 and its text was approved by Cabinet on 8th June 2016. Cabinet thereafter approved its submission for ratification to the National Assembly on 1st August 2019.

4. The Committee observed that more time was required to comprehend the policy document in order to effectively contribute to it. Another meeting was recommended with the Ministry to solely discuss the policy document.
5. As at 27th November 2019, 135 jurisdictions had signed the Convention.

OUTLINE OF THE CONVENTION

6. **Article 1** outlines the objects of the Convention and the persons it covers. The Convention calls upon parties to provide administrative assistance to each other in tax matters, including through judicial intervention, where appropriate. Administrative assistance is said to include the exchange of information, assistance in recovery, including the preservation of property targeted for the recovery of taxes; conservancy; and service of documents.

Under the Article, Parties are obliged to provide administrative assistance with respect to both its affected residents and nationals and the affected residents or nationals of other countries.

7. **Article 2** outlines the taxes to which the Convention applies. It applies to taxes on income or profits; taxes on capital gains which are imposed separately from the tax on income or profits; taxes on net wealth; taxes imposed on behalf of a Party; taxes on income, profits, capital gains or net wealth which are imposed on behalf of political subdivisions or local authorities of a Party; compulsory social security contributions payable to general government or to social security institutions established under public law; estate, inheritance or gift taxes; taxes on immovable property; general consumption taxes, such as value added or sales taxes; specific taxes on goods and services such as excise taxes; taxes on the use or ownership of motor vehicles and taxes on the use or ownership of movable property other than motor vehicles.

Customs duties are excluded from the Convention.

8. **Article 3** outlines the definitions of various terms used in the Convention.
9. **Chapter III (Art. 4 to 17)** outlines the forms of assistance contemplated under the Convention.
10. **Article 4** requires the sharing of information that is foreseeably relevant for the administration or enforcement of domestic laws concerning the taxes. A party may, where its national laws so prescribe, inform a requesting state that they are under an obligation to inform its resident or national of the sharing of information relating to that resident or national.
11. **Article 5** requires the sharing of information upon request in relation to specified persons or transactions, including taking steps to provide information not covered in existing tax files.
12. **Article 6** allows two or more Parties to the Convention to agree to the automatic sharing of tax information.
13. **Article 7** allows for exchange of information without request in particular incidences. Parties are under obligation to share information spontaneously where—

- (a) It comes to their knowledge that there are grounds to believe that a Party may suffer a tax loss;
- (b) a person obtains a reduction in or an exemption from tax in their jurisdiction which result in an increase in tax or to liability to tax in the jurisdiction of another Party;
- (c) business dealings between a person liable to tax in a Party and a person liable to tax in another Party are conducted through one or more countries in such a way that a saving in tax may result in one or the other Party or in both;
- (d) there are grounds for believing that a saving of tax may result from artificial transfers of profits within groups of enterprises; or
- (e) information forwarded by another Party has led to the unearthing of information which may be relevant in assessing liability to tax in the jurisdiction of that Party.

14. **Article 8** allows two or more Parties to the Convention to agree to conduct a simultaneous tax examination of a person in whom they have a common interest in their respective jurisdictions for purposes of thereafter exchanging any relevant information that they obtain.

15. **Article 9** allows a Party to request another for representatives of its tax authority to be present during the tax examination of a person or persons in the jurisdiction of the requested Party. Where the requested Party agrees to the request, it is to notify the tax authority of the requesting Party of the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions governing the examination. The requested Party has the final authority on the manner of conducting the examination.

The Article allows a Party to, at any time, make or withdraw a general declaration of their intention, as a general rule, not to accept requests of other Parties to attend examinations in their jurisdiction.

16. **Article 10** requires a Party that receives tax information from another Party that conflicts with information in its possession to advise the other Party of the conflict.

17. **Article 11** requires a requested Party to take necessary steps to recover tax claims of a requesting in the same manner it would recover its own tax claims provided that the two Parties have agreed to a mechanism for the enforcement of such claims, and the claims are uncontested.

Where the subject of tax recovery is a deceased person, the obligation to provide assistance in recovery is limited to the value of the estate or of the property acquired by each beneficiary of the estate.

18. **Article 12** requires a requested Party to take necessary measures to preserve property that is the subject of a tax claim even in instances where the claim is contested and there is no mechanism in place between it and the requesting Party permitting enforcement of the claim

19. **Article 13** requires a Party requesting assistance with the recovery of a tax claim to submit, together with the request—

- (a) a declaration that the claim concerns a tax covered by the Convention and the claim is not or may not be contested,
 - (b) an official copy of the instrument permitting enforcement of the claim in the jurisdiction of the requesting Party, and
 - (c) any other document required for recovery or measures of preserving property owned by the person that is the subject of the claim.
20. **Article 14** outlines the time limits applicable to tax claims. The law of a Party that requests enforcement of tax claims is final with regard to the period beyond which a tax claim cannot be enforced.
- However, the requested State is not obliged to comply with a request for assistance submitted after a period of 15 years from the date of the original instrument permitting enforcement.
21. **Article 15** provides that a Party requested to provide assistance in the recovery of a tax claim is not under an obligation to accord the recovery of the claim any special priority.
22. **Article 16** allows a Party requested to provide assistance in the recovery of a tax claim to, after informing the requesting Party, allow a person to defer payment of the claim or pay the claim in instalments if its laws or practices permit it to do so.
23. **Article 17** requires a Party, at the request of another Party to serve notices and documents, including judgments, from the requesting Party's jurisdiction relating to taxes covered by the Convention. Service of the documents is to be done in the prescribed and usual manner of the requested Party by a method prescribed by its domestic laws for the service of documents of a substantially similar nature.
- The Article further dispenses with the need to accompany a document being served together with its translation unless the person being served is unable to understand the language of the document.
24. **Chapter IV (Art. 18 to 26)** contains provisions relating to other forms of assistance covered by the Convention.
25. **Article 18** outlines the information that a Party making a request for assistance under the Convention has to include in the request. The request has to include—
- (a) the authority or agency which initiated the request;
 - (b) information to assist in the identification of the person that is the subject of the request;
 - (c) the form in which the requesting Party requires the information to be supplied in order to meet its needs;
 - (d) in the case of a request for assistance in recovery or preservation of property, the nature of the tax claim, the components of the tax claim and the assets from which the tax claim may be recovered;
 - (e) in the case of a request for service of documents, the nature and the subject of the document to be served; and

- (f) whether the request conforms with the law and administrative practice of the requesting Party and whether it is justified in the light of the limits on the obligation to provide assistance under Article 21 of the Convention.
26. **Article 20** requires a requested Party to inform the requesting Party of its efforts to assist and the results of the efforts as soon as possible, where the request complies with the requirements of the Convention. A decision to decline a request and reasons must also be notified to the requesting Party as soon as possible.
27. **Article 21** subjects the obligations under the Convention to the rights and safeguards granted by local laws and administrative practices of a Party requested to provide assistance.

Apart from the provisions of Article 14 with regard to the time limits for enforcing a tax claim, the Convention does not impose any obligation on a Party to—

- (a) contravene its own laws or administrative practices or the laws and administrative practices of a requesting Party;
- (b) act contrary to public policy;
- (c) supply information that is protected under its laws or the laws of a requesting Party;
- (d) supply proprietary information or information the disclosure of which would be contrary to public policy;
- (e) provide assistance where it considers the taxation to be contrary to generally accepted taxation principles or to the provisions of a convention for the avoidance of double taxation, or of any other convention entered into with the requesting Party;
- (f) provide assistance for the purpose of administering or enforcing a tax provision which discriminates against its nationals in the same circumstances;
- (g) provide assistance where the requesting Party has not pursued all reasonable measures available under its laws or administrative practice and no difficulty in pursuing those measures has been demonstrated; or
- (h) provide assistance in recovery where the administrative burden involved is disproportionate to the benefit to be derived by the requesting Party.

The Article further obligates a requested Party to provide requested information whether or not such information is relevant for its own tax purposes. Additionally, a requested Party is precluded from declining a request for information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

28. **Article 22** subjects the information obtained by a Party under the Convention to secrecy and obligates Parties to protect such information in the same manner they would treat such information under their domestic laws. The information is only to be disclosed to persons or authorities (including courts and administrative or

supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes. Disclosure may only be made in public hearings or published rulings on the matters.

Where a Party has made a reservation against providing any form of assistance in relation to the taxes of other Parties they may not use any information obtained from any Party for the taxes that are the subject of the reservation. Similarly, any Party who obtains information from a Party who has made such a reservation cannot use it for a tax that is the subject of the reservation.

Where the laws of a Party which supplies information under the Convention allows for the use of the information for other purposes, it may be used by the requesting Party for such other purpose with the consent of the tax authorities of the requested Party. Similarly, transfer of such information to a third Party may only be done with the consent of the tax authorities of the requested Party.

29. **Article 23** requires commencement of any proceedings relating to measures taken under the Convention in the appropriate judicial body. In addition, any proceedings in a requesting Party that affect recovery by the requested Party are to be immediately brought to the attention of the requested Party to allow it, where necessary, to suspend its proceedings. Each Party is under an obligation to inform the other of any final decision and its implications as soon as possible.
30. **Article 24** outlines mechanisms for the implementation of the Convention. Parties are obligated to communicate with each other through their respective competent authorities which may mutually agree on the mode of application of the Convention among themselves.
31. Any conflicts that may arise from the implementation of the Convention are to be resolved by mutual agreement.

A co-ordinating body composed of representatives of the competent authorities of the Parties to the Convention is tasked with the implementation and development of the Convention under the guidance of the OECD. The co-ordinating body is empowered to recommend any action to further the general aims of the Convention, including studying new methods and procedures for increasing international co-operation in tax matters. It may also recommend revisions or amendments to the Convention. States which have signed but not yet ratified, accepted or approved the Convention (like Kenya) are entitled to be represented at the meetings of the co-ordinating body as observers.

32. **Article 25** governs the language of the Convention. Request for assistance and answers are to be drawn in one of the official languages of the OECD and of the Council of Europe (English and French) or in any other language agreed bilaterally between the Contracting States concerned.
33. **Article 26** governs the costs relating to the Convention. Unless otherwise agreed bilaterally by the Parties concerned, ordinary costs incurred in providing assistance

are to be borne by the requested Party and any extraordinary costs incurred in providing assistance are to be borne by the requesting Party.

34. **Article 27** acknowledges that there may be other existing arrangements for assistance and cooperation in tax matters and notes that the provisions of the Convention do not limit and are not limited by the provisions of such arrangements.

35. **Article 28** governs the signing and entry into force of the Convention. The Convention was initially open for signature by CoE member States and OECD member countries, subject to ratification, acceptance or approval and deposit of the instruments of ratification, acceptance or approval with one of the Depositaries.

It was to enter into force on the first day of the month following the expiry of three months after the ratification by five States. It entered into force in 1995.

For any Party which thereafter ratifies the Convention, it is to enter into force on the first day of the month following the expiry of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

The Article further provides that the provisions of the Convention are to have effect for assistance related to taxable periods beginning on or after 1st January of the year following the one in which the Convention entered into force in respect of a Party, or where there is no taxable period, for assistance related to charges to tax arising on or after 1st January of the year following the one in which the Convention entered into force in respect of a Party. It, additionally, allows any two or more Parties to mutually agree that the Convention shall have effect for administrative assistance related to earlier taxable periods or charges to tax.

With regard to tax matters involving intentional criminal conduct, the Article limits the application of the provisions of the Convention to the date of its entry into force in respect of a Party in relation to earlier taxable periods or charges to tax.

36. **Article 29** governs the territorial application of the Convention. Each State is allowed, at the time of signature, or when depositing its instrument of ratification, acceptance or approval, to specify the territory or territories to which this Convention shall apply. Any State may, at any later date, by a declaration addressed to one of the Depositaries, extend the application of this Convention to any other territory specified in the declaration. The Convention shall apply to any such new territory on the first day of the month following the expiry of three months after the receipt of the declaration by the Depositary.

Any declaration made under the Article may be withdrawn at any time by a notification addressed to one of the Depositaries with the rider that the withdrawal shall become effective on the first day of the month following the expiry of three months after the receipt of such notification.

37. **Article 30** governs reservations to the Convention. It allows any State, at the time of signature or when depositing its instrument of ratification, acceptance or approval or at any later date to declare that it reserves the right—

(a) not to provide any form of assistance in relation to the taxes of other Parties;

- (b) not to provide assistance in the recovery of any tax claim, or in the recovery of an administrative fine, for all taxes or only for certain taxes;
- (c) not to provide assistance in the service of documents for all taxes or only for certain taxes;
- (d) not to permit the service of documents through the post; and
- (e) with regard to tax matters involving intentional criminal conduct, to limit administrative assistance to taxable periods beginning on or after 1st January of the third year preceding the one in which the Convention entered into force in respect of a Party, or where there is no taxable period, to charges to tax arising on or after 1st January of the third year preceding the one in which the Convention entered into force in respect of a Party.

No other reservation may be made under the Convention.

- 38. **Article 31** provides for the denunciation (termination) of the Convention. A Party may, at any time, denounce the Convention by notification addressed to one of the Depositaries. The denunciation shall become effective on the first day of the month following the expiry of three months receipt of the notification by the Depositary. A Party which denounces the Convention remains bound by the provisions of Article 22 in relation to secrecy for as long as it retains in its possession any documents or information obtained under the Convention.
- 39. **Article 32** outlines the functions of the Depositaries of the Convention as the receipt of all instruments and notifications by States and Parties and the communication of information to the Parties. Currently the two Depositaries to the Convention are the Secretary General of the OECD and the Secretary General of the CoE.

FINANCIAL IMPLICATION

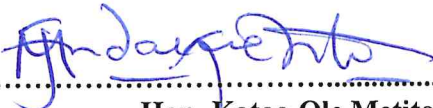
- 40. Under the Convention, unless otherwise agreed bilaterally by the Parties concerned, ordinary costs incurred in providing assistance are to be borne by the requested Party and any extraordinary costs incurred in providing assistance are to be borne by the requesting Party.
- 41. In the Memorandum dated 15th November 2009 submitted by the Cabinet Secretary, the Cabinet Secretary notes that there is an annual fee of **1,200 Euros** payable by all Parties to the Convention.

LEGAL IMPLICATION

- 42. The Convention will enter into force with regard to Kenya's obligations at the expiry of three months after the date of the receipt of the country's instrument of ratification by either of the Depositaries. Upon entry into force, the Convention shall bind the country until the expiry of three months after the date of receipt of a notification of withdrawal from the Convention

MIN. NO.NA/DC.DFR /2019/324: ADJOURNMENT

There being no other business, the meeting adjourned at 1.08 pm.

Signed..... 
Hon. Katoo Ole Metito, M.P
(CHAIRPERSON)

Date..... 3/12/2019

MINUTES OF THE SEVENTY SECOND (72ND) SITTING OF THE DEPARTMENTAL COMMITTEE ON DEFENCE & FOREIGN RELATIONS HELD IN COMMITTEE ROOM 12, NEW WING, PARLIAMENT BUILDINGS ON WEDNESDAY, 4TH DECEMBER, 2019 AT 9.30 AM.

PRESENT

1. The Hon. Katoo Ole Metito, EGH, MGH, MP (Chairperson)
2. The Hon. Richard Tong'i, MP (Vice Chairperson)
3. The Hon. Yusuf Hassan Abdi, MP
4. The Hon. Charles Kilonzo, MP
5. The Hon. Col. (Rtd) Dido Ali Raso, MBS, MP
6. The Hon. Peter Mungai Mwathi, MP
7. The Hon. Beatrice Nkatha Nyagah, HSC, MP
8. The Hon. John Lodepe Nakara, MP
9. The Hon. Memusi Ole Kanchory, MP
10. The Hon. (Dr.) Lilian Gogo, MP
11. The Hon. Vincent Kipkurui Tuwei, MP
12. The Hon. Ernest Ogesi Kivai, MP
13. The Hon. Caleb Amisi, MP

APOLOGIES

1. The Hon. Major (Rtd.) Bashir Sheikh Abdullah, MP
2. The Hon. Nelson Koech, MP
3. Hon. Martha Wangari Wanjira MP
4. The Hon. Moses Nguchine Kirima, MP
5. The Hon. Patrick Makau King'ola, MP
6. The Hon. Asha Hussein Mohamed, MP

IN ATTENDANCE

NATIONAL ASSEMBLY SECRETARIAT

- | | | |
|---------------------------|---|------------------|
| 1. Ms. Grace Wahu Karanja | - | Research Officer |
| 2. Mr. Ronald Walala | - | Legal Counsel |
| 3. Mr. Rodgers Kilungya | - | Audio Officer |

MIN. NO.NA/DC.DFR/2019/325:

PRELIMINARIES

The Chairperson called the meeting to order at 10.00 am and said a prayer. The agenda of the meeting was adopted as hereunder after being proposed by the Hon. Richard Tong'i MP and seconded by the, Hon. Ernest Ogesi Kivai MP.

AGENDA

1. Prayers
2. Adoption of the agenda
3. Confirmation of minutes of previous sittings
4. Substantive agenda: Meeting with the following Stakeholders to consider the Memorandum on Multilateral Convention on Mutual Administrative Assistance in Tax Matters

- a) Ministry of Foreign Affairs
- b) The National Treasury
- c) The Solicitor General & Attorney General's Office
- d) Kenya Revenue Authority

5. Any Other Business

MIN. NO.NA/DC.DFR /2019/326: CONFIRMATION OF MINUTES OF PREVIOUS SITTINGS

Confirmation of minutes was deferred to the next meeting

MIN. NO.NA/DC.DFR /2019/327: MEETING WITH STAKEHOLDERS TO CONSIDER THE MEMORANDUM ON MULTILATERAL CONVENTION ON MUTUAL ADMINISTRATIVE IN TAX MATTERS

The Committee received the following submissions on behalf of the Kenya Revenue Authority and the Principal Secretary for National Treasury

A. NATIONAL TREASURY

The Principal Secretary to the National Treasury appeared before the Committee on 4th November 2019. He briefed the Committee on the contents of the Agreement and submitted as follows:-

1. The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAC) is a comprehensive multilateral instrument available to jurisdictions for tax co-operation to tackle tax evasion and avoidance. It was developed jointly by the Organisation for Economic Co- operation and Development (OECD) and the Council of Europe in 1988.
2. Following the global financial crisis, the G20 London Summit in April 2009 directed that the Convention be opened for signature to developing countries to enable them benefit from the new era of transparency. This was effected on 1st June 2011 following a Protocol prepared in 2010 that allowed non-OECD members to sign the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.
3. The OECD mandated the Global Forum on transparency and Exchange of Information for Tax Purposes to implement the Convention. The Global Forum develops and monitors international standards on exchange of information and conducts peer reviews on the same. The peer review ensures that member jurisdictions comply with the standards of exchange of information.
4. The Convention is intended to promote international co-operation on exchange of information between state parties on tax matters for the better operation of national tax laws, while respecting the fundamental rights of taxpayers.
5. Kenya, has a limited network on Avoidance of Double Taxation Agreement and no Tax Information Exchange Agreements. This Convention, therefore would benefit the Country in accessing tax information from over 130 global jurisdictions who are signatories to the Convention.

Jurisdictions that are Signatories to the Convention

6. There are 158 Global Forum member jurisdictions and 130 of them are signatories to the Convention. Kenya joined the Global Forum in 2009 and signed the Convention in February 2016. An increasing number of African countries including South Africa, Nigeria, Ghana, Mauritius, Senegal, Cameroon, Seychelles, and Uganda have signed and ratified the Convention.

Benefits of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters to Kenya

7. The primary benefit of the agreement is the facilitation of tax administration through sharing of information by tax authorities of all the signatories to the convention. Specifically. The ratification of this convention will assist Kenya achieve the following:-
 - (i) Combating tax evasion and avoidance, and support in tax recovery: The Convention provides for exchange of information in order to combat tax evasion and avoidance, and also includes assistance in tax recovery, the service of documents, joint audits and performance of tax examinations abroad.
 - (ii) Acquire information not disclosed by taxpayers for quality and accurate cross border audits and investigations: The Convention will enable KRA acquire information that is usually not disclosed by taxpayers. The information obtained will ensure the quality and accuracy of cross border audits and investigations conducted to enhance tax compliance and revenue collection.
 - (iii) Timely access of information without having to enter into bilateral agreements: The Convention will allow sharing of information without having to enter into bilateral agreements that usually take a lot of time to negotiate and conclude.
 - (iv) Enhanced fight against corruption, illicit financial flows including money laundering and terrorist financing: In addition to providing a valuable tool for fighting tax evasion and avoidance, the Convention will help access to information to other law enforcement agencies to fight corruption, illicit financial flows including money laundering and terrorist financing.

National Interest

8. The ratification of this Convention shall not affect the national interest of Kenya as the Convention is only concerned with exchange of information for tax purposes with the other parties to the Convention to enhance tax compliance.

Obligations imposed on Kenya

9. Upon ratification of the Convention, Kenya will be required to respond to the requests for tax information on nationals of the parties to the Convention whilst maintaining the fundamental rights of the tax payers.

B. KENYA REVENUE AUTHORITY

Officials from the Kenya Revenue Authority appeared before the Committee on 4th November 2019. They briefed the Committee on the contents of the Agreement and submitted as follows:-

1. The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (**hereinafter referred to as 'the Convention'**) is a comprehensive multilateral instrument available to jurisdictions for tax co-operation to tackle tax evasion and avoidance.

2. The Convention facilitates international co-operation for a better operation of national tax laws, while respecting the fundamental rights of taxpayers. It provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes. This co-operation ranges from exchange of information, including automatic exchanges, to the recovery of foreign tax claims.
3. It was developed jointly by the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe in 1988, and amended by a Protocol in 2010 following the G20 summit in London that allowed non-OECD members to sign the Convention. The OECD mandated the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) to implement the Convention.
4. The Global Forum develops and monitors international standards on exchange of information and conducts peer reviews on the same. The peer review ensures that member jurisdictions comply with the standards of exchange of information relating to various aspects including confidentiality and quality of requests among other requirements.
5. An increasing number of African countries including South Africa, Nigeria, Ghana, Mauritius, Senegal, Cameroon, Seychelles, Tunisia and Uganda have signed and ratified the Convention as shown below:-

	Number	Countries
African countries that have ratified the multilateral convention	9	Cameroon, Ghana, Mauritius, Senegal, Seychelles, South Africa, Tunisia, Uganda, Nigeria
African countries that have signed but not ratified the multilateral convention	8	Mauritania, Morocco, Burkina Faso, Gabon, Liberia, <i>Kenya</i> , Benin, Cabo Verde
African countries in the process of signing the Multilateral Convention	4	Madagascar; Togo; Angola

6. The objective of the Convention is to provide administrative assistance to state parties in tax matters mainly by promoting international cooperation on exchange of information between state parties to enable each party to combat international tax evasion and avoidance while at the same time respecting the fundamental rights of taxpayers.

The Convention in the Global and African Context

7. Intergovernmental cooperation aiming at addressing cross-border tax evasion has grown rapidly over the past few years. The Global Forum has been at the forefront of promoting this cooperation by ensuring the implementation of the two complementary international standards for transparency and exchange of tax information.
8. Despite significant benefits that international tax cooperation can bring to jurisdictions, economically advanced jurisdictions have made far more rapid and evident progress towards greater tax transparency, in the past decade, than developing countries. Some of the successes in the Global context are highlighted in the table below:

S/No	Country	Revenue Collected as a result of EOI
1.	Sweden (2010-2014)	Sweden processed 396 requests that resulted in their collection of USD 33 million in additional taxes.
2.	Australia (2013)	Australia processed 400 requests that resulted in collection of USD 361 million in additional taxes while recovering USD 68 billion through automatic exchange of information.
3.	The Philippines (2014)	The Philippines recovered more than USD 1 million in 2014 from 2 requests.

(Statistics from the Global Forum Annual Member Surveys)

African Context

9. Tax evasion and avoidance is a global concern that reduces government revenue and undermines trust in the tax system. This concern is acute in developing countries. In African countries, tax revenues account for only approximately 18% of GDP while the average tax-to-GDP ratio is 34% in OECD countries.
10. International tax cooperation through exchange of Information (EOI) between tax authorities is a powerful enforcement tool, which allows tax authorities to reach out to offshore information sources.
11. The objective of tax cooperation is to support the investigative efforts of the tax authorities. However, converting information obtained through EOI into revenue takes time and requires certain skills. A growing number of African members now register tangible results as a result of EOI.

Benefits of the Convention.

12. The ratification of the Convention will assist Kenya to achieve the following:-
 - i. The Convention provides for exchange of information in order to combat tax evasion and avoidance, and also includes assistance in tax recovery, the service of documents, joint audits and performance of tax examinations abroad.
 - ii. The Convention will enable KRA acquire information that is usually not disclosed by taxpayers. The information obtained will ensure the quality and accuracy of cross border audits and investigations conducted to enhance tax compliance and revenue collection.
 - iii. The Convention is also beneficial as it allows for sharing of information without having to enter into bilateral agreements that usually take a lot of time to negotiate and conclude.
 - iv. In addition to providing a valuable tool for fighting tax evasion and avoidance, the Convention may also help to further other law enforcement purposes such as fighting corruption, illicit financial flows including money laundering and terrorist financing.

13. The Committee observes THAT ratification of the convention will:

1. Assist Kenya to receive information from over one hundred and twenty jurisdictions on tax matters that is currently not accessible. This will enhance tax compliance and revenue collection;
2. Allow the sharing of tax information without Kenya having to enter into other bilateral agreements;

3. Enhance the fight against corruption, illicit financial flows including money laundering and terrorist financing as law enforcement agencies will access information that is usually not disclosed by tax payers; and
4. Improve Kenya's rating by the Global forum in order to enhance Kenya's capacity to attract Foreign Direct Investments and to raise its international tax profile and global positioning in the area of information and tax transparency.

14. The Committee recommends:-

THAT, Pursuant to Section 8 of the Treaty Making and Ratification Act, the House **APPROVES the Ratification of The Multilateral Convention on Mutual Administrative Assistance in Tax Matters.**

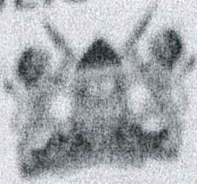
MIN. NO.NA/DC.DFR /2019/324: ADJOURNMENT

There being no other business, the meeting adjourned at 12. pm.

Signed.....

Hon. Katoo Ole Metito, M.P
(CHAIRPERSON)

Date.....
4/12/2019



TWELFTH PARLIAMENT – (THIRD SESSION) THE NATIONAL ASSEMBLY

INVITATION TO PUBLIC PARTICIPATION – SUBMISSION OF MEMORANDA

In the matter of consideration by the National Assembly of the Multilateral
Convention on Mutual Administrative Assistance in Tax Matters

Article 118 (1) (b) of the Constitution provides that "Parliament shall facilitate Public Participation and involvement in the legislative and other business of the Parliament and its Committees". Further, section 8 of the Treaty Making and Ratification Act, 2012 provides for the consideration and Ratification of Treaties by Parliament. Subsection (3) states, "The relevant Parliamentary Committee shall, during its consideration of the Treaty, ensure Public Participation in the ratification process in accordance with laid down parliamentary procedures". The main purpose of the Convention is to promote international co-operation of exchange of information between state parties on tax matters for the better operation of national tax laws, while respecting the fundamental rights of taxpayers.

The above mentioned Convention has been submitted to the Speaker of the National Assembly and is now committed, pursuant to section 8 of the Treaty Making and Ratification Act, 2012, to the **Departmental Committee on Defence and Foreign Relations**.

Pursuant to Article 118 (1)(b) of the Constitution and provisions of section 8 of the Treaty Making and Ratification Act, 2012, the Departmental Committee on Defence and Foreign Relations invites interested members of the public to submit any representations they may have on the Convention.

The representations may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi** or hand-delivered to the **Office of the Clerk, Main Parliament Building, Nairobi**; or emailed to clerk@parliament.go.ke; to be received on or before **Thursday, December 5th, 2019 at 5:00 pm**. The full text of the Convention and its accompanying Memorandum to the National Assembly may be accessed at www.parliament.go.ke.

SERAH M. KIOKO
FOR: CLERK OF THE NATIONAL ASSEMBLY

REPUBLIC OF KENYA



NATIONAL ASSEMBLY

DEPARTMENTAL COMMITTEE ON DEFENCE AND FOREIGN RELATIONS







ADOPTION LIST

Venue: Committee Rm 12, Parliament Buildings

Date: 04.12.2019

AGENDA: Meeting to Consider the Memorandum on Multilateral Convention on Mutual Administrative Assistance in Tax Matters

No.	NAME	SIGNATURE
1.	The Hon. Katoo Ole Metito, EGH, MGH, M.P - Chairperson	
2.	The Hon. Richard Tong'i, M.P - Vice Chairperson	
3.	The Hon. Yusuf Hassan Abdi, M.P	
4.	The Hon. Charles Mutavi Kilonzo, M.P	
5.	The Hon. Patrick Makau, M.P	
6.	The Hon. Col. (Rtd) Dido Ali Raso, M.P	
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10	The Hon. John Lodepe Nakara, M.P	
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15.	The Hon. Moses Nguchine Kirima, M.P	
16.	The Hon. Vincent Kipkurui Tuwei, M.P	
17.	The Hon. Ernest Ogesi Kivai, M.P	
18.	The Hon. Caleb Amisi, MP	
19.	The Hon. Asha Hussein Mohamed, MP	

Prepared by

Signature.....

Victor Weke
First Clerk Assistant

Approved by

Signature.....

Mrs. Florence A. Abonyo
Director, Committee Services