Towards Effective Double Tax Agreements Within The African Union (AU)

By

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Abstract

In the era of globalisation, it becomes impossible for a country's tax policy to stand alone as a result of international trade in goods and services The effect is that trade now transcends national boundaries. As persons live and operate in different countries, it becomes difficult to identify the country with taxing rights so as to avoid double taxation of the income and profits of persons which may be an impediment to the free flow of international trade. The paper identifies that there exists tax agreements between some members of the African Union (AU) and countries of Asia, and Europe. However, few exists with AU members. This is inconsistent with the vision and objectives of the Regional Economic Communities (RECs) in the AU, African Continental Free Trade Area and questions why this is the case. Considering the benefits associated with tax agreements, the paper concludes by making a case for Double Tax Agreements (DTAs) in Africa.

Keywords: Double Tax Agreements, Taxation, Double taxation, Persons, Globalisation

1. INTRODUCTION

Taxation can be seen as a system of compulsory levy or exaction imposed by the government on a variety of tax paying subjects for the purpose of public spending or for other social and economic objectives[1]. Government levy taxes on persons (legal and natural)[2] for the purposes of provision of public goods, infrastructural development and for the funding of public expenditure.[3] On international taxation, 'most of the world's income tax systems impose tax on the worldwide income of their residents and on profits with a source in the country where the income is derived by a non-resident.'[4] This brings about the twin principles of 'source and residence' in determining the state with the right to tax a business. [5]

Countries have their own domestic legal regimes which ensure that persons operating within their borders comply with tax remittances. For example, in Nigeria, there exists the Companies Income Tax Act (CITA),[6] Petroleum Profit Tax Act (PPTA)[7] , Personal Income Tax, Act (PITA)[8] Capital Gains Tax Act[9] and

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[1] A Miller and L Oats *Principles of International Taxation* (3rd ed, 2012, Bloomsbury Publishing Plc, west Sussex) at 3. There are different types of taxes, which can be direct or indirect tax. Indirect tax includes Value Added Tax (VAT), tax in goods and services, excise duties and international trade tax. Direct taxes include personal tax, corporate income tax, property tax and resources tax. It also depends on what countries choose to tax to improve tax revenue. Indirect taxes are the largest source of taxes in Africa.

[2] Organisation for Economic Cooperation & Development (OECD) Model Convention on Income and on Capital, 2017, Article 3 (1) (a) defines persons 'The term "person" includes an individual, a company and any other body of persons;< https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf>(last accessed 10 August 2020).

[3] A Miller and Oats *Principles of International Taxation* (3rd ed, 2012, Bloomsbury Publishing Plc, west Sussex) at 3

[4] V Daurer and R Krever, "Choosing between the UN and OECD Tax Policy Models : An African Case Study" (2014) 22/1 *African Journal of International and Comparative Law* 1 at 1

[5] Miller and Oats *Principles of International Taxation* above at note 3 at 23 When companies operate in two different jurisdictions either as a branch or fixed place of doing business, or even as an agent or engage in consultancy services with a significant presence, it means that there is a source of income from a country other than its own country of residence (ie place of incorporation or registration). In this situation, the home country usually will tax the income using the residence principle while the foreign country taxes the income using the source principle.

[6] *CITA* CAP C 21 LFN 2004 (Nigeria) This covers tax chargeable on all companies operating in Nigeria.

[7] PPTA CAP P13 LFN 2004 (Nigeria) for companies in the oil and gas industry.

[8] Cap P8 LFN 2004

[9] Cap C1 LFN 2004

Finance Act 2020[10]. Ghana has the Income Tax Act[11] which includes the corporate tax paid by companies on their profits in the year. In South Africa, there is in place Income Tax Act 58 of 1962. This comprises of all tax laws and amendments in South Africa. However, in the era of globalisation and growth of cross-border services by Multinational Enterprises (MNEs),[12] commercial activities now transcend domestic setting. With the coming into effect of the African Continental Free Trade Area (AfCFTA) on 30th May, 2019, with an expected growth in intra-African trade, it will result to persons living and working outside their home countries, this shows that a nation's tax policy no longer stands alone but must be wide and efficient enough to withstand competition.[13] How do we manage international taxation to ensure there is no double taxation, evasion and avoidance because if not properly regulated, two jurisdictions may potentially claim jurisdiction to tax the same profit or transaction at the same time.[14] This may lead to tax conflicts and tax burden on the tax payer leading to what is known as juridical double taxation[15] which adversely affects the commerciality of cross-border transactions and may be seen as technical barriers to trade. To avoid juridical double taxation, countries enter into Double Tax Agreements (DTAs), [also referred to as Avoidance of Double Taxation Agreements (ADTAs)] which also help to reconcile 'source and residence' so as to alleviate the tax burden on the tax payer . [16]

Looking at the African Union (AU), some Regional Economic Communities (RECs) in Africa already have provisions on taxation in regional levels. For example Article 40 of the Economic Community of West African States (ECOWAS) Revised Treaty 1993 provides for fiscal charges and internal taxation encouraging member states to eliminate all effective internal taxes, undertake to avoid double taxation and grant assistance to one another in combating international tax evasion. Article 40(5) specifically provides that 'The conditions and modalities for granting such assistance shall be as contained in a Double Taxation and Assistance Convention.' This provides a basis for DTAs in the ECOWAS. Ironically, there is not a single DTA between member states. In the Common Market for the Eastern and Southern Africa (COMESA) region, Article 161 provides that 'The Member States undertake to conclude between themselves agreements on the avoidance of double taxation'[17]. Not all Eight RECs in Africa have Provisions for DTAs.[18] The continent accounts for more than 450 active DTAs, 391 with other jurisdiction and 59 are intra-African[19].

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[10] Finance Act 2019

[11] Income Tax Act, 2015, particularly section 58 for the taxation of Companies.

[12] P Fernandez and J Pope "International Taxation of Multinational Enterprises (MNEs)" (2002) 12/1 Article 7, *Revenue Law Journal* at 106 A multinational enterprise (MNE) is an entity that conducts business in more than one jurisdiction, whether it is a single taxpayer entity or a group of such entities.

[13] Miller and Oats above at note 3 at 21

[14] M Devereux and J Vella, 'Are we heading towards a corporate tax system fit for the 21st century?'(Working paper Series 2014) Oxford University Centre for Business Taxation <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532933> (last accessed 11 June 2020)

[15] Miller and Oats above at note 3 see Juridical double Taxation as a situation whereby more than one country attempts to tax the same income. This arises specifically because of a jurisdictional conflict in the rules that are used to determine residence and or source. Sometimes this occurs because different countries use different rules for the attribution of tax residence.

[16] Article 5 and 7 OECD Model Convention (2017) 10th Version. Twin principles of 'Source and Residence' become profound because in the source country, the income is attributable to incomes within that country, and in the country of residence all residents are usually taxed on their worldwide incomes. If not properly clarified, this leads to problem in tax remittances.

[17] Article 161 Revised COMESA Treaty 2012 https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf (last accessed 10 August 2020)

[18] The Southern African Development Community (SADC) Declaration Treaty of 1992 in its Article 24 provides for relations with other state, regional and international organisations and may enter into agreement with other states whose objectives are comparative with the objectives of SADC. The East African Community Treaty Establishing the (EAC), Article 80(1) (h) for the purposes of Article 79, partner states shall take measures to avoid double taxation. Article 142 – saving clause mentions Tripartite agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. Community of Sahel Sahara (CENSAD) 1998, no provision for DTA, Arab Maghreb Union and Economic Community of Central African States, no provision on DTA.

[19] UN Report, 'Linkages between Double Taxation Treaties and Bilateral Investment Treaties,' United Nations Economic Commission for Africa Addis Ababa 2020 at 14-16 <https://www.uneca.org/sites/default/files/PublicationFiles/linkages_between_double_taxation_treaties_and_bilateral_investment_treaties_-_en_-_final_-_web.pdf>(l ast accessed 19 August 2020)

This paper is structured as follows: after the introduction, part 2 discusses Double Tax Agreements and Models; part 3 examines the reasons for DTAs; part 4 looks at the African Union, the state of DTAs flowing from the provisions of Articles in the RECs and AFCFTA; part5 considers the limitations of DTAs; part 6 makes some legal and policy recommendations and part 7 concludes the paper.

2. Double Tax Agreements (DTAs) and Models

2.1 *Double Tax Agreements (DTAs)*

Under the Vienna Convention on the Law of Treaties 1969,[20] treaties 'means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;'[21].Treaty can thus be referred to as a contract between two sovereign states. Before a treaty can enter into force, it is usually ratified by the states involved in accordance with their national laws.[22] Thus states may have signed a treaty but until it is ratified, it cannot have the force of law or binding on the country.[23] This is the case in African countries.[24]

Double Tax Agreements (DTAs) can be referred to 'as agreements, usually bilateral between two taxing states (contracting states)…..bilateral agreements under which a pair of states referred to as the contracting states will decide how their tax systems will interact so as to ensure that residents of each state get the double tax relief to which they are entitled to.'[25] These agreements also known as avoidance of double taxation agreements or tax treaties are often negotiated between the contracting states to the exclusion of investors in any of the contracting states.

The aim of DTAs is to minimize the extent to which a tax payer will be subject to double taxation. It is important for states entering into DTAs to be aware of the reasons for the agreements and how it will be beneficial for each treaty state. The economic benefits of treaties between two developing countries, though relatively small, may encourage development more generally within a region and may be a valuable tool in preventing cross-border tax avoidance and evasion. Tax treaties may also have other benefits, such as political benefits to signal to the global economy and potential investors that it is a responsible member of the international tax community that is willing and able to conform to widely-accepted tax rules and norms.[26] When states negotiate tax agreements, they

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[20]Vienna Convention on the Law of Treaties <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> (last accessed 11 August 2020)

[21] Article 2 (a) Vienna Convention Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155 at 331 while the Nigerian Treaties (Making Procedure ,ETC) Act LFN 2004 in its Section 3(3) defines Treaties or agreements 'in this Act mean instruments whereby an obligation under international law is undertaken between the Federation and any other country and includes "conventions", "Act", "general acts" "protocols", "agreements" and *"modi-vivendi",* whether they are bilateral or multi-lateral in nature.

[22] See Constitution of the Federal Republic of Nigeria 1999, as amended, section 12

[23] However, under International law, such Treaties are binding internationally even if it has not been ratified by the national laws of the country. See Article 3 of ILC <https://casebook.icrc.org/case-study/international-law-commission-articles-state-responsibility> (last accessed 11 August 2020)

[24] In Nigeria, before a treaty can be in force, it must be ratified and enacted into law by the National Assembly see Section 12(1) Constitution of the Federal Republic of Nigeria 1999(as amended). See also the Treaty Making procedure under the Nigeria's Treating (Making Procedure , ETC) Act, LFN 2004. In South Africa, treaties must also be ratified under the Constitution of the Republic of South Africa of 1996. See Sections 231(3) and/or where it is to be ratified or acceded to (section 231(2) the approval of the National Executive (President and Cabinet Ministers) is always required

[25] *A* Miller and L Oats, *'Principles of International Taxation'* (3rd ed. 2012 Bloomsbury Publishing Plc, west Sussex) at *112 -114.*

[26] Ariane Pickering, 'Why Negotiate Tax Treaties'(May 2013) Papers on Selected Topics in Negotiation of Tax Treaties for Developing Countries, paper no 1 <https://www.un.org/esa/ffd/wp-content/uploads/2013/05/20130530_Paper1N_Pickering.pdf> accessed 11 June 2020

either employ any of the three models which are the Organisation for Economic Cooperation & Development (OECD), UN and US models.

2.2 Models of Tax Agreements

a) United Nations (UN) Model

The UN Model of Tax Convention 2017[27]is a tax agreement model between developed and developing countries. The Model was developed in 1980 to favour the capital importing states. The UN Model seeks to generally favour retention of greater so called "source country" taxing rights than the rights compared to those of the "residence country" of the investor.[28] The implication of this is that persons (for example, a Nigerian Company) with a branch registered in Togo (source country) will be taxed higher on the income that accrues from businesses carried out in Togo in favour of the source country and vice versa.

Furthermore, the UN Model extends some definitions to the advantage of the source state. For example the term Permanent Establishment (PE) under the OECD model only refers to a 'fixed place of business through which the business of an enterprise is wholly or partly carried on'. This implies that the PE for tax purposes may either be a branch, office, place of management, a factory, mine, refinery[29] as the case maybe. If it is not fixed or permanent, tax cannot accrue on such company or transaction. Whereas under the UN model, in the absence of any fixed place of business, profits from services rendered in the residence of the enterprise becomes taxable.[30] Services here include consultancy services. This favours the source principle and expands taxable income.

In Nigeria, the concept of PE has been expanded by the Companies Income Tax (Significant Economic Presence) (SEP) Order 2020 by non-Nigerian companies who render services in Nigeria.[31] The Order provides guidance on the definition of SEP in relation to taxable income derived by any company other than a Nigerian company ("foreign company") in Nigeria, based on Section 13(2)(c) and (e) of CITA.[32] The implication is that companies such as Netflix, Apple, Ali Express and Amazon can be taxed in Nigeria. Furthermore, Article 3 of the SEP order promotes DTAs and its benefits between contracting states.

b) OECD Model

The OECD Model[33] has developed a series of model treaties that have led to the current set of more than 3,000 bilateral income tax treaties.[34] The Model is the most popular of the three models because of its commentaries which is usually modified from time to time. It serves as the model for tax agreements between developed nations and has wide impact on the negotiation, application, and interpretation of tax conventions. However, both developing and developed countries now adopt the model in drafting tax agreements. The OECD Model tends to emphasise residence taxation rights, favouring developed countries.

[27] United Nations Model Double Taxation Convention between Developed and Developing Countries
[28]UN Model Tax Convention 2017, Introductory part <http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf> accessed 21 May 2020
[29] See Article 5 of the OECD
[30] Article 5, UN Model.
[31] The Federal Government of Nigeria has published the Companies Income Tax (Significant Economic Presence) Order, 2020 ("the Order") in its Official Gazette No. 21, Vol 107 of 10 February 2020. Pursuant to the power of the minister in Section 13(4) of the Companies Income Tax Act, 2004 (as amended) [CITA] < https://home.kpmg/ng/en/home/insights/2020/05/minister-of-finance-issues-order-on-significant-economic-presenc.html >accessed 30 June 2020
[32] Order 1 Significant Economic Presence order, 2020, See Article 1(1) (a) (i-iii) the SEP order.
[33]OECD Model Convention 2017
[34]http://www.oecd.org/tax/treaties/tax-treaties-2017-update-to-oecd-model-tax-convention-released.htm (last accessed 17 April 2020)

c) The United States Model

One of the prominent features in the US Model is the saving clause.[35] The U.S. government taxes U.S. MNEs on a residence basis, thus U.S. resident firms incur taxation on income earned abroad as well as income earned in the United States, and they are taxed on their worldwide income. This system is sometimes referred to as a credit system.[36]

Countries of the African Union, which are developing countries, when negotiating DTAs, are expected to rely on the UN model which is well suited for developing countries[37] because the UN Model rules for allocation of taxing powers give more taxing rights to the contracting state where income is sourced, referred to capital importing nations. Unfortunately, the DTAs we have in Africa are mostly modelled after the OECD and not the UN Model and in most cases a combination of both depending on the area where treaty partners feel the provisions are more beneficial to them and domestic ideology. Secondly, these models are a guide to drafting tax treaties.

No two states have the same tax system as there are different definitions of what constitutes tax residence in their domestic laws but whatever is agreed in the treaty becomes binding once they are ratified as such, a state may not invoke a domestic law to avoid an international obligation.[38] However, treaties cannot by themselves impose tax liabilities where none exists under a States' domestic law. Tax Treaties can only limit or reduce domestic tax liabilities; in the same light, any provision in a treaty overrides a domestic tax law provision. An example of this position can be seen under Section 45(1) of Nigeria's CITA.[39] This provision is not related to the overriding provision of section 12 of the Nigerian Constitution on the ratification of treaties.

3. Reasons for DTAs

There are various reasons for entering into DTAs. They include:

a) Protection of tax payers from double taxation:

The primary purpose of DTA is to prevent double taxation and protect tax payers, to a greater extent, than that provided for under the domestic tax law. This is often reflected in the preamble of DTAs which are often couched thus '…for the avoidance of double taxation' of income or profit arising from same transaction in a cross-border transaction.'[40] Double taxation arises where same income is taxed in two countries either at the source or

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[35] *US Model Income Tax Convention,* 2006, art 1.4.

[36] R Avi-Yonah and K Clausing, 'Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt Formulary Apportionment' The Brookings Institution(2007)*The Hamilton Project,* at 6 accessed <https://www.brookings.edu/wp-content/uploads/2016/06/200706clausing_aviyonah.pdf >(last accessed 25 May 2020)

[37] United Nations Model Double Taxation Convention between Developed and Developing Countries(2017) United Nations , New York

[38] See the Vienna Convention, Art 27 and ILC's Articles on State Responsibilities, Article 3 <https://casebook.icrc.org/case-study/international-law-commission-articles-state-responsibility> (last accessed 11 August 2020)

[39] CAP C21 LFN 2004

[40] The Government of the Republic of South Africa and the Government of the Federal Republic of Nigeria, desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains,

resident country.[41] This is undesirable by companies generally as double taxation is harmful to trade in goods and services whether as a developed or developing country.[42]

To achieve the form of protection desirable under a DTA, Article 23 of the UN Model provides for the methods of elimination of double taxation which are the exemption[43] and credit methods.[44] Example of how the credit and exempt methods can be applied in double tax relief is explained in the example below.

i) Double taxation Problem

In Ghana, company income tax is 25 Per cent in Nigeria it is 30 Per cent of the total profit of a company.[45] Company 'Z' which has its residence in Nigeria and taxed on its worldwide income because of the residence rule in practice in Nigeria, also have a subsidiary or branch 'XY' Ltd in Ghana. Ghana usually charges non-resident to income tax on their income from sources within Ghanaian jurisdiction. Based on the Nigerian residency rule, subsidiary XY will be taxed on its income or profit made in Ghana, while Ghana will tax XY based on source principle. In the absence of DTA, XY Ltd will be charged a total of 55 Per cent tax by both Nigeria and Ghana for its income in a tax year. The paper indicates that this is not good for business for a region that needs to grow its GDP, drive its own development in consonance with Aspiration 1 of the African Union Agenda 2063 and a liberalised market in consonance to the AFCFTA because this is an impediment to international trade and services.

ii) Double Tax relief:

In the scenario above, the exemption or credit method of tax relief may be applied through agreements reached in the DTA[46] whereby the countries (Ghana and Nigeria) agree on how they will eliminate double taxation. Under the exemption method, the country of residence which is Nigeria will not tax the foreign income of its tax resident, as the foreign income is said to be exempt while in the credit method, the income earned from the foreign company ie Ghana is taxed in the country of residence. The foreign tax paid is then deducted from the tax on the income charged by the country of residence. This

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[41] A Miller and L Oats, *Principles of International Taxation*' (3rd ed, 2012, Bloomsbury Publishing Plc, west Sussex) at 62 states that there are two basic approaches to determining residence of companies for tax purposes; these are the legal and economic approach. Under the legal approach, tax residence is determined according to the country or place of incorporation/ registration of the enterprise as may be provided for under the company registry law/ rules. Jurisdictions such as Nigeria and Ghana adopt the legal approach. Under the economic approach, tax residence is determined by either the place of effective management or principal business location. Some jurisdictions such as the UK adopt a combination of both approaches. See also Companies and Allied Matters Act (CAMA) 1990, Section 27(1) (b) for Nigerian companies.

[42] Ariane Pickering, '*Why Negotiate Tax Treaties'* (May 2013) Papers on Selected Topics in Negotiation of Tax Treaties for Developing Countries, paper no 1 < https://www.un.org/esa/ffd/wp-content/uploads/2013/05/20130530_Paper1N_Pickering.pdf > (last accessed 11 August 2020)

[43] Article 23(a) Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall, subject to the provisions of paragraphs 2 and 3, exempt such income or capital from tax.

[44] Article 23(b) Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall allow as a deduction from the tax on the income of that resident an amount equal to the income tax paid in that other State; and as a deduction from the tax on the capital of that resident, an amount equal to the capital tax paid in that other. Such deduction in either case shall not, however, exceed that part of the income tax or capital tax, as computed before the deduction is given, which is attributable, as the case may be to the income or the capital which may be taxed in that other State.

[45] For large companies (Companies with gross turnover greater than N100m), assessed on a preceding year basis , medium companies 20%, 20% for companies with gross turnover greater than N25m and less than N100m <https://taxsummaries.pwc.com/nigeria/corporate/taxes-on-corporate-income> (last accessed 17 August 2020)

[46] Article 24, Ghana –UK Double tax agreement <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/498352/ghana-dtc_-_in_force.pdf> (last accessed 24 May 2020)

implies that the country of residence gives credit for the foreign tax.[47] It takes a good accounting method to achieve this. From the example above, where there is no DTA, XY Ltd must pay tax in both Nigeria and Ghana, this will make having an investment in Ghana or any other African country expensive and unattractive compared to only doing business in Nigeria. This is not good for international trade in the era of globalisation, E-commerce and AFCFTA. It defeats the aims and objective of the Lagos Treaty and the Africa agenda at large. In applying the UN model which expands the concept of Permanent Establishment, services such as consultancy and agency relationships also benefit from this method of tax relief.

b) **Provides a uniform basis for settlement of tax related issues**

DTAs provide a means of settling upon a uniform basis the most common problems that could arise in the field of international juridical taxation.[48] The most common problem is usually that of allocation of taxing rights (on dividends, royalty, interest etc) and determining the tie-breaker for taxation of persons operating in the contracting States. This is seen as the beginning of tax problem for companies. The OECD Model Convention 2017 and the UN Model 2017 provide in detail in their commentaries a guiding principle to implementing tax treaties of each of the Articles, which are keys to resolving tax issues thereby making them simple.[49] For example, Article 4[50] provides for 'residence'[51] known as the tie-breaker clause.

Article 4 (2) of the UN Model lays down provisions for determining the residence of the tax payer. This becomes a uniform rule which can be referred to at all times during the lifetime of the treaty by the treaty partners. Situations may arise whereby states are unable to identify who a resident is for the purposes of tax. Article 4 elucidates taxation rights between the two contracting states for purpose of clarity, avoidance of litigation and international conflicts thereby creating legal certainty to foreign investors.[52] Therefore, Article 4 of the UN Model provides for a uniform basis for settlement of tax disputes between contracting states which may not be available in a country's domestic tax law.

In the era of globalisation, persons do business in both contracting states (for instance Ghana and Nigeria) under their domestic law, and, when this is the case, Article 4 of the UN Model provides for a set of rules for deciding in which of the States, for **treaty purposes only,** the tax payer is to be considered resident. Article 4 is very useful as a result of the tie-breaker clause contained therein which aims to prevent a taxpayer from being considered resident in both of the contracting states. The tie-breakers for a company in a DTA ranges from the place of incorporation to the place of effective management[53]which is quite restrictive under a country's

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[47] A Miller and L Oats, *Principles of International Taxation*' (3rd ed, 2012, Bloomsbury Publishing Plc, west Sussex) at 79
[48] Ibid 117
[49] It defined terms such as 'resident of a contracting state under Article 4 UN Model
[50]UN Model Convention 2017
[51] Article 4(1)' Resident of a contracting State' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of incorporation, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.
[52] *A* Miller and L Oats, above at note 47 *at* 23
[53]An example is *UK-Nigeria Tax Treaty*, art. 4(1); *UK Nigeria Double Taxation Agreement* 9th June 1987, art. 25, <www.hmrc.gov.uk/international/dta-intro.htm> accessed 11 June 2020 Article 4 UK-Ghana DTA, Article 4 South Africa-Nigeria DTA

companies Act. In Nigeria, by virtue of Section 27(1)[54] tie breaker clause for a company is the registered office at the time of incorporation.[55] Ghana also adopts the registered office address.[56]

Some situations may arise where there may be no tie-breaker clause in a particular treaty. However, the treaty itself provides for a Mutual Agreement Procedure (MAP)[57] under Article 25.[58] MAP is designed to provide a procedure for resolving difficulties in the application of DTA. MAP can be employed by tax authorities to reach an agreement on the country with the taxing right of a particular company when there is no tie-breaker or where some issues are not covered in a DTA.[59] The MAP is particularly valuable to taxpayers because it provides for a mechanism which enables tax authorities of each state to communicate with each other without having to go through diplomatic channels.

It also gives tax payers opportunity to personally initiate tax related issues without the authorities getting involved; this is not available under a domestic tax law. Contracting states can resolve issues through MAP by emails, phone conversation or even meet face to face.[60] By virtue of the provision of article 4, it becomes very easy for tax authorities to determine where a company is situated for tax purposes because it clarifies residence. Suffice to state that the various tax models being examined are mere templates or guides as to how DTAs between countries should be worded. Residency rule for companies or individuals usually lies in the domestic and Company Laws of each state.

c) **Prevention of Tax Evasion and Tax Avoidance**

Tax evasion occurs where a taxpayer take steps to avoid paying taxes that has already accrued while tax avoidance refers to working within the law or exploiting the law to minimise tax liability so that less tax would be paid than otherwise be paid.[61] In order to facilitate tax planning, MNCs engage in activities such as treaty shopping to minimise tax liability[62] achievable through the use of conduit entities.[63]When this situation arises, it may lead to reduction or non-payment of tax by the said corporation.

To minimise and eliminate evasion and avoidance, tax treaties become paramount as DTAs prevent tax evasion and avoidance[64] as evident in the long title of tax agreements reading thus: "Avoidance of Double

[54]Companies and Allied Matter Act 2020 (Nigeria).

[55]This means that Nigeria adopts the source principle for Multinational companies who are usually registered in their place of origin and therefore becomes tax resident in their country of registration but once they cross border and engage in business in Nigeria, they will be taxed on the source i.e. where they make the money that becomes taxable.

[56] Ghana Companies Act, Number 33, 1963. The UK adopts the central management and control test as was decided in *Calcutta jute mills v Nicolson* (1876) 1TC ,83 and this was reiterated in *Bullock v Unit Construction Co ltd* 1959 (38)TC 712. In the US, the tie breaker is usually the place of legal incorporation. However, some companies in the US move their place of legal incorporation in order to benefit under a particular tax treaty. This poses problem with ensuring they pay their taxes. To forestall this, in some recent treaties adopted by the US, it has adopted the place where the company was created as a tie-breaker test.[56]

[57]MAP is an administrative procedure meant to help resolve difficulties arising from double taxation of taxpayers in a manner contrary to the provisions of the particular double tax treaty, and the application and interpretation of these treaties.

[58]UN Model Convention 2017, Article 25

[59] Article 25(3)

[60]OECD Commentary on article 45 paragraph 64

[61] *A* Miller and L Oats above at note 47 *at* 15

[62] Treaty shopping involves the diversion of Foreign Direct Investment (FDI) through a third country with a better tax regime to achieve reduction of withholding taxes under favourable tax treaties. When multinationals engage in treaty shopping, they may obtain benefits that a host country would otherwise not provide for them.

[63]F Weyzig, " Treaty Shopping: structural Determinants of Foreign Direct Investment routed through the Netherlands" (2013) 20/6 *International Tax and public finance* 910-947.

[64] J MaCarthy, "The Anti- Tax Avoidance Legislation and the Operations of Multinational Companies in Ghana: The Way Forward for the Multinational Companies" (2016) Tax avoidance is a legal process of minimizing the company' s tax liability and the purpose is to postpone tax payment to later date, minimise the tax liability by exploiting the tax reliefs, location advantages, exemptions, filing and paying tax at the right time to avoid payment of penalties to the tax authorities.< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783957> (last_accessed 1 June 2020)

Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains." The Agreement therefore plays a dual purpose of preventing double taxation and also preventing fiscal evasion[65] through the exchange of information procedure in DTAs. Exchange of information can allow tax administrators to learn if their residents have bank accounts or other investments abroad in the treaty partner.[66]

Suffice to state that tax avoidance is not criminal in nature as it is allowed for the purposes of tax planning by corporations while tax evasion is criminal in nature. This is because when a tax payer evades or fails to pay his tax, invariably he has broken the law and when found guilty will be prosecuted under the domestic law of the state. For corporations, when tax is evaded, the company is usually held liable and sanctions will be taken against such company. An example is the Vaswani brothers of Stallion group who evaded tax and customs levy and they were deported from Nigeria.[67] The issue of tax evasion and avoidance are great challenges to tax planning and administration world over. The major reason attributed to this is inadequate tax legislation and planning together with the problem of tax havens which DTAs seem to streamline through the exchange of information provided for in DTAs. For example under article 25 of the South Africa –Nigeria treaty and generally Article 26 of the UN and OECD models, exchange of information tends to assist states in obtaining information about a tax payer to ensure its taxing rights are preserved and to acquire information about the tax affairs of their residents. Such information so exchanged shall be treated as secret and shall not be disclosed to any person other than those concerned with the assessment. This to a very large extent has helped states in the fight against tax evasion in that it brings about transparency and to a very large extent dissuades states from investing in tax havens while encouraging assistance in collection of debts owed to a treaty partner.[68] All these may not be possible without DTAs.

Under International law, States do not enforce tax claims of other states as a result of revenue rule as was decided in *Government of India v Taylor.*[69] In this case, the Indian government tried to enforce a claim for unpaid Indian taxes against a UK company which had been trading in India but was caught by the revenue rule. The only way in which one state can assist another state to enforce its own tax claims against its own residents is to supply information to the other states thereby making enforcement of domestic tax law possible.[70] With this in place, there will be control of taxes between contracting states as no State will claim loss of fund or that the state has been cheated. Nigeria has ratified the Convention on Mutual Administrative Assistance in Tax Matters, an initiative of the OECD. The Convention is designed to facilitate exchange of information on tax matters between the tax jurisdictions of the signatory countries. Nigeria signed the Convention in 2013 and ratified it in April 2015. This will improve the administration of tax in Nigeria thereby equipping the Federal Inland Revenue Service (FIRS) to make enquiries concerning the operations of MNCs in Nigeria.[71]

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[65] *South Africa-Nigeria DTA*
[66] V Daurer and R Krever, "Choosing between the UN and OECD Tax Policy Models : An African Case Study" (2014) 22/1 *African Journal of International and Comparative Law* 1 at 2
[67] S Ugwuanyi, 'Reps order probe of Stallion group over alleged Tax Evasion', August 18, 2015, <http://dailypost.ng/2015/08/08/reps-order-probe-of-stallion-group-over-alleged-tax-evasion/ > (last accessed 15 June 2020)
[68] A Miller and L Oats *Principles of International Taxation* (3rd ed. 2012 Bloomsbury Publishing Plc, west Sussex, 2012) at 117
[69] 1995 AC 491.
[70] A Miller and L Oats *Principles of International Taxation* (3rd ed. 2012 Bloomsbury Publishing Plc, west Sussex) at 159. It may be expedient for the states to amend its domestic law to permit this gathering of information as requested by a treaty partner for example the UK found it necessary to amend its laws in this respect to enable it fulfill its obligation of exchange of information under the tax treaties.
[71] Nigeria joins the OECD convention on Mutual Administrative Assistance. 2020<https://www.oecd.org/tax/nigeria-signs-multilateral-beps-convention-and-crs-multilateral-competent-authority-agreement-to-tackle-international-tax-avoidance-and-evasion.htm> (last accessed 20 June 2020) This is bringing FIRS to international standard and best practices and this will enhance transparency in tax administration in Nigeria. Nigeria signed the Convention in 2013 and ratified it in April 2015.

d) **Fosters Economic growth and Mutual relation**

The UN model convention aid developing States by allowing them tax a larger part of the overseas investor's income.[72] This helps generate income for the developing state. Tax treaties establish the minimum level of economic activity that a resident of one contracting State must engage in within the other State before the latter state may tax the resulting business profits, see Article 7 UN Model. The tax treaty lays out ground rules providing that one State or the other, not both, will have primary taxing jurisdiction over income derived from the branch operations in one contracting state by a corporation that is resident in the other contracting state.[73]

Tax treaties generally widens the opportunities available to investors doing business in one contracting state and can engage in trading activity in the other contracting state without attracting tax liability in that latter state. The essence of this is to make a contracting state viable for investment. The paper identifies that DTA among the AU will facilitate the mutual relation and economic growth of the AFCFTA.

e) **Prevents Impediment to International Trade**

Double taxation hinders flow of international trade. Hence, DTAs prevent tax from causing impediments to international trade and investment by reducing the threat of double taxation that can occur when States impose tax on the same income.[74]Contracting States to the DTA establish economic cooperation by opening the gate for companies from their country to come to the other contracting State because of its confidence and certainty in the tax system of that country. This is vital for the advancement of the African region especially with the huge market expected from trading under the AFCFTA.

As far back as 1985, the European Union (EU) having identified that tax may be a hindrance to the free flow of international trade, sought to abolish tax related barriers to free trade within the union and this was effected under the Treaty on the Functioning of the European Union (TFEU) which laid down the fundamental freedoms to which residents of EU member states are entitled to with respect to commercial matters and this includes taxation.[75] The African Union does not expressly provide for double taxation.

The TEFU is akin to the AU treaty which gives the various RECs rights to tax international trade while providing that obstacles to trade among member states shall be removed.[76] The underlying principle of TEFU is that business should not suffer any discrimination in tax matters as a result of their operation within the EU. It therefore behoves on member states to fashion out ways of implementing trade liberalisation, and this can be achieved through DTA. Despite the benefits associated with DTA, and the AFCFTA, African countries are lagging behind on intra-African DTA, thus there is a need to enhance DTAs in Africa.

4. Taxation in the African Union (AU) and the AfCFTA

The African Union was established on July 8, 2001, it was preceded by the Organisation of African Unity (OAU) which was established on 25th May, 1963 with the objective of providing economic development through economic cooperation in Africa.[77] The challenges in meeting its objective, led to the adoption of the Lagos Plan

[72]A Miller and Oats "*Principles of International Taxation"* above at note 70 at 130
[73] Committee of Experts on International Cooperation in Tax Matters, Report on the seventeenth session (16–19 October 2018) Economic and Social Council Official Records, 2019 Supplement No. 25, 14, <https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-03/N1841485.pdf> accessed 20 July 2020
[74]*ibid*
[75]A Miller and Oats, *"Principles of International Taxation*" above at note 70 at 524 They are: *TFEU 2008,* art. 49(39), 49(43), 56(49) and 63(56).
[76] Article 40 of the ECOWAS and 161 COMESA Treaties
[77] Article 4 AU Treaty

of Action in 1980 by the OAU. This plan resulted in establishing the African Economic Community treaty (AEC) in 1991. The AEC treaty gave room for agreements for the establishment of Regional Economic Communities (RECs) which were seen to be crucial in positioning Africa in the global economy.[78] Currently, there are eight (8) RECs recognised in Africa. [79]

Top priority of the Abuja Treaty of 1991 is free movement of persons. To give support to free movement of persons in the common market, the 1991 Abuja Treaty which established the AEC urged African countries to adopt employment policies that will foster free movement of persons and exchange of available skilled manpower as this would promote regional cooperation and integration on the continent.[80] RECs began to include these in their agreements. Subsequently in January 2018, the Protocol on Free Movement of Persons, Right of Residence and Right of Establishment[81] was adopted by the African Union Assembly. 'The initiative promotes the free movement of persons across Africa through right of entry, right of residence and right of establishment, including the right to establish a business' but does not give right of citizenship.[82] However, only 22 countries have signed the Protocol and four (4) have ratified it. It complements and supports the AfCFTA's call to members to negotiate mutual recognition agreements and promote freedom of movement of labour and capital as essential steps towards an African single market. To foster growth in Africa in line with the AU Treaty and the Africa Union Agenda 2063[83] with the aim of establishing a continental market with the free movement of persons, capital, goods and services, and the African single market, today, the leaders of Africa have committed to the establishment of the African Continental Free Trade Area (AfCFTA)[84]. It is expected that the AfCFTA will bring together fifty-five African countries with a combined population of more than one billion people and a combined gross domestic product of more than US $3.4 trillion.

The general objective of the Agreement on AfCFTA is to 'create a single Market for Goods, Services, and Movement of Persons in order to deepen the economic integration of the African Continent and in accordance with the Pan African Vision of "An integrated, prosperous and peaceful Africa" enshrined in Africa Agenda 2063.' [85] This vision is also in line with the objectives and vision of the ECOWAS and other RECs to establish a single market, encourage economic integration in Africa; seek to promote intra-trade among African nations and removal of non-tariff barriers.[86] The Agreement was adopted in 2018; came into force in May 30 2019 after meeting the requisite number of signatories to it. So far, 34 countries have ratified the agreement while 54 countries have

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[78] I Salami, "Legal and Institutional Challenges of Economic Integration in Africa" 2011 17/5 *European Law Journal* 667-682 at 668

[79] Economic Community of West African States (ECOWAS), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD)the Economic Community of Central Africa States (ECCAS) for Central Africa, East African Community (EAC), South African Development Community(SADC) as well as the Arab Maghreb Union (AMU) Intergovernmental Authority on Development (IGAD)with the aim of strengthening regional ties that will translate to economic growth within the region through the establishment of common market, customs union, movement of persons, goods and services within the common market area.

[80] Iwa Salami above at note 78 at 668

[81] Chapter VI, Article 43 AU Treaty

[82] Vinaye Ancharaz, 'Making The African Continental Free Trade Area (AFCFTA) Work, Module 1: Regional Integration In Africa: Overview' 2020, United Nations African Institute For Economic Development And Planning at 16

[83] Agenda 2063: The Africa We Want. is Africa's blueprint and master plan for transforming Africa into the global powerhouse of the future. It is the continent's strategic framework that aims to deliver on its goal for inclusive and sustainable development and is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress and collective prosperity pursued under Pan-Africanism and African Renaissance The genesis of Agenda 2063 was the realisation by African leaders that there was a need to refocus and reprioritise Africa's agenda from the struggle against apartheid and the attainment of political independence for the continent which had been the focus of The Organisation of African Unity (OAU), the precursor of the African Union; and instead to prioritise inclusive social and economic development, continental and regional integration, democratic governance and peace and security amongst other issues aimed at repositioning Africa to becoming a dominant player in the global arena< https://au.int/en/agenda2063/overview> (last accessed 24 February 2020)

[84] The 18th Session of the Assembly of Heads of state and Government of the African Union , held in Addis Ababa, Ethiopia in January 2012, adopted a decision to establish an African wide continental Free Trade Area by an indicative date of 2017. The AFCFTA with 54 member countries as signatories becomes the world's largest free trade Area after the World Trade Organisation.

[85] Article 3 and 4 of the AFCFTA 2019

[86] Article 4 AfCFTA

signed the Agreement.[87] Nigeria has signed the agreement and on 1st December, 2020, submitted its instrument of ratification making her the 34th country to ratify the Agreement. Trading on the AfCFTA was supposed to have commenced on 1st July 2020, but this has been hampered by COVID-19, thus leading to the postponement of trading on phase one of the negotiation (trade in goods and services and dispute settlement) to 2021.

The implication is that the African economy is open to trade, a single market is created, trade and non-trade barriers are removed, persons living and working in the various countries of Africa will be faced with taxation and double taxation becomes inevitable if adequate DTAs are not in place to protect their income and profits. Although the AU Treaty did not expressly mention the use of DTAs to reconcile tax issues, with the power granted RECs by the Union, AU recognises the adoption of tax treaties by the various RECs as a way to eliminating juridical double taxation.

Having identified the bases for DTAs in Africa as evidenced in the RECs, in the ECOWAS for example, there is not a single DTA between member states. For example Ghana has about eleven tax (11) treaties[88] while Nigeria has about thirteen (13) DTAs but none with an ECOWAS state;[89] both countries only have with Mauritius and South Africa respectively. In the Common Market for the Eastern and Southern Africa (COMESA) region, Article 161 provides that 'The Member States undertake to conclude between themselves agreements on the avoidance of double taxation'[90].

Kenya has DTA in force with African countries of South Africa and Zambia respectively[91]. Egypt has double tax agreement with African country of Ethiopia, Libya, Mauritius, Morocco, South Africa, Tunisia and Sudan.[92]In the, AU South Africa is the best performer in intra-Africa DTA, with about 28 DTAs spread and majorly with the Southern African and Central African countries.[93]

According to the research carried out by PWC between 2013- 2017, cited by the UN report on tax linkages in Africa, the continent accounts for more than 450 active DTAs, 59 are intra-African while 391 are with other jurisdictions. Egypt, Mauritius, Morocco, South Africa and Tunisia have been most active in concluding DTA on the continent. [94] From the above, very few DTAs exist among African nations and are not enough. It appears Member nations are not taking international taxation seriously or have not seen the need to strengthen international taxation as a result of lack of intra-African trade and reliance on imports from other parts of the world. With the coming into effect of the AFCFTA, there is a need to be pragmatic about DTA. The African Tax Administration Forum[95] comprising of 30 member nations can actually make this a priority in line with its vision on taxation in Africa.

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[87] Status of AfCFTA Ratification <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html >(last accessed 8 December, 2020). See also https://youtu.be/pAFCZhqCcWQ accessed 8 December, 2020.

[88]<https://www.ghanabusinessnews.com/2017/06/05/ghana-has-double-taxation-agreements-with-11-countries-by-end-of-april-2017/ >(last accessed 16 June 2020)

[89] See Tax Treaties available at <https://www.firs.gov.ng/TaxResources/TaxTreatiesNew> (last accessed 20 August, 2020)

[90] Article 161 Revised COMESA Treaty 2012

[91]Kenya Individual - Foreign tax relief and tax treaties <https://taxsummaries.pwc.com/kenya/individual/foreign-tax-relief-and-tax-treaties> accessed 5 August 2020

[92]Arab Republic of Egypt Status of List of Reservations and Notifications at the Time of Signature <http://www.oecd.org/tax/treaties/beps-mli-position-egypt.pdf> (last accessed 5 August 2020)

[93] South Africa Cameroon Double Tax Agreement, entered into force 13 July 2017 <https://www.gov.za/sites/default/files/gcis_document/201709/41082gon936.pdf> accessed 3 August 2020 other African countries with DTA with South Africa are South Africa –Lesotho entry into force July 2016, Zimbabwe -South Africa-ratified in 2016, South Africa –Mauritius entered into Force May 28 2015, South Africa-Botswana 2004, South Africa- Ghana, South –Africa Ethiopia, Rwanda, Seychelles, Malawi, Egypt, Congo, Zambia <https://www.lowtax.net/information/south-africa/south-africa-table-of-double-tax-treaties.html >accessed 3 August 2020

[94] UN Report , 'Linkages between Double Taxation Treaties and Bilateral Investment Treaties,' United Nations Economic Commission for Africa Addis Ababa 2020. Pg 14-16 <https://www.uneca.org/sites/default/files/PublicationFiles/linkages_between_double_taxation_treaties_and_bilateral_investment_treaties_-_en_-_final_-_web.pdf>(last accessed 19 August 2020)

[95] Africa Tax Administration Forum <https://www.ataftax.org/overview> accessed 4 August 2020

Suffice to state that member states find it more convenient to relate with countries from other regions in the areas of DTAs and exchange of information than between themselves. This could be related to the low level of intra-African trade 'as research shows that intra-Africa trade is the lowest of all major regions, at approximately 15 Per cent'[96]. Intra-African trade accounted for only 15 Per cent of Africa's total exports and imports over 2010– 17 while 68 Per cent were intra-ECOWAS imports,[97] but the general trade outlook is poor as the continent traded more with the outside world than internally, with the European Union taking the largest share of Africa's exports an average of more than 30 Per cent[98]followed by China. This low performance is occasioned by lack of ease of doing business and other trade related barrier such as taxation. The paper posits that the AfCFTA complements DTAs in Africa, regional agreements promotes DTAs as a combined reading of the various provisions in the RECs mentioned above specifically East African Community (EAC) COMESA and ECOWAS and Article 3(b) of the AfCFTA which provides for the that creation of a' liberalized market for goods and services through successive rounds of negotiations' seem to support negotiations such as DTAs to ensure trade liberalisation.

For countries that have ratified the AFCFTA, ratification does not preclude the country from negotiating DTAs as it does not amount to a duplication of roles. The provisions of the AfCFTA cannot take the place of tax treaties, as tax treaties are between the treaty partners. Although the AfCFTA remove barriers to international trade, this deals more with the importation of goods, trade in goods and services and the tariffs involved but do not cure the issue of double taxation that may arise as a result of income and profits that accrue to persons engaged in international trade in different countries in the AU.

5. Limitation of DTAS

There are some limitations of DTAs such as the risk of double non-taxation and treaty shopping among others. The treaty may preclude source taxation of certain capital gains. If the other country does not impose capital gains tax, the result will be that the capital gain is not taxed in either state.[99] On treaty shopping, residents of a third country may be able to access benefits intended for the residence of a treaty partner. This may reduce the tax that accrues from the source country.[100] Poorly designed DTAs may give away taxing rights of a treaty partner which may have a significant adverse impact on revenue collection. In such situation, treaties are often renegotiated; Rwanda and South Africa in a bid to reclaim some of their taxing rights recently renegotiated their DTAs with Mauritius[101].

6. Legal and Policy Recommendations

Looking at the Nigerian situation, on 1st February, 2017, the Federal Executive Council approved a Revised National Tax Policy (NTP).[102] Clause 2.2.7 of the NTP provides thus:

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[96] Vinaye Ancharaz, 'Making The African Continental Free Trade Area (AFCFTA) Work' United Nations African Institute For Economic Development And Planning , 2020

[97] UNECA Report, Ariax IX, Assessing Regional Integration In Africa | Aria IX Next Steps For The African Continental Free Trade Area, 8 https://www.uneca.org/publications/assessing-regional-integration-africa-aria-ix accessed 13 June 2020

[98] Ibid

[99] Ariane Pickering, ' Why Negotiate Tax Treaties' Papers on Selected Topics in Negotiation of Tax Treaties https://www.un.org/esa/ffd/wp-content/uploads/2013/05/20130530_Paper1N_Pickering.pdf (last accessed 11 August 2020)
for Developing Countries, paper No1, (2013), 22.

[100] *ibid*

[101] UN Report , 'Linkages between Double Taxation Treaties and Bilateral Investment Treaties,' United Nations Economic Commission for Africa Addis Ababa 2020. Pg 14-16 <https://www.uneca.org/sites/default/files/PublicationFiles/linkages_between_double_taxation_treaties_and_bilateral_investment_treaties_-_en_-_final_-_web.pdf>(last accessed 19 August 2020)

[102] National Tax Policy, 2017 available at <https://pwcnigeria.typepad.com/files/fec-approved-ntp---feb-1-2017.pdf> accessed 20 August, 2020.

A wide network of international and regional treaties would be beneficial to the economy. In this regard, Nigeria shall continue to expand its treaty network in the best interest of the Nigerian State.Generally, treaties should prevent double taxation without creating opportunities for non-taxation.

Existing treaties should be reviewed regularly and where necessary renegotiated in line with international best practices. New treaties should consider benefits to Nigeria both in the short, medium but more importantly long term.

Nigeria's model double tax treaty should be regularly reviewed to adequately cater for the best interest of the country. Appropriate measures shall be taken to ensure that all treaties duly signed and ratified are implemented.

The main thrust of the NTP is a gradual shift from direct to indirect taxation. However, with the dwindling oil revenue, compounded by the effect of the COVID-19 pandemic, the task now facing government is herculean.

With Nigeria signing the AfCFTA Agreement and the activities of Nigerians in diaspora, we believe that Nigeria needs to immediately review all existing DTAs. Nigeria has entered into DTAs with the following countries: Canada, Pakistan, Belgium, France, Romania, Netherlands, United Kingdom, China, South Africa, Philippines, Czech, Slovakia and Singapore.[103] They are all modelled after the OECD Model and limited. Unfortunately, the OECD Model like the UN Model has no provision on duration but termination.[104] They can be terminated by giving six months' notice at the end of any calendar year.[105] We urge the government to review these treaties and adopt the UN Model. Similarly given the volume of international trade with other countries, thirteen DTAs are insufficient. Nigeria is an import dependent country. Furthermore with the aims and objectives of the AfCFTA, we will have a wider market for trade in goods and services. We urge more DTAs to be entered into to mitigate the incidence of double taxation risks.

It is further recommended that Africa should enhance intra-African DTAs to effectively harness the AFCFTA. This may be done in consultation with businesses operating or intending to operate in the country. On the basis of the consultations the tax administration should decide on the type of provisions that it aims to include in a treaty and may decide on which of the tax models to rely on during negotiation.[106]

Africa is an emerging market economy and there exists lot of opportunities on the continent, hence Africans should tap into it by strengthening economic ties among member nations. Considering that tax system and DTAs play a vital role in the economic growth and investment policies of a country, which is highly encouraged by the provisions of the various RECs such as ECOWAS, EAC and COMESA, member states are encouraged to strengthen economy ties that will bring the desired economic growth in the AU through the enhancement of DTAs in the Union as this will boost intra-African trade and realisation of the full potential of the AFCFTA when trading on it commences in the coming years.

7. Conclusion

[103] See Tax Treaties available at <https://www.firs.gov.ng/TaxResources/TaxTreatiesNew> accessed 20 August 2020

[104] See Art 32 of the OECD Model

[105] See Art 30 of the Nigeria-Netherlands DTA of 11th December, 1991

[106] M Lang and J Owens, "The Role of Tax Treaties in Facilitating Development and Protecting the Tax Base" WU International Taxation Research Paper Series, (No 2014 03) 8 https://epub.wu.ac.at/4094/1/SSRN-id2398438.pdf (last accessed 15 June 2020)

One of the reasons we have few DTAs in Africa can be associated with a lack of business among member nations on international scale rather we have more of informal businesses operating within the region. The AFCFTA has come to expand intra-African trade through the protocols on trade in goods and services and dispute resolution. It is not clear why African countries adopted the OECD Model as against the UN Model that is pro developing countries. The paper identified and discussed the importance of tax and DTAs which are beneficial to the development and growth of the economies of AU members. They include prevention of fiscal evasion and avoidance, prevention of double taxation, means of settlement of tax disputes, promotion of cross-border activities by removing tax obstacles to trade amongst others. It also highlighted the drawbacks.

It is pertinent to note that moneys raised from tax can be used for infrastructural development, financing social investment and funding of budget of a country, hence the need to ensure that avenues, through which money can be sourced, should not be neglected. Countries such as the US, the UK and a number of OECD countries rely heavily on tax remittances to run their governments, run public transport and provide social security for their citizens, thus they ensure that they have DTAs between them and the countries that their citizens live, work and do businesses with including the developing countries of Africa.[107]

The paper finds that while member states of the AU have tax agreements with countries in Asia and Europe as a result of trade among them, however, intra African DTAs are few and may not be adequate to accommodate financial flows that comes from taxation in the Union. The paper raised genuine concerns about the anomaly and posits that this is not good for economic integration which is one of the aims and objectives of the AU and the AFCFTA. Regional blocs do not preclude countries from entering into DTAs as can be evidenced from countries of Europe rather they promote tax agreements. Furthermore, the paper finds that in the era of globalisation, the domestic tax law of a country can no longer accommodate taxation of persons engaged in cross-border trade in goods and services and that if not put in check, this may lead to tax base erosion and loss of revenue to countries. The paper also finds that the spirit behind economic partnership such as the AfCFTA is to enhance international trade, remove any obstacle to international trade and trade liberalisation while DTAs ensure certainty in tax systems. Therefore an efficient tax regime is needed.

[107]See UK Tax treaties and about 3,000 tax treaties entered into by OECD states.