To the Platform for Collaboration on Tax **24 September 2020**
Via email: taxcollaborationplatform@worldbank.org

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Statement of the Global Tax Advisers Platform on the Platform for Collaboration on Tax Draft Toolkit for Negotiation of Tax Treaties

The Global Tax Advisers Platform (GTAP)[1] welcomes the draft Toolkit for tax treaty negotiations between developed and developing countries. This practical guide will assist governments and other stakeholders in developing countries by supplementing with practical insights the existing tools such as the UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries (the "UN Manual").

[1]The founding members of GTAP are:

- CFE Tax Advisers Europe (Confédération Fiscale Européenne),
- Asia-Oceania Tax Consultants' Association (AOTCA), and
- West African Union of Tax Institutes (WAUTI).

Observers to GTAP are:

- International Association of Financial Executives Institutes (IAFEI),
- Society of Trust and Estate Practitioners (STEP),
- Arc Méditerranéen des Auditeurs (AMA), and
- Centro di Diritto Penale Tributario (CDPT)

GTAP is an international platform, representing more than 700,000 tax advisers in Europe, Asia and Africa, that seeks to bring together national and international organizations of tax professionals from all around the world. The principal aim of GTAP is to promote taxpayer and tax advisers' interests by ensuring the fair and efficient operation of the global tax framework, including recognition of the rights and interests of taxpayers, and the role of tax professionals.

For further information regarding this statement, please contact Piergiorgio Valente, President of CFE Tax Advisers Europe and Chairman of GTAP or Aleksandar Ivanovski, Secretary - General at gtap@taxadviserseurope.org
For further information regarding GTAP, please visit our web page: http://www.taxadviserseurope.org/about-us_gtap/.
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The members of the Global Tax Advisers Platform see significant benefits for countries from entering into a double taxation treaty that could advance their economic interests, such as:

- Creating tax certainty that could incentivise stronger economic ties between countries;
- Incentivising cross-border trade through reduction of double taxation;
- Creating a legal mechanism for tax dispute resolution;
- Relieving of double taxation;
- Creating mechanisms to prevent discrimination against taxpayers;
- Fostering internal economic growth within a developing country brought by more efficient and beneficial international relations in context of the benefits of the toolbox.

Historically, double taxation treaties have accorded a more significant portion of taxation rights to so-called "residence" jurisdictions and have restricted those applicable to "source" jurisdictions, the majority of developing countries. That is now perceived by developing countries as a restriction of their ability to tax a "fair share" of the profits created within their jurisdictions.

A consequence of this perceived imbalance in the structure of double tax treaties is that developing countries have long been in a position of ceding taxation rights with respect to economic income created at "source" within their jurisdiction. As a tool which enables any imbalance between developed and developing countries inherent in their tax treaties to be addressed, the Global Tax Advisers Platform members are strongly supportive of its introduction and use.

We also support the related policies set out by the Platform for Collaboration on Tax in their efforts to provide for practical guidelines that will build and strengthen existing capacity in developing countries. Balancing taxation rights inherent in a double tax treaty also requires a careful balance of the mix of taxes framed within tax policy. Careful choice from a corporate tax and/or a personal income tax perspective can provide or contribute to the equilibrium necessary to create a positive economic climate within the jurisdiction. Applying the principles of fairness and equitability will no doubt result in development of more stable and sustainable taxation systems, managed in an efficient and transparent manner.

As a corollary, we wholly agree that collaborative work on transparency is indispensable in providing countries with the necessary tools and information to combat and prevent tax evasion and BEPS practices. We recognise that the work of the Global Forum on Tax Transparency has been at the forefront of international efforts in addressing shortcomings of the present framework for international cooperation among jurisdictions. As a result of these efforts, the peer-review process, and obtaining access to relevant data from other tax jurisdictions, administrations in developing countries are increasingly able to identify and assess tax on income created within their jurisdiction.

The Global Tax Advisers Platform (GTAP) is a strong and determined advocate for the need for all stakeholders to commit to multilateral knowledge sharing and training. In a digital world communication is instant and global, and the practices, experiences and expertise of tax professionals and administrators have a ready, worldwide audience. Sharing such knowledge between professionals is a significant facilitator in the creation of a sustainable environment in which actual and perceived legacy imbalances in capacity between developing and developed countries will be reduced and eventually removed as we evolve an efficient global tax system fit for the 21 Century.

We, as an international non-profit platform of tax professionals, stand ready to support and advance these efforts, by offering a forum for sharing and exchange experience by tax professionals across the globe. As a result of the joint efforts of the founding bodies and observers of the GTAP, an inaugural global tax conference, entitled "Tax and the Future", was held in Torino, Italy in October 2019 on the occasion of the 60th Anniversary of CFE. This event was held under the patronage of the European Parliament, acknowledging the role of CFE in sharing the values of the EU, and in the presence of the Director of the OECD Centre for Tax Policy and Administration, and the European Commission.

As tax professionals, we will continue to seek to achieve these goals by advancing the principles set out in in the "*Torino-Busan Declaration*", which brings stakeholders' attention to the relevance of sustainability, capacity building and the need to achieve streamlined tax system operations, both internationally and nationally, in order to guarantee equitable and fair taxation for the benefit of citizens, governments and taxpayers. This Declaration, signed by all our members and observers is a key document which relates closely to the policy goals and aspirations underpinning the establishment of the Platform for Collaboration on Tax.

The constituent member organisations and observers of GTAP stand ready to support these efforts in practice and welcome a closer cooperation. We will continue to aspire to contribute to an international taxation framework that, from our perspective, should be based on four key-pillars: taxation policy as a key instrument for growth, sustainability of tax policies in context of climate policy, fair taxation in context of the digitalisation of the economy; and focus on improvement of taxpayers rights in certainty in a fast-paced world.

On behalf of the Global Tax Advisers Platform,

Chairman | **Secretary - General**

Professor Piergiorgio Valente | **Aleksandar Ivanovski. *LL.M***

Appendix I: Further technical issues related to the Draft Toolkit.
Appendix II: Specific Comments from the West-African Union of Tax Institutes (WAUTI)

Appendix I: **Technical Issues Related to the Draft Toolkit**

1. ***Interpretation of tax treaties***

GTAP members stand ready to provide their expertise in the context of interpretation of tax treaties. Following the phase of negotiation and ratification/implementation of a tax treaty, significant technical issues arise due to interpretation of tax treaties. The interpretation of double tax treaties, which are instruments of both international and domestic law (dual nature of the tax treaties), is governed by the Vienna Convention of the Law of Treaties.

Following the entry into force of the MLI, as a result of BEPS Action 15, the operation of tax treaties has become streamlined, but the interpretation and need of capacity and well qualified experts has become even more pressing. Gaining understanding of the common rules of interpretation of tax treaties could help developing countries to bring certainty and will serve as a major aid in future treaty negotiations. Finally, when dealing with EU member states, negotiations need to be trained on the specificities of the interaction between EU law and double tax treaties (cf. Case C-307/97 *Saint-Gobain*).

2. **Tax sparing in treaties with developing countries**

Double tax treaties which are based on the UN Model Tax Convention often contain so-called "tax sparing" clauses, whereby the "residence" state would give credit to the resident taxpayer related to economic activity in a developing country, even though tax has not been paid in reality in the developing country. GTAP members encourage further knowledge sharing and awareness raising among treaty negotiators to explore such policy options in negotiations, which will encourage and strengthen economic trade whilst preserving the value of any economic incentives offered in the source country.

3. **Domestic revenue mobilisation, tax morale and tax treaties**

GTAP members have repeatedly raised the importance of tax morale as key concept which will improve domestic revenue mobilisation and strengthen the relationship of trust between the taxpayers and governments, as well as empowerment of the taxpayer's position. By increasing tax morale and therefore domestic revenue mobilisation, GTAP members believe that countries will be further able to increase the pool of experienced tax professionals both in the private sector and the public institutions. As a result, the trust in the governments will be strengthened and an atmosphere of positive returns from the system back to citizens will be produce, with willingness of individuals to voluntarily contribute to the "social contract" by paying more taxes. Strong capacity in the public service are also a means to demonstrate how well governments turn tax revenues into beneficial expenditures, so these can produce a double dividend comprising both the intrinsic benefit of the service provided and the spill over benefits from public satisfaction generated by its provision.

Appendix II: Specific comments from the West African Union of Tax Institutes (WAUTI)

In Africa, developing countries rely heavily on their tax revenues in setting their annual budgets. However, the most ambitious budget forecasts during their execution may come up against the great capacity of multinational companies to optimise their taxes by resorting to complex strategies, but primarily based on the existence of international tax treaties.

International tax treaties are bilateral or multilateral agreements binding countries which seek to avoid double taxation of taxpayers who are nationals of countries signatory to these conventions. They are also used as instruments preventing fraud and tax evasion. Government authorities play a leading role in the negotiation. But in the international context, the power games between developing and developed countries are not balanced, and this situation often benefits the economically stronger countries (investors) to the detriment of the poorer (holders of resources).) and developing countries.

The tax authorities have a role to play in the interpretation of these conventions for their proper application and thus to curb the potential misuse of these treaties by investors.

1. The role of government and tax authorities

Governments of developing countries should adopt the models provided by United Nations or the OECD during negotiations of their tax treaties to ensure proper application of the rules derived from those Conventions practices. But the reference to these models may not be enough, because the developing country Parties should ensure that the resources and policies necessary for the achievement of development objectives, including ODDs are in place and operational at the domestic level.

When these policies are well defined and supported, their application should be easy for the tax administrations who will vigorously enforce and foresight international rules in line with local regulations against unfair practices in the use of certain tax treaties.

2. Prevention of abusive practices

Tax administrations in developing countries are confronted with abusive use of tax treaties for the avoidance of double taxation especially in the area of investment for the exploitation of natural resources. Thus, in Senegal, there is an example of the case of the Senegal - Mauritius convention.

This Treaty was signed in Dakar on April 17, 2002, and was ratified by the President of the Republic of Senegal by virtue of Law No. 2004-04 of February 6, 2004 authorizing the President of the Republic to ratify the Treaty.

In Mauritius, the Treaty is introduced into the tax system in accordance with Article 76A (ITA 1995 consolidated with 2018) which provides that for arrangements to assist in the collection of foreign tax, "the Minister may enter into arrangements with the government of a foreign country for the purpose of providing assistance in the collection and recovery of foreign tax ".

The treaty entered into force on January 1, 2005 after the completion of the necessary notification formalities in each State, in particular on the date of receipt of the last of these notifications in accordance with Article 28 of the treaty. However, on 30 June 2019, the Ministry of Foreign Affairs was instructed to initiate the unilateral termination process of the Treaty on the date of June 15, 2019 for effectiveness of the so-called termination on 1 July 2019.

According to the reason put forward by the country's high authorities, in the 17 years of the Treaty's existence, Senegal has lost nearly 150 billion francs in tax revenue because of this Treaty, which has been more beneficial for Mauritius. The President of the Republic, anxious to protect the interests of Senegal on the verge of oil and gas exploitation in 2021, could have lost several hundred billion dollars like those recorded over the past 17 years if nothing had been done .

Mainly, this denunciation is made through the diplomatic channel and with the consequence, the termination of the treaty in Senegal, on January 1, from the date immediately following the notification of its denunciation, that is to say on January 1, 2020.

Unfortunately since this announcement, the Senegalese government has not made available any documents indicating how the termination process is unfolding and materialising the effectiveness of this denunciation.

This is why it is necessary to incorporate into international conventions the practical modalities of denunciation in order to leave no doubt about the decision of the States Parties and consequently to inconvenient taxpayers who have set up their economic models on the conventions in question.

Part A Background Notes

Generally, treaties address issues of avoidance of double taxation, concept of permanent establishment and residency (as required to encourage foreign direct investment amongst others), exchange of information amongst contracting states to reduce the incidence of global tax evasion.
The Toolkit represents a joint effort to provide capacity-building support to developing countries on tax treaty negotiation, building on previous contributions and reducing duplication and inconsistencies.

We note that the Toolkit has excellently built on the UN Manual, particularly on its Section 11 by providing tax Administrators with the tools they need in tax treaty negotiation, in all its phases namely (preparation, conduct and follow-up), complementing it with a set of tools and resources. The Toolkit, a joint initiative of the IMF, OECD, UN and World Bank is a great effort designed to help developing countries build capacity in tax treaty negotiations. The Toolkit describes the steps involved in tax treaty negotiations such as how to decide whether a comprehensive tax treaty is necessary.

Merits of DTC include:

(i) prevention of fiscal evasion by residents of the contracting states especially in respect of income derived from cross border transactions involving the two countries.

(ii) Creation of a more conducive atmosphere for bilateral trade and investment between the contracting states.

(iii) Increased flow of goods and passengers including skilled personnel resulting from the exemption from tax of the profits of enterprises engaged in international shipping and air transportation between the contracting states;

(iv) Increased co-operation between the tax administration of the contracting states through the exchange of information and skills;

(v) Easier resolution of disputes between the tax administrations of the contracting states;

(vi) Prevention of discriminatory tax practices on enterprises of one contracting state operating in the other state;

(vii) Allowing for planning and easier decision making as to which country to invest in or in what proportion; and

(viii) Creation of a stable tax regime that inspires confidence in investors.

(ix) DTTs can address cross-border transactions between associated enterprises (article 9 of the OECD Model Tax Convention on Income and on Capital (OECD Model)

Part B Nigeria and Her Treaty Partners (ADTA) (The Nigerian Model)

Nigeria is one of the developing countries that have entered into bilateral double taxation treaties with some countries to avoid taxing non-residents twice; once where the income is earned and again in the country of residence. The scope of the double taxation treaty between two countries is to promote and strengthen economic, technical and industrial cooperation of these two countries on a mutual benefit basis.

Apart from the OECD and the UN models that are used in negotiating bilateral tax treaties, Nigeria has adopted its own model which serves as the basis for negotiating bilateral tax treaties with other countries. Nigeria's model reflects the text of the OECD Model in as much as she has the OECD members as her trading partners. The Nigeria model, in 7 chapters and 31 Articles takes care of the peculiarities in her tax laws. Nigeria has limited numbers of treaties signed with fourteen few countries across the globe even though approximately 3,000 DTAs are in force. While this is a large number, it is only a fraction of the number of potential bilateral relationships (IMF, 2014, p.25). Depending on how "developing country" is defined, between 1,000 and 2,000 of these agreements involve at least one developing country (Hearson, 2016a, p.10).

Process of Tax Treaties in Nigeria

The Federal Inland Revenue Service (FIRS) under the auspices of the Federal Ministry of Finance is the competent authority with responsibility for tax treaty processes in Nigeria. A completely fledged Department of Tax Policy is in charge of Treaty issues. Nigeria prefers the term "Avoidance of Double Taxation Agreement (ADTA). Nigeria signed her first Treaty with the United Kingdom on 9th June 1987 while the Treaty entered into force on 1st January 1988.

In order to enjoy the benefits of a tax treaty with Nigeria, a taxpayer must be a resident of Nigeria or the treaty partner or both countries. The FIRS Information Circular published on 4th December 2019, lists the following criteria:

1. The taxpayer must be liable to tax in the treaty country of which he is a resident
2. the income in question is not exempted from tax in Nigeria
3. the tax for which that individual is seeking benefit is covered by the treaty
4. the benefit is not specifically excluded under the treaty; and
5. the benefit is claimed within the time stipulated by the treaty or domestic laws. The stipulated time is 2 years after the end of the year of assessment in which the foreign tax was paid.

Peculiarities in the Nigerian Model

Article 8 Shipping and Air Transportation

Like any other, this Article provides the rules for taxation of incomes from shipping and air transport operations between treaty countries. It also deals with the principle of reciprocity, a major feature of Nigerian Model. The incomes from the operation of ships and airlines in international traffic are to be exempted on reciprocal basis. The reciprocity may arise from three instances (a) where reciprocity exists, (b) where reciprocity is deemed and (c) where no reciprocity exists.

Article 11 Interests

Interests arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. The term ‘interest’ is defined as ‘income from debts claims of every kind, whether or not secured by mortgage.’’ Currently, the treaty rate applied to interest is 7.5%., previously 12.5%. The interest on loans paid by a Government is free from tax. The Agreement also provides that the recipient of the interest must be the beneficial owner of the interest, to enjoy the treaty benefits.

Article 14 Independent Personal Services

The Article relates to natural persons. The OECD Model no longer feature this Article as it does not appear in recent Treaties. It has been covered by Article 7 (Business Profits).

Article 22 Other Incomes

Under this Article, the Agreements of certain countries provides for ‘Other Incomes’ but the UK DTA does not.

2019 Information Circular

The FIRS in 2019 issued an information circular on claim of tax treaty benefits in Nigeria. The 2019 Circular was issued pursuant to the following domestic tax laws:

a) Companies Income Tax Act (CITA), Cap. C21 LFN 2004 (as amended up to 2020), (Sections 45 and 46)
b) Personal Income Tax Act (PITA), Cap. P8 LFN 2004 (as amended by the Finance Act 2019),(Sections 38 and 39)
c) Petroleum Profits Tax Act (PPTA), Cap P13 LFN 2004 (as amended by the Finance Act 2019) (Sections 61 and 62)
d) Capital Gains Tax Act (CGTA), Cap C1 LFN 2004. Section 41 (as amended up to 2020)

The Circular is aimed at providing guidance and clarity on the requirements, process of accessing and computing various tax treaty benefits available to residents and non-residents deriving income from Nigeria and its treaty partners. According to the Circular, Nigeria currently has effective double taxation agreements (DTAs) with fourteen countries.

Treaties In Force/ Countries with which Nigeria has concluded Avoidance of Double Taxation Agreements (ADTA)

Nigeria has currently concluded the ADTA with in respect of taxes on income and on capital gains with 14 countries. The first country is UK, and the Agreement was entered into on 1st January, 1989, followed by Pakistan and Belgium with the same effective date of January 1st, 1991. As at December 2019, the 14 countries that Nigeria has concluded the ADTA with, with the Agreements in force are presented in the following list:

Countries	ADTA Type	Date/Place of Signing	Date of Entry into Force	Effective Date
Nigeria – Canada	Comprehensive	4th August, 1992 in Abuja	16th November, 1999	1st January, 2000
Nigeria – Pakistan	Comprehensive	10th October, 1989 in Lagos	7th March, 1990	1st January 1991
Nigeria - Belgium	Comprehensive	20th November, 1989 in Brussels	1st January, 1990	1st January, 1991
Nigeria - France	Comprehensive	27th February, 1990 in Paris	2nd May 1991	1st January, 1992
Nigeria - Romania	Comprehensive	21st July, 1992 in Abuja	18th April, 1993	1st January, 1994
Nigeria - Netherlands	Comprehensive	11th December, 1991 in Lagos	9th December, 1992	1st January, 1993
Nigeria - United Kingdom	Comprehensive	9th June, 1987 in London	1st January, 1988	1st January, 1989
Nigeria – China	Comprehensive	15th April, 2005 in Abuja	21st March, 2009	1st January, 2010
Nigeria - South Africa	Comprehensive	29th April, 2000 in Cape Town	5th July, 2008	1st January, 2009
Nigeria – Italy	Air & Shipping Agreement Only	22nd February, 1976 in Lagos	1977	1st January, 1978
Nigeria – Philippines	Comprehensive	30th September, 1987 in Manila	18th August 2013	1st January, 2014
Nigeria - Czech	Comprehensive	31st August 1989 in Lagos	2nd December, 1990	1st January, 1991
Nigeria – Slovakia	Comprehensive	31st August 1989 in Lagos	2nd December, 1990	1st January, 1991
Nigeria – Singapore	Comprehensive	2nd August, 2017	1st November 2018	1st January 2019

Part C Comments on Key Issues Discussed in the Draft

1. Discussion Draft

A country's decision to negotiate a tax treaty should be the based on an analysis of the relevant economic factors, a review of the tax regimes of both countries (with the primary objective of identifying risks of double taxation and non-taxation) and an analysis of the tax treaty model of the other country (if available) and of its recent tax treaties in order to identify the main elements of its tax treaty policy.

Further, a country's decision to negotiate a tax treaty should also be guided by an assessment of its available resources, including in terms of the availability and skills of current tax officials.

COMMENT

These valuable considerations are not always taken into when treaties are negotiated in Nigeria. Few officers are skilled in the area of treaty negotiations.

2. Discussion Draft

Countries entering into tax treaty negotiations need a good understanding of the ways in which treaties operate and of the potential benefits and costs arising from treaties.

COMMENT

This is not always the case in Nigeria. As noted by Evert Jan Quak, despite being in a majority, developing countries lack influence in the UN's Committee of Experts, while the OECD's Committee of Fiscal Affairs has considerably more resources and technical capacity than the UN Committee. In effect, Nigeria and other developing countries seem to be incapacitated in decision making.

3. Discussion Draft

Treaties are frequently primarily used as a tool to attract investment into developing economies (Zolt 2018.

COMMENT

Not much has been achieved in this area in Nigeria.

4. Discussion Draft

Examples of countries that have renegotiated or cancelled tax treaties include Argentina in 2012, Rwanda in 2013, Mongolia in 2013, India in 2016, and Senegal in 2019

COMMENT

Nigeria has had its own experience of outright cancellation or renegotiation of some treaties in the past. Nigeria Sweden Agreement was terminated in 1989, with fresh tax treaty negotiations which commenced in 2002 and eventually concluded in 2016, but awaiting ratification by the National Assembly.

5. Discussion Draft

A country should not agree to negotiate tax treaties until it has the necessary technical expertise, having first researched the terms upon which a potential treaty partner has negotiated tax treaties with other countries.

COMMENT

There is a gap in this area which needs to be closed.

6. Discussion Draft

A question that should always be considered before agreeing to enter into tax treaty negotiations with a country is whether there is a material risk of double taxation with that country, which is unlikely where a country levies little or no income tax. Countries should also consider whether there are elements of the other country's tax system that could increase the risk of non-taxation, such as tax advantages that are ring-fenced from the domestic economy.

COMMENT

Nigeria takes this into consideration.

7. Discussion Draft

In almost all countries, the signed treaty has to be approved by the parliament or legislative assembly before it can be considered that the state has given its consent to be bound by the treaty

COMMENT

This requirement is provided for in the 1999 Constitution but the ratification process is always slowed and delayed.

8. Discussion Draft

It is a good practice to inform all interested parties when a new treaty enters into force and when its provisions will have effect. This may be done through a press release, notice in the official gazette or journal or on the website of the tax administration or of the ministry in charge of finance.

COMMENT

Nigeria needs to reflect the current version of the UN Model Double Taxation Convention between Developed and Developing Countries and the relevant UN Commentaries as well as ongoing decisions of the Committee in her draft Agreement.

Countries especially developing ones should develop capacities to enable them understand the complexity in international trade to avoid abuses of the provisions of treaties. Concept like international transfer pricing, BEPS, thin capitalization are strategies that can hedge against tax avoidance.

9. Discussion Draft

For instance, where a main reason for wanting to conclude a tax treaty is to obtain administrative assistance from another country, such as the benefit of exchange of information or assistance in collection of taxes provisions, an alternative approach would be to use a tax information exchange agreement (TIEA) or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("MAAC"). This approach, however, requires that the other country signs and ratifies the MAAC (unless it has already done so) or be willing to conclude a TIEA rather than a tax treaty.

COMMENT

On 17 August 2017, Nigeria became a signatory to two major international multilateral instruments to address tax avoidance and evasion. These are:

(a) the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or "MLI ") and

(b) the Multilateral Competent Authority Agreement for the Common Reporting Standard (CRS MCAA).

By signing the MLI, Nigeria becomes the 71st jurisdiction to signify interest in preventing base erosion and profit shifting (BEPS). Nigeria is also the 94th jurisdiction to join the CRS MCAA.

CONSULTATION QUESTIONS

Question One

Does this draft toolkit effectively address all the relevant technical and practical considerations as well as skills necessary to build capacity for tax treaty negotiations in developing countries?

COMMENT

Not absolutely. Nigeria is one of the developing countries that enter into double taxation treaties with the belief that it will benefit the economies of the both contracting parties. This is however not really the case as benefits of treaties skews uneven among nations in treaty arrangements. In effect, every country that engages in double taxation treaty must review the tax treaty it currently has with other contracting States to determine if it truly benefits from each of the treaty it enters. Re negotiation is inevitable where it is established that the merits are not as beneficial as anticipate. Furthermore, amending the key clauses of the treaty should be considered.

Anderson Tax, is of the view that in order to fairly examine treaties and their enactment process in Nigeria, the provisions of the 1999 Constitution of the Federal Republic of Nigeria (as amended) (CFRN); the TMPA; and Companies Income Tax Act 2007 (CITA) must be considered as some of the provisions show some inconsistencies regarding the treaty enactment process. Section 12 of the Constitution and Section 3 of the TMPA provide that the National Assembly, which is the supreme law must ratify all treaties before they become effective. However, Section 45 of the CITA provides that the Minister of Finance "may by order" give effect to any DTT between Nigeria and another country.

Question Two

Are there particular resources or tools, especially beneficial for developing countries, not covered in this toolkit that should be considered?

COMMENT

The application of refunds of withholding taxes, is not effectively put to use in Nigeria. The relevant OECD Action Plan to tackle BEPS are not yet embeded in the Nigerian model.

Part D Other Issues and Views to Consider in Building Effective Tax Treaty Negotiation Teams.

Some of the foregoing issues may pose challenges to treaty process of developing countries such as Nigeria. Section 12 of the 1999 Constitution of the Federal Republic of Nigeria expressly provides that before a treaty between Nigeria and another state shall have the force of law it must be enacted into law by the National Assembly. There are always delays from this arm of Government in executing this process. Others are:

i. countries entering into treaties with other Contracting States should carefully evaluate certain issues in the Agreement such as the extent of conformity of the treaty with the UN or OECD model on tax treaties,
ii. likely impact of the treaty on sharp practices by multinational enterprises,
iii. implication of the treaty for resource generation for the country,
iv. Implications of Treaty Shopping for Foreign Direct Investment.
v. Need to examine whether an anti-avoidance legislation will have any complimentary role in addressing abuses.
vi. Consider whether there are policies and existing tax legislations in the country the treaty may be in conflict with.
vii. Does the country's tax administration/arbitration system have the capacity and the strength to respond to some of the challenges and conflict that may arise from the treaty.

<u>Challenges</u>

Nigeria does not have adequate DTAs. Presently, Nigeria has only fourteen subsisting tax treaties. Few countries that are not as developed as Nigeria or some developing countries have up to 50 -100 DTAs. The treaty with Mauritius signed in 2012 is long overdue for ratification. A delay in the ratification of any treaty would give room for uncertainty amongst the treaty's stakeholders and will hold back the flows of certain foreign direct investment into Nigeria. Nigeria should speed up the process of ratifying the already signed treaties in order to bring in foreign direct investment.

Some of the hurdles against procurement of tax treaty in Nigeria are as listed below;

i. Bureaucratic process involved in the initiation, data gathering, correspondence and negotiation;
ii. Constitutional requirements on treaty;
iii. Legislative process - span and procedures;
iv. Political structure as relating to taxation
v. The federal government of Nigeria signed the DTA with Sweden in 2004, with South Korea in 2006 and with Spain in 2009. However, these agreements are yet to become effective in Nigeria on the basis of the constitutional provision which requires such treaties to be domesticated through ratification by the National Assembly.

vi. It should be noted that the more recent DTAs signed with Mauritius, the UAE and Qatar are yet to be presented for ratification.
vii. DTAs signed with Mauritius, the UAE and Qatar are yet to be presented for ratification.

Overcoming the Challenges

Nigeria should:
i. embark on accelerated legislative process on the three Bills;
ii. conduct joint sitting, where it is possible with a view to gaining time;
iii. ensure conclusion of the three Bills in earnest and seek Executive assent to be effective.
iv. the Federal Government should also review the tax treaties it currently has with other countries to determine if Nigeria is benefitting from the DTTs. Where it is established that Nigeria is not, re-negotiating and amending key clauses of the DTTs could be considered.

FINDINGS/EXCERPTS FROM PREVIOUS STUDIES WHICH MAY BE USEFUL

International DTA network:

• Countries in Eastern and Southern Asia have concluded more DTAs than countries in Sub-Saharan Africa. There are 314 tax treaties in force in Asia, compared to 205 in Africa (Hearson 2016b). Six Asian countries (Pakistan, Vietnam, Sri Lanka, Philippines, Bangladesh and Mongolia) have concluded 30 or more DTAs, while no African country has concluded more than 19 (Figure 1).

• Over half of the agreements are with non-OECD countries. 51% of the treaties in Africa and 55% of the treaties in Asia are with non-OECD countries (Hearson, 2016b).

The majority of developing countries' DTAs were with advanced economies (Hearson, 2016b; Hearson 2015, p.8).

Among African countries, the largest number of treaties are with South Africa, Mauritius, United Kingdom, Italy and Norway.

• Asian countries' treaties grant the source country greater taxing rights than African countries' treaties.

• Developing countries' DTAs contain lower withholding tax rates than in the past, but less stringent permanent establishment provisions.

There are two key ways that DTAs can restrict a country's ability to tax foreign investors. First, by lowering the rate of withholding tax levied on foreign income earned at source. Second, by imposing a high threshold for permanent establishment, that is, the minimum level of activity that must take place before taxes can be levied (Hearson, 2016a, p.9).

For both African and Asian countries, there is a trend towards lower withholding tax rates. In Africa, this trend is more pronounced in DTAs with OECD countries (Hearson, 2016a, p.22).

However, PE provisions are becoming less restrictive over time, which means that recent DTAs expand the circumstances in which countries can tax foreign companies' income within their borders (Hearson, 2016a, p.22).

- Neumayer (2006) analyses with which developing countries industrialized countries sign bilateral investment treaties (BITs).
- He concludes that economic and political interests motivate industrialized countries when choosing their partners to sign BITs with.
- To a lesser extent, they also take into account the needs of developing countries. Good governance is not found to play a role.
- Also looking at BIT formation, Elkins et al. (2004)34 find that "developing countries are more likely to sign BITs with developed countries if their competitors have done so already" and thus conclude that the spread of BITs can be explained by the "increased competition for FDI among developing countries".
- Neumayer and Plümper (2010) find that "a capital-importing country is more likely to sign a BIT with a capital exporter only if other competing capital importers have signed BITs with this very same capital exporter. Similarly, other capital exporters' BITs with a specific capital importer influence an exporter's incentive to agree on a BIT with the very same capital importer".36 Swenson (2005) concludes that BITs have a backward and a forward looking element.
- She finds evidence that developing countries enter into BITs to retain the existing FDI stock and also to attract new foreign investors.
- The study revealed that countries with a bigger population tend to have more double tax treaties. However, once gross domestic product (GDP) is included, population is completely dominated by GDP and ceases to exhibit any significance. GDP is therefore the vastly superior indicator for the size of the economy. Graphs 1a and 1b show the effect of GDP on the number of DTTs of a country.
- Despite the fact that there are only 34 OECD member countries in the sample, as opposed to 142 developing economies, it only requires a 9% increase in FDI to stipulate one additional DTT.
- Whereas in both cases GDP matters, the degree of openness is correlated with DTTs among developing economies, whereas DTTs between industrialized and developing economies depend on FDI.

- political variables are considered. The political system of a country may have an impact on the number of DTTs it can forge. As DTTs are both difficult to negotiate but also difficult to implement and prosecute, it is tested whether institutional variables matter for DTTs. Also, in view of DTTs also providing for the exchange of information, countries which are concerned about the secrecy of their citizens' tax data may be less inclined to sign DTTs with states with high corruption levels.
- countries undoubtedly lose tax base and hence tax revenue by signing a DTT that transfers part of the profits of foreign direct investors to the home country .

With Whom Do Countries Have Double Tax Treaties? The following section tries to establish determinants that explain which countries sign DTTs with each other.

Data and Methodology

- "specific target contagion" is accounted for, i.e. that a specific developing country may be more likely to sign a DTT with a specific OECD member country, if the developing country's neighbouring countries have already entered into a DTT with that specific OECD member country. To illustrate, it is tested whether, say, Uruguay is more likely to sign a DTT, with, say, Norway if Uruguay's neighbouring countries such as Brazil have already signed a DTT with Norway. For Norwegian firms, Uruguay and Brazil may represent close substitutes when making an investment in South America. Thus, Uruguay may be more ready to sign a treaty with Norway if Brazil already has a treaty in place, so not to be at a competitive disadvantage. In the regression analysis, both types of spatial
- According to Barthel and Neumayer (2012), the strong positive target contagion interdependence can explain why developing countries sign DTTs with OECD member countries, even though the treaties "systematically favour a distribution of the taxes generated from MNCs [Multinational Corporations] to the advantage of the capital-exporting residence country".

RECOMMENDATIONS & CONCLUSION

As noted by the National Tax Policy (2012), Nigeria will continue to expand her treaty network in the best interest of the Nigerian state. Brazil had signed 37 treaties between 1967-2017. It should also continue to meet her international obligations under the tax treaties, protocols and agreements that are currently in force.

Proposed treaties in Nigeria and in other developing countries should be widely circulated amongst stakeholders and the general public in order to encourage a robust consideration of the benefits or otherwise of the treaties.

There should be regular review of the existing treaties and re-negotiation in line with best practices.

The Federal Inland Revenue Service working in consonance with the Federal Ministry of Finance and the Federal Ministry of Foreign Affairs shall be responsible for the negotiation and conclusion of the terms of the treaties and shall ensure that they provide the maximum benefit to the Nigerian economy.

The Joint Tax Board, an umbrella body for Tax Authorities, a legal body set up under the Act should be playing a critical advisory role in the negotiation of treaties prior to conclusion. Treaty partners shall also ensure that all terms in the treaty are fair and beneficial to both parties to the treaty.

Nigeria should reserve the right at all times to cancel any arrangements which are no longer beneficial to its economy, which have become obsolete or which are not being observed by the other party. Cancellation of such treaties should be done in line with the provisions of the treaty and in accordance with Nigerian law.

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