THE NEED FOR THE ENHANCEMENT OF DOUBLE TAX AGREEMENTS WITHIN THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS).

BY

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Abstract

In the era of globalisation, it becomes impossible for a country's tax policy to stand alone because of international trade in goods and services. As companies operate in different countries, it becomes difficult to identify the country with taxing rights. If not identified, this may lead to Juridical double taxation of the income of a company; may be an impediment to the free flow of international trade, as such, not good for business. To curb juridical double taxation, the League of Nations (now United Nations) began to develop tax treaties to protect multinational corporations, leading to a plethora of double tax agreements between states today. The paper identifies that there exists tax agreements between some members of the Economic Community of West African States (ECOWAS) countries and countries of Asia, and Europe, however, none exists with ECOWAS members. The paper finds that this is not good for the Aspiration 1 of the African Union 2063 Agenda and the vision and objectives of ECOWAS. Considering the benefits associated with tax agreements and to remove taxation as a barrier to international trade in the ECOWAS, it becomes expedient for the enhancement of double tax agreements among member states, hence this paper. The paper concludes and recommends that elimination of juridical double taxation will enhance the investment climate and increase foreign direct investment, which will in turn assist in the growth of investment flows among ECOWAS countries in line with the African Union Agenda, 2063. The paper focus on companies operating in the ECOWAS, but more reference will be made to Nigeria and Ghana.

Keywords: Double Tax Agreements, Taxation, ECOWAS, Double taxation, Companies.

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1.1 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. Government levy taxes for the purpose of provision of public goods, infrastructural development and for the funding of public expenditure.[1] '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.'[2] This brings about the twin principles of 'source and residence' in determining the state with the right to tax a business. The twin principles of 'Source and Residence' become profound because in the source country, the income is attributable to factors within that country, and in the country of residence all residents are usually taxed on their worldwide incomes.[3] If not properly clarified, this leads to problem in tax remittances.

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.[4] Jurisdictions such as Nigeria and Ghana adopt the legal approach.[5] Under the economic approach, tax residence is determined by either the place of

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[1] Anghard Miller and Lynne Oats, *' Principles of International Taxation*' 3rd. ed. (Bloomsbury Publishing Plc, west Sussex, 2012) 3
[2] Veronica Daurer and Richard Krever, "Choosing between the UN and OECD Tax Policy Models : An African Case Study" *African Journal of International and Comparative Law,(*2014)
[3] Article 5 and 7 Organisation for Economic Cooperation & Development OECD Model Convention (2010). There is a proposed amendment to the OECD Model Tax Convention that will be in Place sometime in the year 2018.
[4] Anghard Miller and Lynne Oats, *Principles of International Taxation*' 62
[5] Companies and Allied Matters Act(CAMA) 1990, Section 27(1) (b)

effective management or principal business location.[6]Some jurisdictions such as the UK adopt a combination of both approaches.

In setting up a company, foreign businesses have the option of either trading directly with the country of choice such as exporting goods to customers or providing services from outside the country or registering an entity in a foreign country in the form of a **branch** or a **company** to enable it do business in the foreign company.[7] However, some countries forbid businesses from operating within its shores as a 'branch'.[8] Suffice to state that countries have their own domestic legal regimes which ensure that companies operating within their borders comply with tax remittances. For example, in Nigeria, there exists the Companies Income Tax Act (CITA),[9] Petroleum Profit Tax Act (PPTA)[10] among others, while in Ghana; there exists the Income Tax Act[11] which includes the corporate tax paid by companies on their profits in the year.

However, in this era of international trade occasioned by globalisation and growth of cross-border services by Multinational Enterprises (MNEs),[12] commercial activities have now moved beyond a purely domestic setting. The effect is that a nation's tax policy no longer stands alone but must be wide and efficient enough to withstand competition.[13] When companies operate in two different jurisdictions either as a **branch** or **fixed place of doing business,** or even as an **agent** or **consultancy**, 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

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[6] Miller and Oats, '*Principles of International Taxation*'62.

[7] Reginald Mexu, "The Tax Framework and Challenge of Foreign Investments in Nigeria" *Gravitas Review of Business and Property Law*, VOL 17, N0 2, (2016) 51.

[8] In Nigeria, Section 54, Companies and Allied Matters Act provides for participation of foreigners in company formation in the country. However, it forbids foreign businesses from operating through a branch.

[9]*CITA* CAP 60, LFN 1990 (Nigeria) This covers tax chargeable on all companies operating in Nigeria. For a list of all the laws governing taxation in Nigeria.Accessed May 25, 2018. http://www.firs.gov.ng/Tax-Management/Pages/Tax-Legislations.aspx.

[10]*PPTA* CAP. 354 LFN 1990(Nigeria) for companies in the oil and gas industry.

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

[12] Prafula Fernandez and Jeff Pope, "International Taxation of Multinational Enterprises (MNEs)" *Revenue Law Journal*, Vol 12, Issue 1, Article 7, (2002) 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, '*Principles of International Taxation*'21.

taxes the income using the residence principle while the foreign country taxes the income using the source principle.[14]If not properly regulated, two jurisdictions may potentially claim jurisdiction to tax the same profit or transaction at the same time.[15] This may lead to tax conflicts and tax burden on the tax payer leading to what is known as juridical double taxation[16]which adversely affects the commerciality of cross-border transactions. To avoid juridical double taxation, countries enter into Double Tax Agreements (DTAs) which also helps to reconcile 'source and residence' so as to alleviate the tax burden on the tax payer.

In negotiating DTAs, there are three models of tax treaties which may be adopted by states. They are the United Nations (UN), Organisation for Economic Cooperation & Development (OECD) and the United States (US) Models.[17]Developing countries such as the Economic Community of West African States (ECOWAS) member states rely on the UN Model tax convention while developed countries rely on the OECD Model.

The mission of ECOWAS is to promote economic integration within the region. Countries in this region enjoy both cultural and geopolitical ties and shared economic interest.[18] Ironically, there is not a single DTA between these ECOWAS states. For example Ghana have about eleven tax (11)treaties[19] while Nigeria have about thirteen(13) DTAs but none with an ECOWAS state ; both countries only have with the African country of Mauritius respectively. Also, recently, the African Continental Free Trade Area (AFCTA) was adopted by about Fourty-Four (44) African nations

[14] i*bid*
[15] Michael Devereux and John Vella, 'Are we heading towards a corporate tax system fit for the 21st century?'(Working paper Series 2014) Oxford University Centre for Business Taxation. Accessed June 11, 2018. https://www.sbs.ox.ac.uk/faculty-research/tax/publications/working-papers-0/are-we-heading-towards-corporate-tax-system-fit-21st-century
[16]Miller and Oats, 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.
[17] The Organisation for Economic Cooperation & Development (OECD) model which is mainly adopted between developed countries, The United Nation(UN) Model, which is mostly employed when negotiating tax treaty between developed and developing countries to which the ECOWAS states fall into and the United State (US) Model.
[18] http://www.ecowas.int/about-ecowas/basic-information/ accessed May 16, 2018.
[19] https://www.ghanabusinessnews.com/2017/06/05/ghana-has-double-taxation-agreements-with-11-countries-by-end-of-april-2017/ .Accessed May 16, 2018

with the objective of creating a single market for goods and services and a liberalised market in Africa.[20] This is also in line with both the AU Agenda, 2063 and objective of the ECOWAS.

Considering that there are a couple of Nigerian manufacturing companies that have moved to and operate in Ghana and some other ECOWAS states[21] for example, Dunlop Nigerian Plc and Michelin[22]while some major investments in Ghana, are owned by Nigerians. Also in a bid to expand its frontiers, Dangote Cement Ltd now have operations in about ten (10) African countries[23] and about Five (5) Nigerian banks operating within the region as branches.[24]How does Nigeria ensure that it does not lose taxes on incomes that accrue from these companies? How are Nigerian companies domiciled in other ECOWAS countries protected whilst ensuring that their companies do not evade paying taxes in the country? Where no DTA exists, which country then has the right to tax such a company? These questions agitate this paper. Therefore, the paper will consider how the lack of DTAs among member states hinders tax compliance leading to loss of revenues. It will also highlight how lack of DTAs may lead to the possibility of double taxation of companies resident in the region; hence the paper seeks to canvass the need for enhanced DTAs in the region.

In the light of the above, the paper will be structured as follows. Part one inclusive of the introduction discusses DTAs and the various models, focusing on the UN model. Part two examines the objectives and visions of ECOWAS, reasons for DTA and why DTAs will have to be enhanced within the ECOWAS. Part three gives an overview of Aspiration 1 of the African 2063 Agenda and the AFCTA which complements negotiation of DTAs and how an efficient tax

[20] Article 3 and 4 of the AFCTA, 2018

[21] Most of these companies moved as a result of insecurity, inadequate power supply and the need for the expansion of their business.

[22] Amaka Agwuegbo, 'As Nigerian coys, move to Ghana', accessed May 21, 2018 https://www.vanguardngr.com/2009/08/as-nigerian-coys-move-to-ghana/

[23] http://www.dangotecement.com/ accessed June11, 2018 These countries are Nigeria, Cameroon, Ghana, congo, Ethiopia, Senegal, South Africa, Zambia, Tanzania and Sierra Leone

[24] Eme Dada and Adegoke Adeleke, ' An Empirical Analysis of Integration and Inter Regional Trades in ECOWAS' *Journal of African Development* , Vol 17 (2015) 102

regime within ECOWAS member states can help in the actualisation of this Agenda within the region. Part four concludes the paper highlighting the need for the enhancement of DTAs within the ECOWAS region while recommending that elimination of double taxation will enhance the investment climate, increase foreign direct investment, which will in turn assist in the growth of investment flows between countries.

1.2 Double Tax Agreements (DTAs)

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 tax treaties are often negotiated between the contracting states without consulting the multinationals or investors in any of the contracting states. When states negotiate tax agreements, they either employ any of the three models which are the OECD, UN and US models. However, for the ECOWAS states and countries of the African Union, which are developing countries, when negotiating DTAs, they often employ the UN model which is well suited for developing countries[26] because the UN model rules for allocation of taxing powers give more rights to the contracting state where income is sourced.

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, no state can renege on it. However, treaties cannot by themselves impose tax liabilities where none exists under a States’ domestic law. Tax Treaties can only limit or reduce

[25] *ibid* 117-118.

[26] United Nations Model Double Taxation Convention between Developed and Developing Countries(2011) United Nations , New York, accessed May 25, 2018. http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf

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.[27]

The aim of DTAs, between states 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 with widely-accepted tax rules and norms.[28]

(a) UN Model

The UN model of tax convention[29] is a tax agreement model between developed and developing countries. The model was developed in 1980 to favour the capital exporting states. As indicated earlier in this paper, 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.[30]The implication of this is that foreign investors (a Nigerian Company) with a branch in Togo (source country) for example will be taxed higher on the income that accrues from the Nigerian companies operating in Togo and vice versa. However, if there is a tax treaty between Nigeria and Togo, it will delineate the methods of double tax relief between Nigeria and Togo so as not to overburden the tax payer. The paper posits that this form of agreement will help enhance international trade between the contracting states. This raises the question whether as regards

[27]CAP 60,LFN 1990(Nigeria).

[28] Ariane Pickering, 'Why Negotiate Tax Treaties'(May 2013) Papers on Selected Topics in Negotiation of Tax Treaties for Developing Countries, paper no 1.accessed June 11, 2018. http://www.un.org/esa/ffd/tax/2013TMTTAN/Paper1N_Pickering.pdf

[29] UN Model Tax Convention 2011

[30]UNModel Tax Convention 2011, Introductory part. accessed May 21, 2018 http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf

ECOWAS, relying on the UN Model which seeks to aid developing countries tax capital importing countries is not self- defeating since countries within the ECOWAS are all developing countries?

Furthermore, the UN model extends some definitions to the advantage of the source state. For example the term Permanent Establishment (PE) under the OECD 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[31] 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.[32] Services here include consultancy services. This favours the source principle and expands taxable income.

(b) OECD Model

The Organisation for Economic Cooperation & Development (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 OECD 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 impacts on the negotiation, application, and interpretation of tax conventions. The OECD model tends to emphasise residence taxation rights, favouring developed countries.

(c) The US Model

[31] See Article 5 of the OECD
[32] Article 5, UN Model.
[33] OECD Model Convention 2010.
[34] http://www.oecd.org/tax/treaties/tax-treaties-2017-update-to-oecd-model-tax-convention-released.htm accessed April 17, 2018. 1

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. This system is sometimes referred to as a credit system.[36]

2.1 The ECOWAS

The Economic Community of West African States (ECOWAS) was established on May 28 1975 via the Treaty of Lagos. ECOWAS is a 15-member regional group with a mandate of promoting economic integration in all fields of activity of the constituting countries.[37] With a population of 357,703,977,[38] ECOWAS was set up to foster the ideal of collective self-sufficiency for its member states. As a trading union, it is also meant to create a single, large trading bloc through economic cooperation.[39] The community 'aims to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its people, and to maintain and enhance economic stability, foster relations-among member States and contribute to the progress and development of the African Continent.'[40] The vision of ECOWAS includes creating an integrated region where the population enjoys free movement, have access to efficient education and health systems and engage in economic and commercial activities while living in dignity in an atmosphere of peace and security.[41] This extends to free international trade and trade liberalisation[42] whereby tax cannot be an impediment to the free flow of international trade thus an efficient tax regime becomes vital. To ensure that tax does not

[35] *US Model Income Tax Convention*, 2006, art 1.4.
[36] Reuven Avi-Yonah and Kimberly Clausing, 'Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt Formulary Apportionment' *The Hamilton Project*, The Brookings Institution(2007),6 accessed May 25, 2018 https://www.brookings.edu/wp-content/uploads/2016/06/200706clausing_aviyonah.pdf
[37] http://www.ecowas.int/about-ecowas/basic-information/ accessed May 22, 2018.Member countries are Member countries making up ECOWAS are Benin, Burkina Faso, Cape Verde, Cote d' Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo
[38] https://countryeconomy.com/countries/groups/economic-community-west-african-states. accessed June 9, 2018
[39] *ibid*
[40] Article 3, ECOWAS Revised Treaty 1993
[41] http://www.ecowas.int/about-ecowas/basic-information/ accessed May 22, 2018.
[42] Article 35, ECOWAS Treaty

hamper international trade within the community, the ECOWAS treaty in its section 40(5) provides that:

> 'Member States undertake to avoid double taxation of Community citizens and grant assistance to one another in combating international tax evasion. The conditions and modalities for granting such assistance shall be as contained in a **Double Taxation and Assistance Convention' (emphasis mine).**

The provision of Article 40(5) gives credence to DTAs in the ECOWAS and where none exists as alluded to in this paper, there is a need for enhancing same between the ECOWAS states. This may be connected to the fact that tax issues or juridical double taxation can be an impediment to cross-border transaction and impede trade leading to tax base erosion. However, a look at the states within the community indicates that there are no tax agreements existing between member states[43] either at multilateral or bilateral levels as it were with members of the European countries, Asia and South Africa. Suffice to state that states in the ECOWAS find it more convenient to relate with countries from other regions in the areas of DTAs and exchange of information than between themselves.[44] To achieve the African Union 2063 agenda, particularly Article 1 which focuses on 'a prosperous Africa based on inclusive growth and sustainable development'[45]DTAs can be a platform to achieving the visions and objectives of the ECOWAS.

2.2 Reasons for DTAs

a) Protection of tax payers from double taxation:

[43] http://www.firs.gov.ng/Tax-Management/Pages/Tax-Treaties.aspx accessed May 23, 2018. Nigeria have about 13 double tax treaties with countries and non with any ECOWAS state, Ghana, has about 11 tax treaties and non with an ECOWAS state https://www.ghanabusinessnews.com/2017/06/05/ghana-has-double-taxation-agreements-with-11-countries-by-end-of-april-2017/,accessed May 23, 2018. Republic of Benin have signed DTAs with 4 countries http://fortuneofafrica.com/benin/2014/02/06/double-tax-agreements-of-benin/ accessed May 23, 2018

[44] Bukky Olajide,' Effective resource management, ease of doing business imperative for tax development says AFFLU September 2, 2013 : accessed May 23, 2018. http://ngrguardiannews.com/business-news/131616-effective-resource-management-ease-of-doing-business-imperative-for-tax-development-says-afflu

[45] http://www.un.org/en/africa/osaa/pdf/au/agenda2063.pdf (accessed May, 23 2018)

The primary purpose of DTA is to relief double taxation and protects tax payers to a greater extent than that provided for under the domestic tax law. This is often reflected in the preamble or title 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. Although the various tax models no longer have this reflected in the titles, countries that enter into these agreements have them in the tittle of DTAs.[46] As stated earlier, double taxation arises where same income is taxed in two countries either at the source or resident country. This is undesirable by multinational companies as double taxation is harmful to trade in goods and services whether as a developed or developing country.[47]

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 to include the exemption[48] and credit methods.[49] Example of how the credit and exempt methods can be applied in double tax relief is explained thus:

Double taxation Problem

[46] Ghana –UK Double Tax Agreement , Effective in United Kingdom from 1 April 1995 for corporation tax and from 6 April 1995 for income tax and capital gains tax Effective in Ghana from 1 January 1995. The title of the DTA is 'CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF GHANA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL GAINS' accessed May 24, 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/498352/ghana-dtc_-_in_force.pdf

[47] Ariane Pickering, 'Why Negotiate Tax Treaties'

[48] 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.

[49] 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.

In Ghana, company income tax is 25% while in Nigeria it is 30%. Imagine that 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. This means that XY Ltd will be charged a total of 55% tax on its income for the 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 AFCTA. Something needs to be done urgently to address this issue which may act as an impediment to international trade and services.

Double Tax relief:

In the scenario above, the exemption or credit method of tax relief may be applied through agreements reached in the DTA[50] 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 implies that the country of residence gives credit for the foreign tax.[51] 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 ECOWAS state 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 economic integration in the ECOWAS.

[50] Article 24, Ghana –UK Double tax agreement accessed May 24, 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/498352/ghana-dtc_-_in_force.pdf
[51] Miller and Oats, ‘*Principles of International Taxation’* 79

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.[52] 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 companies operating in the ECOWAS and Africa. This is seen as the beginning of tax problems. The OECD model convention 2010 and the UN model 2011 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 it simple.[53] For example, Article 4[54]provides for 'residence'[55] known as the tie-breaker clause.

Article 4 (2) lay 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.[56] Therefore, Article 4 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.

[52]*ibid* , Miller and Oats, 117.
[53] It defined terms such as 'resident of a contracting state under Article 4 UN Model
[54]UN Model Convention 2011
[55] 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.
[56]Miller and Oats, *Principles of International Taxation* , 23.

In the era of globalisation, MNC/ companies are seen to be doing business in both contracting states (for instance Ghana and Nigeria) under their domestic law, and, when this is the case, Article 4 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 range from the place of incorporation to the place of effective management[57]which is quite restrictive under a country's companies Act. In Nigeria, by virtue of Section 27(1)[58] tie breaker clause for a company is the registered office at the time of incorporation[59] while Ghana also adopts the registered office address.[60]

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)[61] under Article 25.[62] 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.[63] 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

[57]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 June11, 2018. Article 4 UK-Ghana DTA

[58]*Companies and Allied Matter Act* CAP 59, LFN 1990(Nigeria).

[59]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.

[60] 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.[60]

[61]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.

[62]UN Model Convention 2011, Article 25

[63] Article 25(3)

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.[64] 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 takes 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.[65] In order to facilitate tax planning, MNCs engage in activities such as treaty shopping to minimise tax liability[66] achievable through the use of conduit entities.[67]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[68] as evident in the long title of tax agreements reading thus: "Avoidance of Double 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

[64]OECD Commentary on article 45 paragraph 64
[65] Miller and Oats, *Principles of International Taxation*, 15.
[66] 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.
[67]Francis Weyzig. "Treaty Shopping: structural Determinants of Foreign Direct Investment routed through the Netherlands," *International Tax and public finance* 20, no.6 (2013) 910-947.
[68] John 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. Accessed June 1, 2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783957

double taxation and also preventing fiscal evasion[69] through the exchange of information procedure in DTAs.

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 An example is the Vaswani brothers of Stallion group who evaded tax and customs levy and they were deported from Nigeria.[70] 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 UK-Nigeria Treaty[71] 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.[72] All these may not be possible without DTAs.

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[69] *Uk-Nigeria Tax Treaty.*

[70] Sylvester Ugwuanyi, "Reps order probe of Stallion group over alleged Tax Evasion", August 18, 2015 , accessed June 15, 2018. http://dailypost.ng/2015/08/08/reps-order-probe-of-stallion-group-over-alleged-tax-evasion/.

[71] *UK Nigeria Double Taxation Agreement*, art.25. accessed June 1, 2018. www.hmrc.gov.uk/international/dta-intro.htm. The long title of the UK-Nigeria Double Tax Treaties includes avoidance of double taxation and the prevention of fiscal evasion.

[72] Miller and Oats, *Principles of International Taxation*, 117.

Under International law, States do not enforce tax claims of other states as a result of the revenue rule as was decided in *Government of India v Taylor*.[73]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.[74]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.[75]

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,[76] 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 bilateral tax treaty lays out ground rules providing that one State or the other, not

[73]1995 AC 491.
[74]Miller and oats, *Principles of International Taxation*, 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.
[75]Nigeria joins the OECD convention on Mutual Administrative Assistance.Accessed June 11, 2018. http://pwcnigeria.typepad.com/files/nigeria-oecd-convention-on-mutual-administrative-assistance.pdf_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.
[76]Miller and Oats , ' *Principles of International Taxation'* 130

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.[77]

A bilateral tax treaty 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 states of the ECOWAS will facilitate the mutual relation and economic growth of the AU Agenda 2063.

e) **Prevents Impediment to International Trade**

As alluded to in the paper, 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.[78]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.[79] This is vital for the advancement of the African region. 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.[80]

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[77] Introduction to international double taxation and tax evasion and avoidance Committee of Experts on International Cooperation in Tax Matters Seventh session Geneva, (24-28 October 2011) , 14, accessed June 11, 2018. http://www.un.org/esa/ffd/tax/seventhsession/CRP11_Introduction_2011.pdf
[78]*ibid*
[79]http://www.firs.gov.ng/Tax-Management/Pages/Tax-Treaties.aspx accessed June 11, 2018.
[80]Miller and Oats, 524, They are: *TFEU 2008,* art. 49(39), 49(43), 56(49) and 63(56).

The TEFU is akin to the ECOWAS Treaty (Lagos Treaty) which also provides for taxation within the ECOWAS while providing that obstacles to trade among member states shall be removed.[81] 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.

2.3 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.[82] Another challenge is the issue of treaty shopping whereby residents of a third 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.[83]

3.1 The African Continental Free Trade Area(AFCTA)

In March 2018, about 44 African countries signed and adopted the AFCTA;[84] about nine (9) countries including Nigeria (which is the largest economy in the ECOWAS) did not sign the agreement. The general objective of the agreement 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. The paper posits that the AFCTA complements DTAs in Africa and specifically in the ECOWAS, as a combine reading of Article 35 of the ECOWAS Treaty and

[81] Article 35 of the ECOWAS Treaty
[82] Ariane Pickering, ' Why Negotiate Tax Treaties' Papers on Selected Topics in Negotiation of Tax Treaties for Developing Countries, paper No1, (2013), 22.
[83] *ibid*
[84] https://au.int/sites/default/files/pressreleases/34033-pr-indication20of20signing20authority20-20updated20final20final20docx.pdf. Accessed June 12, 2018
[85] Article 3(a-g) of the AFCTA2018 and specific objectives, see Article 4. Article for makes provision for special objectives which include to a. progressively eliminate tariffs and non-tariff barriers to trade in goods;
b. progressively liberalize trade in services.

Article 3(b)[86] of the AFCTA 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 ECOWAS countries that are signatories to the AFCTA, being a signatory does not preclude the country from negotiating DTAs as it does not amount to a duplication of roles as the provisions of the AFCTA cannot take the place of tax treaties, as tax treaties are bilateral between the treaty partners. Although the AFCTA removes barriers to international trade or regional trade which includes taxation, AFCTA deals more with the importation of goods, trade in goods and services and the tariffs involved but does not cure the issue of double taxation that may arise as a result of income that accrues from companies engaged in international trade in different countries.

3.2 Conclusion

The paper identified and discussed the importance of tax and DTAs to the development and growth of the economies of member states of ECOWAS. 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.

The paper finds that while member state of ECOWAS have tax agreements with countries in Asia, Europe and South Africa; they however, do not have intra ECOWAS DTAs. 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 ECOWAS. Furthermore, the paper finds that in this era of globalisation, the domestic tax law of a country can no longer accommodate taxation of

[86] Create a liberalized market for goods and services through successive rounds of negotiations, contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs;

companies 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 is to enhance international trade, remove any obstacle to international trade, trade liberalisation in accordance with the AFCTA and additionally in the case of DTAs, ensure certainty in tax systems.

The paper recommends that if the objective of setting up the ECOWAS is to be achieved, member states must engage in intra ECOWAS tax treaties. The ECOWAS treaty offers member states the opportunity to encourage tax agreements among themselves and this is in line with the AU Agenda, 2063. Considering Aspiration 1 of the African Agenda 2063 which seeks to build shared prosperity through social and economic transformation of the continent, coupled with the regional integration canvassed in the ECOWAS and AFCTA respectively, tax remittances through an enhanced DTA within the ECOWAS becomes vital to developing the African economy and securing the future generation, hence the need for African countries especially the ECOWAS to negotiate more DTAs.

It is pertinent to note that moneys raised from tax can be used for infrastructural development which is also in line with Aspiration 1 of the AU Agenda 2063 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 the government, run public transport and provide social security for her citizens, thus they ensure that they have DTAs between them and the countries that their citizens have business ties with including the developing countries of Africa.[87]

Furthermore, for DTAs to be beneficial developing countries should decide on the countries with which it needs to negotiate tax treaties. This may be done in consultation with businesses

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

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.[88]

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 Article 40(5) of the ECOWAS Treaty, member states are encouraged to strengthen economy ties that will bring the desired economic growth in the community through the enhancement of DTAs in the community.

[88] Michael Lang and Jeffrey Owens, "The Role of Tax Treaties in Facilitating Development and Protecting the Tax Base" WU International Taxation Research Paper Series, (No 2014 03) 8.Accessed June 15, 2018 http://epub.wu.ac.at/id/eprint/4094