Recent Developments in Africa 2011

FIT International Taxation Conference, Mumbai 2011

This article reports on an analysis of the developments of international taxation in the African continent. The results of the analysis were presented by the author during the 17th International Taxation Conference– Mumbai, 2011.

The objective of this research is to assess the position of African tax treaties practice within the ambit of the UN Model1 (2001) and the OECD Model2 (2010). The research also examined whether there are or not any specific provisions in African tax treaties that deviate from the standard provisions of the UN and OECD Models.

1. Introduction: Statistical analysis

An overview of the Double Tax Agreements (DTAs) signed in Africa and those signed in the European Union (EU), which represents the major economic partner of Africa, has shown the following results:

1.1 African versus EU countries

African countries, which represent twice the number of EU countries, have less than 1/3 of the number of DTAs signed by EU countries. The 53 countries of Africa have signed only 628 DTAs. 83% of these are already in force. The

* Noureddine Bensouda, 2011. Previously Director General of the Moroccan Tax Administration and currently General Treasurer for the Kingdom of Morocco.

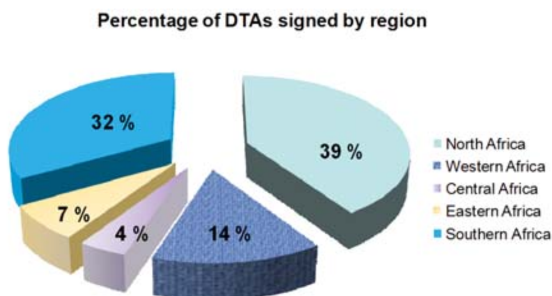
27 countries of European Union have signed 2 045 DTAs. About 90% of these are already in force.

Within Africa, the top 5 countries in terms of DTAs signed are South Africa, Egypt, Morocco, Tunisia and Mauritius. They have about 45% of the total number of DTAs signed in Africa.

Within EU, the top 5 countries, namely United Kingdom, France, Belgium, Germany and Italy, have only 26% of total DTAs signed by EU countries.

1.2 Comparison among African countries

The most important regions in terms of DTAs signed are North Africa and Southern Africa.



North Africa with only 7 countries has 39% of DTAs signed in Africa. In this region, Egypt, Morocco and Tunisia are among the top 5 African countries.

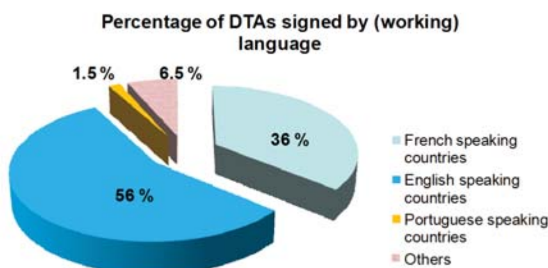
Southern Africa with 13 countries has 32% of DTAs signed in Africa. South Africa and Mauritius are among the top 5 African countries.

Western Africa with 15 countries has only 14% of DTAs signed in Africa. Senegal, Nigeria and Ivory Coast are the top 3 countries in this group.

Eastern Africa with 10 countries has 7% of DTAs signed in Africa. Ethiopia, Kenya and Uganda are the top 3 countries in this group.

Central Africa with 8 countries has only 4% of DTAs signed in Africa. Gabon, Cameroon and Democratic Republic of Congo are the top 3 countries in this group.

Besides this geographical analysis, the working language of African countries was checked to assess its relation with the number of DTAs signed within African countries.



African English speaking countries have signed the most DTAs. In other words, the 19 English speaking countries, representing 35% of total African countries, are leading the group with 56% of total African DTAs signed.

The 23 French speaking countries, which represent 43% of total African countries, follow with 36% of total African DTAs signed.

In this respect, many questions were raised during the analysis (*i*) how could we explain the fact that English speaking countries are leading in terms of DTAs signed? (*ii*) Would it be appropriate to conclude that this results from the fact that English is the language of International Taxation? (*iii*) Could we conclude that those countries have in general more expertise in DTAs compared to others?

1.3 Africa tax treaty network

For the sake of simplicity, the research distinguished three periods to figure out whether Africa has or not a young tax treaty network.

Number of TT signed	Before 1990	Between January 1990 and before January 2000	After January 2000	Countries with no TT signed
628	161	213	**254**	9

The analysis has shown that the majority of DTAs concluded by African countries were signed

in the early 21 century. In other words, Africa has a young tax treaty network as 40% of its DTAs were signed after January 2000.

DTAs signed before 1990 were concluded with former colonies. Many of these DTAs were terminated and recently renegotiated.

Angola, Burundi, Comoros, Equatorial Guinea, Sao Tome and Principe, Burundi, Djibouti, Eritrea and Somalia have not signed any DTA yet.

Finding out what are the major tax treaty partners of African countries was another point of interest of this research.

Europe	Africa	Asia	America	Oceania	Middle East + Gulf Countries
259	175	104	25	2	63

European countries are the leading DTAs partners, representing 41% of total signed African DTAs. The importance of the trade between the 2 continents could explain this trend.

African countries could be concluding more DTAs among themselves.

1.4 Scope of the research

This analysis, carried out using information available in the International Bureau of Fiscal Documentation database as of July 2011, is limited to the taxation of companies.

In addition, 20 African countries were covered namely Algeria, Angola, Benin, Botswana, Cameroon, Central African Republic, Democratic Republic of Congo, Egypt, Ethiopia, Ghana, Kenya, Madagascar, Morocco, Mozambique, Nigeria, Senegal, Tanzania, Togo, Tunisia and South Africa.

2. Developments in domestic taxation

This research could not be carried out without understanding how domestic taxation deals with some concepts such as residency, permanent establishment (PE), unilateral relief and management or technical services fees.

2.1 The concept of residency

One of the major issues in international context relates to the concept of residency. The key criterion for fiscal residency (for corporations) is the place of incorporation for countries such as Algeria, Benin, Togo, Tunisia, Senegal, Democratic Republic of Congo and Central African Republic.

With respect to Morocco, a company is deemed to be non-resident if it has its legal seat outside Morocco. Therefore, it can be inferred that a resident company would be the antithesis of the non-resident company. In other words, a company is deemed to be resident if it has its legal seat there.

Regarding Cameroon, the Tax Code does not provide any express definition of the concept of residency for companies. The territoriality rule included in Article 5 of the Tax Code states that corporate tax is due by companies operated in Cameroon.

In South Africa, the criteria for residency are incorporation and Place of Effective Management. Effective management refers to the place where the operative, day-to-day management of the company takes place, or where the company is managed by the directors or senior managers on a regular basis. This view of the tax authorities differs from that taken by both OECD and UN. For the OECD and the UN, the place where the overriding control is exercised or where the board of directors meets is relevant.

It has been noticed that few African countries namely Angola, Egypt, South Africa, Botswana and Ethiopia define the concept of residency under their domestic tax law or use the concept of place of effective management (POEM) or centre of management as a criterion for residency.

Most of the countries studied use POEM as a tie breaker rule for companies under their DTAs although the concept is generally neither a criterion for residency nor defined under their domestic tax law.

2.2 The PE concept

The Permanent Establishment concept was the second point to be analyzed.

2.2.1 Definition

Most of the countries covered do not have a PE

definition under their domestic tax law although a reference to PEs is found in their tax code.

In few cases, the concept of PE is defined by the Tax Code and follows closely the UN Model (Botswana, Tanzania) or the OECD Model (South Africa, Mozambique).

2.2.2 Agency PE

Agency PE provisions are available under domestic tax law of countries such as Central African Republic, Egypt, Ghana and Nigeria. For the majority of the remaining countries, the only reference to Agency PE is found in their tax treaties.

A question was raised during this research: Can a country tax under agency PE according its DTAs although this taxing right does not exist under its domestic law? Would this be contrary to one of the fundamental rules of tax treaties which state that a tax treaty cannot create a tax liability which does not exist under domestic law?

2.2.3 Force-of-attraction principle

Regarding the force-of-attraction principle, except for Angola, there is no written rule in the tax code implementing the force-of-attraction principle in the countries covered in this research.

However, it is not excluded that in practice (as it is the case in Cameroon and Togo) during tax auditing, tax administration may attempt to collect taxes on the basis of this principle, in situations where a non-resident company with a local PE runs a taxable operation in the country.

2.2.4 Branch profit tax

Half of the countries covered have a branch tax which is levied on the profits of branches of foreign companies in addition to the normal corporate tax rate. The tax is generally applicable on repatriated profits only. The branch profit tax is in general equal to the dividend withholding rate for legal entities.

The effective rate of the branch tax is around 10% for the countries covered. Higher rates are applicable in Togo (20%), Cameroon (16.5%) and Algeria (15%).

In Senegal, the branch profits tax is levied even when the permanent establishments' profits are exempt from corporate income tax.

2.3 Unilateral relief

Generally, resident companies are subject to corporate income tax on their worldwide income.

However, some countries apply the territorial principle for active income (business profit) while passive income (dividends, interest and royalties) is taxed on a worldwide basis as it is the case for Morocco, Tunisia, Senegal, Madagascar, Central African Republic, Benin and Algeria.

As a general rule, there is no unilateral double taxation relief under domestic tax law in respect of foreign taxes paid.

One could notice that in general African countries need to conclude more DTAs to attract investors in order to eliminate double taxation that may arise in cross-border situations.

2.4 Management or technical services fees

The notion of "Management and technical services fees" may be defined as any amount payable for administrative, managerial, technical or consultative services or similar services.

Almost all countries (except Democratic Republic of Congo) covered in the analysis levy a withholding tax for management and technical services fees.

The withholding tax rates are generally between 10% and 20%.

Management and professional fees are subject in Kenya and Egypt to withholding tax at the rate of 20% if paid to a non-resident person with no PE there.

Management and professional fees are subject to withholding tax at the rate of 20% if paid to a non-resident person with no PE in Kenya.

In Benin, remuneration for technical assistance and management fees paid to non-resident companies will be subject to a 12% withholding tax.

3. Distinctive features of African tax treaty practice

Countries	Number of tax treaties signed
South Africa	74
Egypt	63
Morocco	54
Tunisia	52
Algeria	36
Senegal	16
Nigeria	15
Ethiopia	13
Kenya	13
Botswana	12
Tanzania	10
Ghana	9
Mozambique	7
Cameroon	4
Dem. Rep. of Congo	3
Benin	3
Togo	3
Central Africa	2
Madagascar	2
Angola	0
Total	**391**

The current research project covers about 400 DTAs and amending protocols which have been concluded in the mid 20th century to nowadays. As it will be discussed in more details below, African taxation treaty practice has many distinctive features. One of the goals of this part is to assess whether Africa begins to move to a more source based tax treaty policy.

3.1 Tie breaker rule

Most DTAs signed by African countries uses POEM as a tie breaker rule for dual resident companies which is also the criterion used by both the UN and OECD Models.

However, and as mentioned earlier in this article, the concept of POEM is not defined under the domestic law of the countries covered.

Very few countries use registration, incorporation or legal seat as a criterion for residency in their DTAs. Examples include Madagascar-France DTA (1983), Nigeria-Canada DTA (1992) and Morocco-France DTA (1970).

Others (*i*) use the criterion of nationality before the POEM, (*ii*) start with the POEM and switch to the mutual agreement or (*iii*) directly prescribe a mutual agreement between competent authorities.

The nationality and the mutual agreement criteria are often used in situations where the treaty partner is Canada. Examples include DTA with Tanzania (1995) and Kenya (1982).

3.2 The building or construction site

"Building or construction sites" provision included in the PE article was analyzed to find out whether most of the countries covered use or not a period shorter than the 12 months as it is included in the OECD Model.

The results of the study have shown that the most of the countries covered (except South Africa in its treaties with OECD countries) use a period shorter than the 12 months recommended by the OECD Model.

The majority of them follow the minimum period of 6 months as prescribed by the UN Model.

However, a few of them also use periods such as 3 months (Nigeria), 9 months (Ghana) or no time period (Senegal).

3.3 Furnishing of services

The "furnishing of services" provision as contained in paragraph 3(b) of Article 5 of the UN Model was used as a reference.

This provision states that the term PE also includes "*the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than six months within any twelve-month period.*"

The outcome of this research has shown the following trend: several recently signed DTAs include such a provision.

The majority of these DTAs include a minimum period of six months. However, minimum periods such as 3 or 2 months or 75 days are also found in some DTAs signed by Algeria and Morocco.

3.4 Agency PE

An "agency PE" provision was included in all DTAs analyzed. Nevertheless, as it has been noted earlier, the taxing right does not exist under domestic law for the majority of the countries covered.

In addition, some countries such as Senegal, Kenya, Nigeria, Cameroon, Togo, Madagascar, Tunisia, Morocco and Central Africa include in the majority of their tax treaties the extended provision of the agency PE as it is provided in paragraph 5(b) of Article 5 of the UN Model. The provision states that a person without the authority to conclude contracts in the name of the enterprise may nonetheless be considered a dependent agent and constitute a PE in situations where the person maintains *a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.*

3.5 Force-of-attraction principle

Article 7, paragraph 1 of the UN MC contains a limited force of attraction provision that subjects not only the profits of a PE to taxation in the PE State, but also the profits from the sales in that State of the same or similar goods or merchandise to those sold through the PE and profits from other business activities in that State of the same or similar kind to those effected through the PE.

The limited force-of-attraction provision is included by some countries but only in a very limited number of their DTAs.

In addition, it has been noticed that most of the African DTAs signed with Indonesia includes such a clause. Examples include DTA with South Africa (1997), Egypt (1995) and Morocco (2008).

3.6 Branch profits tax

Few countries, namely Morocco, Tunisia, Cameroon and Senegal include a branch profits tax in their DTAs although more than half of the countries covered have such a tax under their domestic law.

Failure for African countries to include such a provision in their tax treaties could be the result of the negotiating power of their tax treaty partners.

Generally, the branch tax rates vary from 5% to 20%. Higher rates are applicable in Cameroon (15% and 20%), Senegal (5%, 10% and 16%), and Tunisia (12% and 15%). Morocco has lower rates (5%, 6%, 7%, 8% and 10%).

3.7 Management or technical fees

The analysis showed that few countries, including Tanzania, Botswana, Morocco and Ghana, include the provision of management or technical fees either in the definition of royalties or in a separate article.

Nevertheless, almost all of the countries covered have this provision under their domestic laws.

3.8 Tax sparing

The last provision to be scrutinized was the tax sparing provision. This author believes that it is an important provision to be included by developing countries in their tax treaties, although OECD and developed countries have become more reluctant to grant such a clause in their tax treaties because of taxpayer abuse.

Indeed, few countries were able to include such a provision in a limited number of their tax treaties. The tax sparing was found to cover income tax in general, or dividends, or interest and royalties, or only dividends. It was also often found to be limited in time to the first 5 or 10 years.

4. Conclusion

The results of this research can be interpreted in various ways. Only the more general observations are included in this conclusion.

Perhaps the most fundamental conclusion of this research is that African countries should review their domestic law and try to fill in the gaps especially when the taxing rights are granted

under their DTAs while the same taxing rights do not exist under their domestic tax laws.

Another general conclusion is that African countries prefer to follow the standard provisions of the UN Model. Developed countries should, in this respect, help developing countries to keep their taxing rights by preserving the source based taxation.

South-south cooperation needs to be strengthened. For instance, the top 5 African countries, as seen earlier in this paper, could serve as a locomotive in terms of international taxation expertise. In addition, training in international taxation should be among the priorities of African tax officers.

1. UN Model Tax Convention on Income and Capital (11 January 2001).
2. OECD Model Tax Convention on Income and Capital (22 July 2010).