2020

Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unavailing Efforts and an Argument for Reform

Oladiwura Ayeyemi Eyitayo-Oyesode
oladiwura.eyitayo@dal.ca

Recommended Citation

Oladiwura Eyitayo-Oyesode, Source-Based Taxing Rights from the League to the OECD Model Convention 2014: Unavailing Efforts and the Formulary Solution, (2020) 13:1 L & Dev Rev 193.

Oladiwura Ayeyemi Eyitayo-Oyesode*

Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unavailing Efforts and an Argument for Reform

https://doi.org/10.1515/ldr-2018-0073

Abstract: A significant number of scholars have written about the nexus between fairness in the allocation of taxing rights in double taxation treaties and sustainable development in developing countries. These scholars have argued for expansive taxing rights for developing countries, as against the current source- restricting provisions in taxation treaties between developed and developing countries based on the OECD and UN Model taxation treaties. They have also highlighted the need for developing countries to critically assess their treaty networks, and to consider gaps in their local laws and policies that encourage revenue loss. This paper contributes to this body of knowledge by identifying provisions in Nigeria's double taxation treaties that encourage revenue loss. It concludes by recommending amendments to Nigeria's double taxation treaties.

Keywords: international taxation, double taxation treaties, source countries, residence countries, inter-nation equity

> One of the important issues for international taxation is to effect a division of revenue between two countries where income sourced in one country is derived by a resident of the other country. This division has equity consequences as between nations. If investment and income flows are in balance between two countries, it is possible to achieve a fair division of tax revenue by giving greater emphasis to exclusive residence country taxation. If the flows are not in balance, it is necessary to agree to a balance between residence and source taxation to achieve a division of revenue that is acceptable (and fair) to both countries.[1]

1 Richard J. Vann, "Current Trends in Balancing Residence and Source Taxation" (2014) Sydney Law School Legal Studies Research Paper No. 14/107 1 at 8. Available at SSRN: <www.ssrn.com/abstract=2538269>.

***Corresponding author: Oladiwura Ayeyemi Eyitayo-Oyesode,** Schulich School of Law, Dalhousie University, Halifax, Nova Scotia B3H 4R2, Canada, E-mail: oladiwura.eyitayo@dal.ca

1 Introduction

Transnational business activities by multinational corporations (MNCs) necessitate the harmonization of the taxation rules of states usually for the following reasons: prevention of international double taxation,[2] "encouraging cross-border economic activity, preventing international tax avoidance and evasion, and more generally, strengthening political ties with the partner country".[3] This harmonization takes the form of double tax treaties between states, which are now about two thousand and six hundred in number.[4]

Double tax treaties are international agreements between states, binding on states under the honoured *pacta sunt servanda* customary rule of international law.[5] Nearly all double taxation treaties are mirrored in line with the OECD Model Double Tax Convention on Income and Capital, 2017[6] (the OECD Model) and the UN Model Double Taxation Treaty between Developed and Developing Countries, 2017[7] (the UN Model). These two conventions serve as model treaties containing common terms, including the rules governing allocation and exercise of taxing rights by states. The rules divide taxing rights with respect to profits derived by MNCs from their cross-border activities between states as "source" and "residence" states, respectively. These rules can be traced to the report of four economists, Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp, who formed the Fiscal Committee of the League of Nations in 1923.[8] They were developed by the League of Nations (the League) as mechanisms for the prevention of double taxation of MNCs, a practice which characterized the taxation of the cross-border activities of MNCs by developed countries.[9] On its part, the OECD formally adopted and modified these rules in 1977 to serve as a template for double tax treaties between developed and developing countries.

---

2 Michael Lang, *Introduction to the Law of Double Taxation Conventions* (2013) IBFD, at 30.

3 Julia Braun and Martin Zagler, *An Economic Perspective on Double Tax Treaties with (in) Developing Countries*, World Tax Journal (2014), 242 at 243.

4 *Ibid*.

5 *Article 26* of the Vienna Convention of the Law of Treaties (1969). See also Klaus Vogel, *Double Tax Treaties and Their Interpretation*, 4 International Tax & Business Lawyer (1986), 1.

6 OECD, *Model Tax Convention on Income and Capital: Condensed Version 2017* (OECD Publishing, 2017).

7 United Nations, *Model Double Taxation Convention between Developed and Developing Countries* (2017).

8 See Sol Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (UK: Cambridge University Press, 1992) for the historical background of double taxation treaties.

9 *Ibid*.

The UN published the Model Double Taxation Convention in 1980 when it observed that past model tax conventions, including the OECD Model, failed to facilitate bilateral treaties between developed and developing countries. The UN noted that allocation rules in these past models favoured residence countries more than source countries.[10] The UN Model relied on the provisions of the OECD Model but modified it by relinquishing more taxing rights to source countries, different from the provisions of the OECD Model which favoured residence countries.[11]

Considering the divergence in the rules contained in the OECD and the UN Models regarding the exercise of taxing rights by source countries, this paper assesses the implications of the restrictive source-based taxing rights under the OECD Model. It also examines the impact of the expansive source-based taxing rights under the UN Model using Canada's Double Taxation Treaty with Nigeria as a case study.

The discussion is divided into five sections. Section 1, this Introduction, briefly sets out the theme of discussion and the line of argument pursued. Section 2 gives a historical account of the evolution of the current rules governing the exercise of source-based taxing rights under the OECD Model. The aim is to assess the context within which these rules emerged as tools adopted by the League[12] to harmonize unilateral taxation laws of developed countries for the prevention of double taxation. Section 3 assesses in detail the allocation rules under Articles 7–13 of the OECD Model. This section analyses the text of these rules, as well as the commentary on those rules, to establish the unfairness of the rules against source countries, especially where investment and income flows between source and resident countries are unbalanced. This section discusses the inadequacies of the rules in the context of the inter-nation equity principle,[13] as well as economic reasons why the restriction of source-based taxing rights under

10 See *supra* note 7, at vi–x. See also Alexander J. Easson, *The Evolution of Canada's Tax Treaty Policy Since the Royal Commission on Taxation*, 26 Osgoode Hall Law Journal (1986), 495; Kim Brooks, "Canada's Evolving Tax Treaty Policy in Globalization and its tax Discontents", in Arthur J. Cockfield (ed.), *Globalization and Its Tax Discontents: Tax Policy and International Investments* (Toronto: London: University of Toronto Press, 2010); Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfied Policies*, 26 Brooklyn Journal of International Law (2001), 1357 for a detailed discussion of the restrictive taxing rights under the OECD Model and the modification to those under the UN Model.

11 *Ibid*.

12 The League of Nations' work in harmonizing taxation laws of states preceded that of the OECD. The League functioned in this regard from 1923 till 1954 when it became defunct.

13 In the context of this paper "Inter-nation Equity" means the "equitable division of the tax revenue between countries": see Peggy Musgrave, *United Taxation of Foreign Investment Income: Issues and Arguments* (Cambridge: Harvard Law School, 1969) at 131. See also Alex J.

the OECD Model is unjustifiable. As an alternative to the restrictive source-based taxing right under the OECD Model, Section 4 examines the source-expanding provisions under Canada's Double Taxation Treaty with Nigeria which mirrors the UN Model. Although the UN Model expands source-based taxing rights, the argument made in Section 5 of this paper is that the UN Model only varies slightly from the OECD Model. This section also discusses the minimal impact that source-expansive rules in the Canada-Nigeria treaty has on Nigeria's economy due to the low foreign direct investment (FDI) inflows from Canada to Nigeria. Altogether, this paper concludes by recommending the assessment and reform of Nigeria's tax treaties, whether based on the OECD Model or on the UN Model, to ensure that economic activities carried on by non-residents within the country are fully taxed.

2 Source-Based Taxing Rights under the OECD Model

2.1 The League of Nations and Tax Law Harmonization

The current rules in the OECD Model which allocate taxing rights between source and residence countries, come from the report by the Fiscal Committee of the League in the 1920s. The rules were intended to serve as mechanisms to balance the taxation of the profits of MNCs by developed states for the prevention of double taxation.[14] The League's effort to balance the taxation laws of

Easson, *International Tax Reform and the Inter-Nation Allocation of Tax Revenue* (Wellington, NZ: Victoria University Press, 1991); Jinyan Li, "Improving Inter-Nation Equity", in Arthur Cockfield (eds.), *Globalization and its Tax Discontents: Tax Policies and International Investments: Essays in Honour of Alex Easson* (Toronto: University of Toronto Press, 2010), pp. 117–137; Nancy B. Kaufman, *Fairness and the Taxation of International Income*, 29 Law & Pol'y Int'l Bus (1997–1998), 145, 145 but see Kim Brooks, "Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Value" (October 30, 2008), *Tax Reform in the twenty-first Century*, Richard Krever and John G. Head (eds.), Kluwer Law International, Forthcoming. Available at SSRN: www.ssrn.com/abstract=1292370 where Brooks reviewed Peggy and Richard Musgrave's 1972 essay entitled "Inter-nation equity" in Richard M. Bird and G. Head (eds.), *Modern Fiscal Issues: Essays in Honor of Carl S. Shoup* (Toronto: University of Toronto Press, 1972) as well as subsequent works of Peggy Musgrave on the subject and defined "Inter-Nation Equity" as "the allocation of national gain, which is affected by the source country's decision to tax (or not) the gain (or loss)".

14 Mitchell B. Carroll, *Global Perspectives of an International Tax Lawyer* (Hicksville: New York: Exposition Press, 1978) at 29; see also Picciotto *supra* note 8, at 22–23.

states began in the interwar years.[15] During this period, investment flowed from capital-exporting states (predominantly the US and Britain) to capital-importing states. The disagreement in the fiscal laws of capital-exporting countries and capital-importing countries needed to be harmonized to prevent MNCs from being doubly taxed in source countries (importing countries) and their home/resident countries (exporting countries) which would ultimately hinder international trade. For instance, Britain, a capital-exporting state, felt strongly about retaining its worldwide taxing rights over its residents wherever those residents earn their income, while France, a capital-importing state, levied tax on business profits as well as profits earned on securities derived by both domestic and foreign corporations in France.[16] The possibility of an MNC being doubly taxed exists under this circumstance if France were to levy income tax on profits derived within its jurisdiction by a Britain-resident corporation. This is one reason the allocation rules were developed by the League in 1928 through its model taxation treaty to divide taxing rights among developed countries.[17]

Consequently, a source country could only tax the profits of a non-resident enterprise derived from business activities carried on by such an enterprise within its jurisdiction if the enterprise had a permanent establishment, that is, a fixed place of business in the source country. On the other hand, resident corporations given residual taxing rights over the business profits of their residents subject to the existence of a foreign tax credit mechanism (FTC) which served as an offset to foreign taxes, paid residence countries which levied income tax on the worldwide income of their residents, to source countries. In addition, for investment income, that is, dividends, royalties and interests, primary taxing rights were given to resident countries, while source countries were allotted limited taxing rights. This category of income was regarded as personal income and the primary taxing right exercisable by resident countries over it was justified on the strong ties which resident countries have with the assets generating the income.[18]

The source rule prescribed by the League in 1928 for the exercise of taxing rights by source countries on the business incomes of non-resident enterprises was affirmed in 1935.[19] By the 1935 amendment, source countries could only

15 *Ibid*.
16 Picciotto *supra* note 8, at 25–26.
17 *Ibid*.
18 *Supra* note 14.
19 League of Nations, Article III (1) of the League of Nations Double Taxation Convention (1935), available at: <www.uni-heidelberg.de/institute/fak2/mussgnug/historyoftaxdocuments/normtexte/voelkerrecht/V00016.pdf>.

exercise taxing rights over the business incomes of non-resident enterprises if such income accrued from business activities carried on in source countries by permanent establishments of the non-residents and are attributable to those permanent establishments. The rule states as follows:

> An enterprise having its fiscal domicile in one of the contracting states shall not be taxable in another contracting state except in respect of income directly derived from sources within its territory and, as such, allocable, in accordance with articles of this convention, to a permanent establishment situate in such state.[20]

The significance of the allocation rules formulated by the League in 1928 lies in the restriction of source-based taxing rights and the grant of exclusive or primary taxing rights to residence countries.[21] Brooks argues that the situation before the adoption of tax treaties in the 1920s was, surprisingly, the reverse.[22] She argues that before the 1920s, source countries had the exclusive right to tax source income, while residence countries provided tax credit for taxes paid by their residents to source countries.[23] According to Brooks, the rules changed in the 1920s because it became necessary to restrict the taxing rights of source countries because developed countries had different rules regulating the exercise of taxing rights by "source" and "residence" countries. Therefore, it was expedient to enact uniform allocation rules to minimize incidences of double taxation, which could hinder international investment.[24] The preferred option was to restrict source-based taxing rights, while granting residence countries exclusive primary taxing rights.[25] Brooks further submits that exclusive taxing rights to residence countries was preferred because as at then, it was easy to determine where taxpayers were resident than it was to determine the source of income being taxed. The third reason Brooks cites is the Capital Export Neutrality principle, a subset of the Equality canon of taxation, which states that individuals are to be taxed equitably

20 *Ibid*.

21 Charles Irish, *International Double Taxation Agreements and Income Taxation at Source*, 23 International and Comparative Law Quarterly, no. 2 (1974), 292–316 at 293.

22 Kim Brooks, *Global Distributive Justice: The Potential for a Feminist Analysis of International Tax Revenue Allocation*, 29 Canadian Journal of Women and the Law, no. 2 (2009), 267–297 at 281–282.

23 *Ibid*.

24 See the Experts' Report on Double Taxation to the League of Nations in 1923, available at: <www.adc.library.usyd.edu.au/view?docId=split/law/xml-main-texts/brulegi-source-bibl-1.xml&chunk.id=item-1&toc.id=item-1&database=&collection=&brand=default> at 42 and 51 where the experts state that the exemption of non-residents from income taxation in source countries "is the most desirable practical method of avoiding the evils of double taxation and should be adopted wherever countries feel in a position to do so".

25 *Ibid*.

irrespective of where their income is earned.[26] These reasons seem valid when examined through the lens of the need to harmonize individual allocation rules to prevent double taxation. In addition, in the context of the function of income tax as a tool for distributive justice among states, restrictive source-based taxing rights had no negative effect on source countries during this period. This is because they were all developed countries. As such, any contraction of revenue that they suffered as source countries was easily made up for by the ability to tax residents on their worldwide income, seeing that the income inflows between them were equal, or nearly so.[27] Restrictive source-based taxing rights, however, do not have the same effect on source countries in the case of a tax treaty between a developed country and a developing country. The reason is that the income inflows are not equal between the countries. It is in this context that this paper argues that the allocation rules that were formulated and applied by developed countries in the early years, but are now being applied to developing countries, create inequitable consequences for the latter and, to that extent, need to be reformed.

Although, the League of Nations released model tax conventions after 1935, the allocation rules established in 1928, which were amended in 1935, were maintained in subsequent UN[28] Model Tax Conventions.[29] The next section examines the OECD's work on tax law harmonization.

2.1.1 The OECD and Tax Law Harmonization

The OECD, formerly the OEEC (Organization for European Economic Co-operation) took over from the League of Nations concerning harmonization of international taxation rules after the League became defunct in 1954.[30] The prevention of

26 Peggy Musgrave, "Combining Fiscal Sovereignty and Coordination: National Taxation in a Globalizing World," in Inge Kaul and Pedro Conceicao (ed.), *The New Public Finance Responding to Global Challenges* (New York: Oxford University Press, 2006), 167 at 170.

27 Brooks *supra* note 22.

28 The United Nations replaced the League of Nations after the end of the Second World War, in 1945, available at: <www.un.org/en/sections/history/history-united-nations/>.

29 See the commentary and text on the London and Mexico Model Tax Conventions of 1943 and 1946. C.88. M.88.1946-II-A (Geneva, November 1946), available at: <www.biblio-archive.unog.ch/Dateien/CouncilMSD/C-88-M-88-1946-II-A_EN.pdf>.

30 The OEEC was formed in 1947 to administer American and Canadian aid under the Marshall Plan for the reconstruction of Europe after World War II, see OECD, *Explorations in OEEC History* (Paris: OECD Publishing, 2009); see also OECD, *Draft Double Taxation Convention on Income and Capital* (Paris: OECD, 1963); Warren Christopher, *In the Stream of History: Shaping Foreign Policy for a New Era* (California: Stanford University Press, 1998).

double taxation with the goal to engender market reforms in the European Community[31] was a focal agenda pursued by the OEEC after World War II.[32] Consequent upon the success recorded by the OEEC in reforming the European Economic Community, it was redesigned as the OECD in 1961, with a wider mandate to develop policies that would enhance the economic development of member states, which, at this time, included non-European states.[33] At this time, investment flow had transcended the borders of developed countries and extended to developing countries, and the OECD, desirous to maintain economic ties with developing countries, designed a model double taxation convention to serve both developed and developing countries. This was because the OECD found that previous model tax conventions developed by the League of Nations did not contain provisions suitable to the peculiar needs of developing countries. The OECD notes as follows:

> [T]he essential fact remains that tax conventions which capital-exporting countries have found to be of value to improve trade and investment among themselves and which might contribute in like ways to closer economic relations between developing and capital exporting countries are not making sufficient contributions to that end … Existing treaties between industrialized countries sometimes require the country of residence to give up revenue. *More often, however, it is the country of source which gives up revenue. Such a pattern may not be equally appropriate in treaties between developing and industrialized countries because income flows are largely from developing to industrialized countries and the revenue sacrifice would be one-sided*. But there are many provisions in existing tax conventions that have a valid place in conventions between capital-exporting and developing countries too.[34] (Emphasis mine)

Although, the OECD highlighted the failures of past model tax conventions as to achieving fair division of taxing rights between developed and developing countries, the allocation rules under the OECD Model (from the first model of 1977, to the current 2017 model)[35] are, *in pari materia*, the rules prescribed by the League in 1928 as modified in 1935.[36] This then means that the observations by the OECD that the allocation rules developed by the League were biased against

31 *Ibid*. The European Economic Community was created by the Treaty of Rome in 1957 and renamed as the "European Community" upon the formation of the European Union in 2003. The EEC later ceased to exist upon its absorption into the present day European Union in 2009.
32 *Ibid*.
33 *Ibid*. Canada and the United States became members in 1961.
34 OECD, *Fiscal Incentives for Private Investment in Developing Countries: Report of the OECD Fiscal Committee* (Paris, 1965), para. 164.
35 *Supra* note 6. The OECD Model has gone through series of amendments beginning in 1977, 1992, 1994, 1995, 1997, 2000, 2002, 2005, 2008, 2010, 2014 and most recently, in 2017.
36 As outlined in Section 3 *infra*.

source countries, still holds true. These historical developments reveal the circumstances surrounding the adoption of the allocation rules by the League in 1928, and how the League affirmed these rules in subsequent Models. The OECD copied these rules in 1963, and they remain unchanged until today.

The next section assesses in detail, the implications of the OECD's restrictive source-based taxing rights under Articles 7 and 10–13 on source countries, using Nigeria as a case study.

3 Source-Based Taxing Rights under Article 7 of the OECD Model

Article 7 contains additional rules governing the exercise of taxing rights by source countries. The foundational rules regarding division of taxing rights among states is contained in Article 5. This provides that a source country can exercise taxing rights over the profits of a non-resident enterprise where such enterprise carries on business activities in the source country through a permanent establishment.[37] A permanent establishment is defined as "a fixed place of business in which the business of an enterprise is wholly or partly carried on".[38] The permanent establishment threshold is to "delineate the degree of contact a non-resident enterprise carrying on business in a jurisdiction requires before it is subject to tax there".[39] The term "permanent establishment" under the OECD Model includes especially: a place of management; a branch; an office; a factory; a workshop, a mine, an oil or gas well, a quarry or any other place of extraction of natural resources. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.[40] The OECD Model removes temporary structures with no degree of permanency to the situs from the definition of the term "permanent establishment". Structures maintained by non-resident enterprises in source countries for storage, display of delivery, for purchasing goods, or for a preparatory or

37 *Article 5(1)* of the OECD Model *supra* note 6.
38 *Ibid*.
39 Kim Brooks, "Canada's Evolving Tax Treaty Policy toward Low-Income Countries", in Arthur Cockfield (eds.), *Globalization and its Tax Discontents: Tax Policies and International Investments*: Essays in Honour of Alex Easson (Toronto: University of Toronto Press, 2010), pp. 189–211, at 195–196.
40 *Article 5(2) & (3)* of the OECD Model *supra* note 6.

auxiliary reason solely for the purpose of the enterprise, are excluded from the definition of a permanent establishment."[41]

3.1 Article 7: Background

Article 7 flows from the provisions of Article 5 and offers additional rules to govern the exercise of taxing rights by source countries on business profits of non-resident enterprises. This section analyses Article 7(1), which prescribes the circumstances under which source countries can tax the business profits of non-resident enterprises. I consider the implications of this rule on source countries, using Nigeria as case study. Article 7(1) of the OECD Model provides as follows:

> Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other State.

The analysis of this provision begins with the OECD commentaries.[42] The OECD commentary to this paragraph reveals that two rules are subsumed under this paragraph.[43] The first rule states that unless an enterprise carries on business activities in a source country through a permanent establishment, its profits are not subject to tax in the source country. This first rule reiterates the rule under Article 5, which exempts the profits of a non-resident enterprise from being taxed by source countries in the absence of a permanent establishment. The second rule is that the profits of an enterprise taxable in a source country are the profits that are attributable to their permanent establishment. This second rule is described in the commentary as the "attribution rule".[44]

The summary of these two rules is that a source country cannot tax the profits of a non-resident enterprise unless there exists substantial connection

41 *Article 5(4)* of the OECD Model *supra* note 6; see also Brooks *supra* note 39, 195–199 for a detailed assessment of the restrictive definition of a "permanent establishment under" under *Article 5* of the OECD Model compared with the equivalent provision under the UN Model.

42 International instruments, which include double tax treaties, can be validly interpreted to give meaning to their terms using commentaries to those instruments. See *Articles 31 and 32* of the Vienna Convention on the Law of Treaty, 1969; see also High Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, 22 Intertax (1994), 144.

43 OECD, *Commentary on Article 7(1) of the OECD Model supra* note 6, at 302, paragraph 1.

44 *Ibid.*

between the income of such a non-resident enterprise and that country.[45] The "substantial connection" must be the accrual of taxable profits of the non-resident enterprise from the activities carried on through its permanent establishment in a source country.[46] The import of both rules subsumed under Article 7(1) is to limit the right of source countries to tax the business profits of non-resident enterprises.[47]

A pertinent question that arises here in the context of the inter-nation equity principle is the essence, and perhaps, the justification for the "permanent establishment" principle in the OECD Model, seeing that it restricts source-based taxing rights. Considering the history of the OECD Model, which shows that the OECD adopted the allocation rules that were prescribed by the League in the 1920s, I discuss below the *raison d'etre* for the adoption of the permanent establishment principle by the League, before moving to argue in subsequent sections how the principle in the OECD Model creates unfair consequences for source countries in tax treaties between developed and developing countries, and even in tax treaties between some developing countries. In discussing the permanent establishment threshold, the following questions come to mind: If fairness implies that countries be compensated for their contributions to income derived from activities carried on within their jurisdictions, why is there a qualification to the exercise of taxing rights if exercised legitimately? Put another way, why is there an insistence on the existence and attribution of business income of non-residents to a "fixed place of business", which can be easily dispensed with in light of technological developments,[48] before source countries can exercise their taxing rights under the OECD Model?

The permanent establishment principle was first found in the tax treaty between Austria-Hungary and Prussia in 1899.[49] The league adopted it in the 1920s as a mechanism to solve issues of double taxation that may arise when source and residence countries concurrently exercise their taxing rights over

45 Mary C. Bennett, Carol A. Dunahoo Baker and LLP McKenzie, *Washington The Attribution of Profits to a Permanent Establishment: Issues and Recommendations*, 33 Intertax, no. 2 (2005), 51.
46 *Ibid*.
47 *Supra* note 43, para. 14.
48 For instance, in e-commerce where economic activities are carried out over the internet without the need for a 'fixed place of business' as prescribed under the OECD Model, See Arthur Cockfield, *Balancing National Interests in the Taxation of Electronic Commerce Business Profits*, 74 Tulane Law Review (1999), 133–217.
49 Arvid A. Skaar, *Permanent Establishment: Erosion of a Tax Treaty Principle* (Boston: Kluwer Law and Taxation Publishers, 1991), 65–101.

corporations.[50] To relieve double taxation, the League stated that source countries would have to give up their tax revenue from foreign investors except in "pure and predominant origin assets, such as land and real estate", which translates to income from a fixed base in source jurisdictions,[51] equivalent to the definition of permanent establishment.[52] Even though the League recognized that this mechanism does violence to the interests of source countries where investment inflows are unbalanced (in the sense that it prevents them from reaping from their contributions to income produced from activities carried on in their jurisdictions), it still recommended this approach as the most desirable among the other options considered.[53] Thus, the League chose to resolve the efficiency problem of double taxation at the expense of distributive justice. The League stated clearly that source countries were to bear the cost of relieving double taxation.[54] However, as argued above, this policy was justifiable as at the time it was adopted because income flows among treaty countries were balanced. In the context of modern treaties, however, source restricting provisions create inequities for source countries. Before I assess the implications of the permanent establishment principle on source countries, especially in double tax treaties between developed and developing countries, and between developing countries in certain instances, I move next to establish how Articles 10–12 of the OECD Model also restrict source-based taxing rights.

3.1.1 Restrictive Source-Based Taxing Rights under Articles 10–12 of the OECD Model

Similar to the effect that Article 7 of the OECD Model has on source countries, Articles 10–13 of the OECD Model present additional instances of source-based

50 Michael J. Graetz and Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 Duke Law Journal (1997), 1021–1110, 1088.

51 Report on Double Taxation submitted to the Financial Committee – Economic and Financial Commission Report by the Experts on Double Taxation – Document E.F.S.73. F.19 (April 5, 1923) – Volume 4 Section 1: League of Nations, available at: <www.//adc.library.usyd.edu.au/view?docId=split/law/xml-main-texts/brulegi-source-bibl-1.xml;collection=;database=;query=;brand=default> at 49.

52 As outlined in Section 3 *infra*.

53 See p. 50 of the 1923 Report *supra* note 51 where the Experts stated as follows: " … At the present stage of our considerations, however, we do not see any other form of compromise which is likely to reconcile the conflicting interests and to have any prospect of success …".

54 Report on Double Taxation submitted to the Financial Committee – Economic and Financial Commission Report by the Experts on Double Taxation – Document E.F.S.73. F.19 (April 5, 1923) – Volume 4 Section 1 *supra* note 51, at 40.

restrictions. Article 10 restricts source taxation of dividends to 5% of the gross amount of the dividends if the beneficial owner holds directly at least 25% of the company paying the dividends throughout a 365-day period, and up to 15% of the gross amount of the dividends in other instances. Article 11 restricts the taxing rights of source countries over interest payments to 10% of the gross amount of the interests. Article 12 totally forbids source countries from taxing royalties.[55]

In general, several reasons have been adduced for the limitation placed on the taxing rights of source countries under the OECD Model. Some of the reasons are as follows: that source countries lack information about the overall activities of non-resident enterprises needed to arrive at the taxable profits if the source-based taxing right is expanded[56]; minimization of double or inappropriate taxation; promotion of certainty to MNCs[57]; minimization of compliance burdens; prevention of shift in tax revenues from residence countries to source countries; and prevention of difficult and subjective tax treaty provisions.[58]

Interestingly, however, the consequences highlighted as reasons for the restriction of source-based taxing rights exemplify the gaps in international taxation. For instance, the challenge of double taxation, which was a major reason for the enactment of the OECD Model, the UN Model and, indeed, previous models by the League, still persists despite the attempts to fashion viable methods to prevent double taxation such as the inclusion of the FTC mechanism in these Models. The FTC was designed to be utilized by residents to offset foreign taxes paid to source countries by corporations resident in their countries.[59] The problem of double taxation stems from the allocation rules which only attempt to divide taxing rights over the profits of MNCs among states in an order of priority of economic allegiance regarding the type of income, but not to preclude states from taxing the income of MNCs either as source or residence states. For instance, the exercise of a primary taxing right over the business profits of non-residents by source countries does not preclude the

55 *Supra* note 6.

56 *Ibid*.

57 Some developed countries also raised this point in the discussion preceding the adoption of the UN Model, See Paragraph 6 of the commentary on Article 7(1) of the UN Model, *supra* note 7, at 142. See also Kim Brooks, *Tax Treaty Treatment of Royalty Payments from Low-Income Countries: A Comparison of Canada and Australia's Policies* 5 eJournal of Tax Research, no. 2 (2007), 168–197.

58 *Ibid*.

59 The FTC was first introduced by the United Kingdom in 1894 but later expanded in 1945 also adopted by the US in 1918, see Graetz and O'Hear *supra* note 50, 1022–1109 for a detailed history of the evolvement of the FTC mechanism.

residence country from exercising residual taxing rights over the same income.[60] Although tax treaties are binding on signatories, the lack of effective enforcement mechanisms in international taxation is an incentive for states to dishonour their commitments. Kaufman sums up the current situation in the following words: "More than a thousand bilateral income tax treaties in force around the globe operate to minimize, but by no means eliminate, such double taxation".[61] The exercise of taxing rights by source and residence countries based on the allocation rules is, therefore, deeply rooted in the notion of fiscal sovereignty, which allows states to levy tax on their subjects, be it persons, property, or business.[62] The problem of double taxation of business income can only be solved when tax is levied on the basis of economic nexus, that is, taxation of income arising from economic activities carried on within a jurisdiction, rather than on the sole basis of status, such as nationality/citizenship, place of incorporation or place of management. This does not imply that residence taxation will not feature under this arrangement. What it means is that residence countries will only tax income that has some level of economic connection to activities carried on within their jurisdictions. In addition to the economic nexus rule, there is also the need for effective coordination of characterization of income by tax treaty countries to avoid double taxation.[63]

In addition, the problem of lack of information on the global business of MNCs raised by the OECD as a justification for non-expansion of source-based taxing rights is a major challenge which nearly all countries face at present. This is because MNCs carry on integrated businesses. As such, the statements of the global business of an MNC remain relevant to effectively tax the profits of related entities. This is the underlying reason for the OECD's Country-by-Country reporting Rules, which require MNCs caught by the provisions of the rules to file with relevant tax authorities, reports detailing the operations of

60 Nancy B. Kaufman, *Fairness and the Taxation of International Income*, 29 Law & Pol'y Int'l Bus (1997–1998), 145 at 147, citing United Nations Centre on Transnational Corporations, "International Income Taxation and Developing Countries" (1998).

61 *Ibid, at* 151.

62 J. Field, in State Tax on Foreign-Held Bonds, I5 Wall. (U. S) cited in Joseph H. Beale, *Jurisdiction to Tax*, 32 Harvard Law Review, no. 6 (1919), 587–633 at 587.

63 See the Pierre Boluez *v*. Commissioner case (1984) 83 T.C. 584. In this case, the competent authorities of the US and Germany could not reach a consensus on the characterization of Mr Boulez's income for tax purposes. The US insisted that the income arose from the performance of services in the US, thus was taxable in the US. Germany, on the other hand, insisted that the income were royalties, and therefore were only taxable in Germany based on the US-Germany tax treaty.

their global businesses.[64] With the cooperation of all countries, it is believed that the Country-by-Country Reporting Rules will achieve their intended objectives but not without amendments to some key provisions.[65]

In summary, international tax problems exist at present even with the restriction of source-based taxing rights under the OECD Model. The prevalence of these challenges is proof that restrictive source-based taxing rights in tax treaties do not resolve the problems in international taxation. Rather, what the circumstances surrounding the adoption of tax treaties between developed countries and most developing countries reveal is that the economic and political strength of developed countries, which place them at a stronger bargaining position, is likely a major factor behind the retention of restrictive source-based taxing rights in tax treaties.[66]

The next section assesses in detail, the implications of Articles 7 and 10–12 of the OECD Model on source countries.

3.1.1.1 Articles 7(1) and 10-12 of the OECD Model: An Assessment

The critical point here is that the "permanent establishment test and attribution rule" under Article 7(1) and the restrictions under Articles 10–12 of the OECD Model have negative equity consequences. The first reason is that the permanent establishment test and attribution rule preclude source countries from taxing the business profits of non-resident enterprises made outside their permanent establishments within their jurisdictions. Second, the restrictions and total exemption under Articles 10–12 allocate more taxing rights to residence countries without any economic basis. To this end, the attribution rule under Article 7 and the restrictions under Articles 10–12 violate the "inter-nation equity principle" which ensures "equitable division of the tax revenue between countries".[67]

This paper argues that since equitable division of taxing rights necessitates fair allocation of benefits among countries based on their level of contributions to activities generating such benefits, the allocation of taxing rights should be

---

64 Action Plan 13, OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing, 2013).

65 See Oladiwura A. Eyitayo, *Profit Shifting by Canadian Multinational Corporations: Prospects of Reversal under Canada's Country-by-Country Reporting Rules*, 26 Dalhousie Journal of Legal Studies (2018), 79, available at: <www.//heinonline.org/HOL/LandingPage?handle=hein.journals/dalhou26&div=7&id=&page=> for a discussion of the gaps in the OECD's Country-by-Country Reporting Rules.

66 Irish *supra* note 21, at 298–299.

67 Peggy B. Richman, *Taxation of Foreign Investment Income: An Economic Analysis* (Baltimore: Johns Hopkins Press, 1963), at 49; Richard A. Musgrave, *Fiscal Systems* (Connecticut: Yale University Press, 1969), at 238.

based on the level of economic activities occurring within each country.[68] This approach will ensure that source countries' contributions to all forms of economic activities resulting in business income are adequately compensated through the ability to levy income tax on those income in proportion to the activities carried on within such jurisdictions.

Peggy Musgrave who developed the "inter-nation equity" principle, argues that the issue of equitable division of tax revenue among the countries concerned in the transactions of MNCs is an important question in international business transactions.[69] She notes that "international revenue sharing, as an aspect of the taxation of foreign investment, is a matter of inter-nation equity … "[70] Musgrave justifies the entitlement of source countries to tax income derived from business activities carried on within their jurisdictions both by resident and non-resident entities in the following words:

> A country is expected to share in the gains of foreign-owned factors of production operating within its borders, gains that are generated in cooperation with its own inputs, whether they be natural resources, an educated or low-cost workforce, or proximity to a market.[71]

The right of source countries to tax business profits of non-resident enterprises "may be thought of as a national return to the leasing of these complementary factors to non-resident investors or temporary workers".[72] In sum, Musgrave links the entitlements of source countries to tax both the business and investment income of MNCs to the notion of sovereignty. This entitlement follows the

68 See Arthur Cockfield, *Reforming the Permanent Establishment Principle through a Quantitative Economic Presence Test*, 38 Canadian Business Law Journal (2003), 400–422. In this article, Cockfield argues for a replacement of the permanent establishment test with the quantitative economic presence test. This approach would enable source countries to tax income from all economic activities occurring within their jurisdictions even without the existence of a fixed place of business.

69 Peggy B. Musgrave, *United States Taxation of Foreign Investment Income: Issues and Arguments* (Cambridge: Law School of Harvard University, 1969), at 130; see also Richard Musgrave, "The Carter Commission Report" (1968), at pp. 180–181. Peggy and Richard Musgrave also used the term "inter-nation equity" as the national gain or loss accruing to a state upon the imposition of a tax in their article entitled "Inter-Nation Equity" in *Modern Fiscal Issues: Essays in Honour of Carl S. Shoup*, 1972. Other scholars have also employed the term "Inter-Nation Equity" in their works. see generally, Kim Brooks, "*Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Value*" for a review of Peggy Musgrave's works on "Inter-Nation Equity" for a detailed assessment of the use of the term both by the Musgraves and other authors.

70 Peggy Musgrave *Ibid*, *at* 133.

71 Peggy Musgrave *Supra* note 26, at 172.

72 Musgrave *supra* note 26, at 168.

capital-importing neutrality principle (the CIN principle) which states that a tax system "should not distort the choice facing savers to invest at home or abroad" and, thus, makes it possible for source countries to treat both domestic and foreign investors in the same way.[73] Musgrave describes the right of a source country to tax all the income of non-residents arising within its borders as a norm of inter-nation equity, distinct from the equitable right of a resident country to tax its residents.[74]

What Articles 7(1) and 10–12 of the OECD Model do is deprive source countries of their fair share of benefits that ought to compensate them for their contributions to the activities of non-residents carried on in their jurisdictions.[75] This occurs when the economic activities performed by non-residents in source countries do not fall within the definition of permanent establishment under the OECD Model; when the income of non-residents cannot be attributed

73 Arthur Cockfield "Taxing Foreign Direct Investment in a Non-Cooperative Setting: Contributions by Alex Easson", in Arthur Cockfield (ed.), *Globalization and its Tax Discontents: Tax Policies and International Investments: Essays in Honour of Alex Easson* (Toronto: University of Toronto Press, 2010), 18–34 at 20; see also Thomas Rixen, *The Political Economy of International Tax Governance* (United Kingdom: Palgrave Macmillan, 2008), at 62.

74 *Supra* note 70.

75 See Jalia Kangave, *Taxing TWAIL: A Preliminary Inquiry into TWAIL'S Application to the Taxation of Foreign Direct Investment*, 10 International Community Law Review (2008), 389–400. In this article, Kangave queries the import of Double Taxation Agreements in general in facilitating development in third world countries. She argues that the inequality in the income inflows between developed and developing countries due to immigration and financial constraints on the part of residents of developing countries lead to only the residents of developed countries benefiting from the reduced rates under Double Taxation Agreements. Kangave also argues that the exemptions in double taxation treaties between developed and developing countries occasion revenue loss to developing countries, which ultimately, negatively, affect third world peoples.

See also Martin Hearson and Jalia Kangave, *A Review of Uganda's Tax Treaties and Recommendations for Action*, Institute of Development Studies, International Centre for Tax and Development Working Paper (London, UK 2016), p. 50. Hearson and Kangave argue that developing countries need to revisit their treaty networks in light of the findings that show that tax treaties concluded between developing countries and developed countries have a strong bias for residence taxation. For details about the interplay of political and economic factors in negotiation of tax treaties between developed and developing countries, see Martin Hearson, *When Do Developing Countries Negotiate Away their Corporate Tax Base?* 30 Journal of International Development, no. 2 (2018), 233–255; Martin Hearson, *Measuring Tax Treaty Negotiation Outcomes: The ActionAid Tax Treaties Dataset Working Paper*, Institute of Development Studies, International Centre for Tax and Development (Brighton, UK, 2016), p. 47; Martin Hearson, "The UK's Tax Treaties with Developing Countries During the 1970s", in Peter Harris and Dominic de Cogan (eds.), *Studies in the History of Tax Law* (United Kingdom: Hart Publishing, 2017).

to permanent establishments; or through the limitation of source tax rates on passive investment income. The inequitable consequences of Articles 7(1) and 10–12 of the OECD Model in tax treaties between developed and developing countries is what this paper argues against.

As well, it must be emphasized that inter-nation equity is crucial in dividing taxing rights among states where investment flow and income are not in balance. As Vann argues, where contracting states have the same or nearly the same level of investment flow, even where source-based taxing rights are restrictive, the expansive residence-based taxing rights will make up for the imbalance.[76] Vann considers extensively the implications of having restrictive source-based taxing rights in double tax treaties. His observations are summed up thus:

> One of the important issues for international taxation is to effect a division of revenue between two countries where income sourced in one country is derived by a resident of the other country. This division has equity consequences as between nations. If investment and income flows are in balance between two countries, it is possible to achieve a fair division of tax revenue by giving greater emphasis to exclusive residence country taxation. If the flows are not in balance, it is necessary to agree to a balance between residence and source taxation to achieve a division of revenue that is acceptable (and fair) to both countries.[77]

The quote above sums up the argument of this paper that the allocation rules in tax treaties are biased against developing countries because the FDI inflows between developed and developing countries are unbalanced. In other words, the circumstances that should govern the division of taxing rights in tax treaties between countries where investment flow is not at par ought to differ from those regulating division of taxing rights between countries with equal or nearly equal economic influence. The question raised by an assessment of Articles 7(1) and 10–12 turns on the similarity in the allocation rules which were developed for developed countries by the League and the rules contained in the OECD Model which are being applied to developing countries. Easson critiques the allocation rules under the OECD Model as being "a more or less accidental result of the attempt to eliminate double taxation … by major capital-exporting countries"[78] He sums up his observations about the inadequacies of the rules in the following words:

76 Vann *Supra* note 1.

77 Vann *Supra* note 1, at 7.

78 A.J. Easson, *International Tax Reform and the Inter-Nation Allocation of Tax Revenue* (Wellington: Victoria University Press, 1991), at 20.

> … the present division has been a more or less accidental result of the attempt to eliminate double taxation … since the principal architects of these model treaties have been the major capital-exporting countries, it seems reasonable to suppose that, to the extent that the existing arrangements are inequitable, they operate to the prejudice of countries that are primarily importers of capital, and as the great majority of lesser-developed countries fall into this category, there is the further consideration that some redistribution in favour of source countries would on balance be desirable and would promote a form of vertical equity among nations.[79]

The relationship between Nigeria as a source country with an insignificant amount of investment outflow, compared to Britain, for instance, which is a major emerging economy with massive investment outflows as the residence country, exemplifies an unbalanced economic relationship. In this scenario, inter-nation equity is jeopardized when Nigeria is prevented from exercising taxing rights over profits derived by an enterprise resident in Britain from business activities directly carried on by such an enterprise in Nigeria, such as is the case in Nigeria's Double Taxation Treaty with Britain.[80] This position

---

79 *Ibid*. See also David Rosenbloom and Stanley Langbein, *United States Treaty Policy: An Overview*, 19 Columbia Journal of Transnational Law (1981), 359 at 392–393. These authors confirm that both the OECD and US Model Treaties are not designed for tax treaties between developed and developing countries, and as such, impose substantial revenue burden on developing countries. They argue as follows: "The OECD and US models are, as indicated designed primarily for treaties between countries where the flows of income are roughly reciprocal. The limitations of source taxation in those models produce a revenue cost for that state. However, when investment flows are more or less reciprocal, the revenue sacrifices more or less offset each other. In a treaty between a developed and a developed and a developing country the flows are largely in one direction: income flows from the developing country to the developed country. Thus, a model which is in form reciprocal in fact can impose a substantial revenue burden on a developing country"; see also Irish *supra* note 21, at 298–299 who argues that majority of the double taxation treaties with restrictive source-based taxing rights between African countries and developed countries were " … assumed by newly independent countries as part of the general assumption of rights and obligations from the former colonial powers" but see Yariv Brauner, *An International Tax Regime in Crystallization-Realities, Experiences and Opportunities* 56 Tax Law Review (2003), 259 at 307–308. Brauner, while arguing for the OECD to take up the role of harmonizing international taxation rules, argues against the notion that the OECD tax treaty Model benefits developed countries at the expense of developing countries. He further argues that developing countries have never been forced to conclude bilateral treaties with developed countries. Brauner's argument appears to be conceptually flawed on the grounds that the allocation rules in the OECD Model, as examined in the previous section of this paper, obviously benefit developed countries more than developing countries. Brauner's argument also fails to consider political and economic factors that largely influence the terms of tax treaties between developed and developing countries.

80 *Article 7(1)* of the Agreement Between The Government of the Federal Republic of Nigeria and the Government of the United Kingdom of Great Britain and Northern Ireland for the equally applies under Nigeria's Double Taxation Treaties with France, the Netherlands and China, which mirror the allocation rule under Article 7(1) of the OECD Model.[81] The profits, which are exempt from being taxed in Nigeria, become taxable in Britain, France, the Netherlands, and China, respectively, as residence countries of MNCs concerned. In addition, restriction of source taxation is seen in Articles 10–12 of all the double taxation treaties that Nigeria has with other countries. In this case as well, Nigeria cannot tax investment income beyond the prescribed threshold even though the income arose from economic activities carried on within Nigeria. This unfairness is what Kaufman reacts to by stating that: "Inter nation equity is not concerned with the relation between the individual taxpayer and the taxing sovereign … but is concerned with the one sovereign's competence to tax in relation to that of other sovereigns".[82]

The argument that this paper makes against the restrictive source-based taxing rights under the OECD Model goes beyond tax treaties between developed and developing countries. It equally applies to tax treaties between developing countries (for instance, Nigeria's double tax treaty with China has restrictive source-based taxing provisions under Articles 7 and 10–12), considering the phenomenal investment outflows from emerging economies, the BRICS countries particularly China, India and Brazil, into developed and developing countries.[83] UNCTAD noted in 2014: "MNEs from developing economies alone invested $468 billion abroad, a twenty-three percent increase from the previous year. Their share in global FDI reached a record thirty-five percent, up from thirteen per cent in 2007".[84] Although FDI outflows from Asia declined in 2016–2017, the recent economic projections show that the region is still a major source of FDI worldwide, accounting for nearly one-fourth of global outflows.[85] Unfortunately, the OECD has indicated its lack of interest in reforming the allocation rules by the non-inclusion of this subject in its BEPS Project despite the fact that it was raised by developing countries during regional consultations.[86] As such, it is imperative

Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, available at: <www.firs.gov.ng/Tax-Management/Pages/Tax->.

81 See Federal Inland Revenue Service, Tax Treaties, available at: <www.firs.gov.ng/Tax-Management/Pages/Tax-Treaties.aspx>.

82 Kaufman *supra* note 60, at 198.

83 UNCTAD, *Reforming International Investment Governance*, World Investment Report (2015), at 6.

84 *Ibid*., see also Vann *supra* note 1, at 14–15.

85 UNCTAD, *Investment and New Industrial Policies*, World Investment Report (2018), at 48.

86 See OECD, Part 2 of a Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries (2014), available at: <http://www.oecd.org/tax/part-1-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf> see also Irene Burgers and Mosquera for Nigeria to assess its treaty networks with both developed and developing countries, and to begin to consider how it can maximise the revenue potential of its tax treaties by renegotiating source-restricting provisions.

It is often argued that developing countries, as source countries, derive benefits other than maximization of tax revenues from double taxation treaties.[87] These benefits are often said to accrue from FDI as the harbinger of capital and technology flows to them.[88] Perhaps, this same reason accounts for liberalization of trade regulations in Nigeria, both through several amendments to Nigeria's laws, and through provisions in double tax treaties encouraging FDI.[89] Even so, reports show that tax incentives are largely ineffective in attracting and sustaining FDI in developing countries because of other factors, such as poor infrastructure, macroeconomic instability, unclear property rights, weak governance or judicial systems.[90] Therefore, Nigeria's tax policy, focused on tax incentives as the means of attracting FDI, is counterproductive in light of these other factors. It is important to stress this, given that at this point, Nigeria's tax contribution to its GDP is one of the lowest in the world, standing at 5.1%.[91] Beyond the FDI argument, therefore, is the need to modify the allocation rules under Nigeria's tax treaties that are based on the OECD Model to reflect the "inter-nation" equity rule and to compensate for activities carried on in Nigeria by non-resident enterprises either directly or indirectly.

The desire to transition from oil dependency to taxation as a means to finance sustainable development must be coupled with actual commitments. By way of recommendation, Nigeria should consider the source-expanding

---

Valderrama and Irma Johanna, *Corporate Taxation and BEPS: A Fair Slice for Developing Countries?* 10 Erasmus Law Review, no. 1 (2017). Available at SSRN: <https://ssrn.com/abstract=3026299>.

87 Eric Neumayer, *Do Double Taxation Treaties Increase Foreign Direct Investment to Developing Countries?* 43 Journal of Development Studies, no. 8 (2007), 1501–1519.

88 *Ibid*.

89 Kunle M. Adeleke *et al.*, *Impact of Foreign Direct Investment on Nigeria Economic Growth*, 4 International Journal of Academic Research in Business and Social Sciences, no. 8 (2014), 234–242.

90 See the Report submitted to the G20 Development Working Group by the IMF, OECD, UN and World Bank "Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment" (2015). See also Fabian Barthel *et al.*, "The Relationship between Double Taxation Treaties and Foreign Direct Investment", in M. Lang (ed.), *Tax Treaties: Views from The Bridge – Building Bridges between Law and Economics* (Amsterdam: IBFD, 2010), at 3–18; See also Ronald B. Davies, *Tax Treaties, Renegotiations, and Foreign Direct Investment*, 33 Economic Analysis and Policy, no. 2 (2003), 251–273.

91 IMF, *Mobilizing Tax Revenues in Nigeria: Options for Revenue Mobilization in Nigeria*, IMF Country Report Working Paper No. 18/64, March 2018.

provisions contained in the recent amendments to the OECD Model.[92] These amendments include the addition to the introduction to tax treaties, that their purpose is to eliminate tax avoidance; the expansion of the permanent establishment status to include a person who habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts; and the addition of the limitation-on-benefits rule, anti-abuse rule for permanent establishments situated in third states, and a "principal purpose" test to discourage treaty shopping.

These amendments are the outcomes of the OECD's Base Erosion and Profit Shifting (BEPS) Project.[93] Although they do not radically expand source-based taxing rights, they can deliver increased revenue to Nigeria through taxation. Ultimately, there needs to be an expansive reform of Nigeria's tax treaties beyond the OECD amendments.

The source-based taxing right is expanded under the UN Model as exemplified by the Canada-Nigeria Double Taxation Treaty.[94] It presents an alternative to the OECD's restrictive source-based rules, in a way. In the next section, I assess the source-expanding provisions of the treaty in the context of the implications that its provisions have on source countries, using Nigeria as case study.

4 The United Nations and Tax Law Harmonization

The UN's ambition for promoting the inflow of FDI to developing countries and to maximize domestic resource mobilisation "on conditions which are politically acceptable as well as economically and socially beneficial", sums up the rationale behind the UN Model.[95] Piqued by the situation under the OECD's mechanism where the allocation rules gave more taxing rights to residence/developed countries, the UN asked a group of experts in 1968 to design a suitable mechanism to promote the interests of developing countries. In 1979 and 1980 respectively, the UN released the *Manual for the Negotiation of Bilateral Tax Treaties*

92 OECD, 2017 Update To The OECD Model Tax Convention, available at: <www.oecd.org/ctp/treaties/2017-update-model-tax-convention.pdf>.

93 OECD, Base Erosion and Profit Shifting, available at: <http://www.oecd.org/tax/beps/>.

94 Canada-Nigeria Tax Treaty, available at: <http://internationaltaxtreaty.com/download/Canada/DTC/Canada-Nigeria-DTC-Aug-1992.pdf>.

95 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. Available at SSRN: <www.ssrn.com/abstract=2398438>.

between Developed and Developing Countries[96] and the *United Nations Model Double Taxation Convention between Developed and Developing Countries*.[97] The UN adopted these instruments to serve as models for *tax* treaties between developed and developing countries. But it relied on the OECD's 1963 Model, which consolidated the works of the previous Models to serve its objective. It recognized that as much as the promotion of investment inflow into developing countries depended on the investment climate guaranteeing safe terms for non-resident enterprises, it was equally important to consider the overall implications of these terms on the economy of source countries. To this end, the UN identified the shortcomings of the allocation rules under the OECD Model, and sought to address them through the design of the UN Model in 1980. The UN Model has been revised thrice, first in 1999, second in 2010 and most recently in 2017. The next section examines the extent to which the allocation rules under the UN Model promote source-based taxing rights, using the Canada-Nigeria Double Taxation as illustrations.

4.1 Source-Based Taxing Rights under the Canada-Nigeria Double Taxation Treaty

4.1.1 Background

Source-based taxing rights take a different form under Article 7 of the Canada-Nigeria Double Taxation Treaty (the Treaty): the provision expands source-based taxing rights. These rules flow from Article 5 of the Treaty, which prescribes the threshold that should be maintained by a non-resident in a source country before the source country can legitimately tax the profits of the non-resident, a requirement referred to as the "effectively connected rule" in international tax.[98] Article 5 of the Treaty departs from the equivalent provision under the OECD Model by relaxing the degree of contact required by the rules for fulfilling the permanent establishment threshold, which is the condition precedent for the exercise of taxing rights by a source country. For instance, the amount of time required for a building site, construction, assembly project or supervisory

96 United Nations, *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries* (2003).
97 *Supra* note 7.
98 Jinyan Li, *Taxation of Non-Residents on Business Profits*, United Nations Department of Economic and Social Affairs Working Paper No. 5-A (2013), 12.

activities to be held to establish business permanency has been reduced to three months from the twelve months required under the OECD Model.[99]

4.1.1.1 Article 7 of the Canada-Nigeria Double Taxation Treaty: Analysis

The source-based taxing right is specifically governed by paragraphs 1 and 3 of Article 7 of the Treaty. These provisions form the focal point of assessment here. Paragraph 1 prescribes the rules governing the amount of profit of a non-resident enterprise that is taxable in a source country, while paragraph 3 adds to the rules in paragraph 1 to provide for allowable and non-allowable deductions that can be made from accounts of permanent establishments in the form of expenses. The background on the provisions of Article 7 given above sums up the goals of paragraphs 1 and 3. It is instructive, however, to highlight the commentaries to the equivalent provisions in the UN Model to demonstrate the significance of the expansive source-based rules under Article 7 of the Treaty. In the meantime, Article 7(1) of the Canada-Nigeria Treaty provides as follows:

> The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on or has carried on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to:
> (a) That permanent establishment;
> (b) Sales in the other State of the same or similar property or merchandise as that sold through that permanent establishment; or
> (c) Other business activities of the same or similar nature as those carried on in that other State through that permanent establishment.

First, it is important to stress that Article 7(1) upholds the permanent establishment threshold required for the exercise of the taxing rights by source countries.[100] Article 7(1) of the Canada-Nigeria Treaty, however, deviates from its equivalent provision under the OECD Model by increasing the amount of profits made by a non-resident enterprise in a source country, which become subject to tax therein.

Canada's Tax Treaty with Nigeria is one out of the six tax treaties, which Canada has with low-income countries containing this increase.[101] This increase is termed the "limited force of attraction rule", introduced by the UN in 1980 and

99 Similar provision exists in Canada's Double Taxation Treaty with Algeria, see Brooks *supra* note 39, at 196.
100 Brooks *supra* note 39, at 195.
101 Brooks *supra note 39*, at 199.

retained under the current UN Model. This rule includes profits derived by a non-resident enterprise outside of the profits derived by the permanent establishment of such a non-resident from sales or similar activities in a source country as taxable by such source country. The UN commentary to paragraph 1 of Article 7 explains that the "limited force of attraction" rule only applies to business profits covered by Article 7, and not investment income such as dividends, interests and royalties.[102] It is also important to note that this rule applies to profits derived from sales activities and other similar activities, but excludes purchase activities.[103] The commentary further highlights the circumstances surrounding the emergence of the "limited force of attraction" rule. The rule emerged as a form of anti-avoidance measure to prevent profits derived by non-resident enterprises from source countries from escaping tax therein. The commentary highlights the concerns raised by some developing countries about the administrative challenge they face under the OECD's attribution rule in associating the profits of non-resident enterprises to business activities being carried on by permanent establishments of such enterprises within their jurisdictions. However, developed countries argued against the introduction of the "limited force of attraction" rule by reiterating their reasons for justifying the restrictive source-based taxing rights under the OECD Model.[104] Their emphasis is the need to avoid uncertainty to taxpayers. Overall, the arguments by the developing countries trumped those by the developed countries as evidenced by the introduction of the "limited force of attraction" rule.

This modification to the source-based taxing rights under the UN Model in a significant way affirms the "inter-nation equity" principle. The UN sidestepped the emphasis placed by the OECD Model on the "permanent establishment" threshold as a condition precedent for exercising taxing rights by source countries. It rather focused on the substance of the transactions which occurred in source countries and for which those countries became entitled to tax their profits. This benefit would have been lost to the restrictive source-based taxing right under the OECD Model but for the expansion introduced under the UN Model, which the Treaty incorporates as Article 7(1).

The tax base of source countries is also expanded through the limitations placed on deductions that can be made from the accounts of permanent establishments under Article 7(3) of the Treaty, which provides as follows:

102 See UN Commentary on *Article 7(1)* of the UN Model *Supra* note 7.
103 See *Articles 5(3) (d) and 7(4)* of the UN Model *supra* note 7.
104 *Supra* note 57.

> In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere. However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on monies lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on monies lent to the head office of the enterprise or any of its other offices.

The UN commentary reveals the rationale for these detailed rules concerning deductions from accounts of permanent establishments in source countries. The commentary lists two reasons: as a form of assistance to other developing countries not represented in the Group of Experts, and to make taxpayers fully informed about their fiscal obligations.[105]

A combined reading of the text of this rule and the UN commentary reveals that four rules are subsumed under this provision. The first rule is the allowance of deductions to be made from the accounts of a permanent establishment in the form of expenses incurred either within or outside the source country in performing a function the direct purpose of which is to make sales of a specific good or service and to realise a profit through a permanent establishment.[106] The second rule is the proscription of deductions from the accounts of a permanent establishment's executive and administrative expenses at the head office. This is premised on the fact that such deductions would overtly amount to income stripping, given that other articles of the Convention allow to be deducted by permanent establishments, the full costs of interest, royalties and other expenses incurred by the head office on behalf of the permanent establishment.[107] The third rule deals with the allocation of costs/expenses for tangible (semi-finished goods) and intangible goods and rights respectively, as well as deductions for services by related entities. For this category of goods/rights, the UN commentary provides that costs be allocated to the concerned entities based

105 UN commentary on Paragraph 3 of *Article 7 supra* note 7, at 151.
106 *Ibid*. at paras. 16–18.
107 *Supra* note 103, Para. 16.

on the share of each entity.[108] For services provided by an enterprise to permanent establishments, the UN commentary also requires that the expenses be allocated on an actual cost basis to the various parts as costs incurred and not to represent profit to another part/entity of such an enterprise.[109] The fourth rule is the prohibition of deductions in the form of interests on loans charged by a head office to its permanent establishment, save for financial institutions such as banks. This prohibition is premised on both legal and economic grounds. The legal standpoint is that the transfer of capital against payment of interest and an undertaking to repay in full at the due date is a formal act incompatible with the true legal nature of a permanent establishment, while the economic argument against the prohibition is that internal debts and receivables may be arbitrarily fixed.[110] It is important to note that Paragraph 3 of Article 7 of the UN Model upholds the provision of Section 27 (g) and (h) of Nigeria's Companies Income Tax Act which disallow deductions of management fees as an expense charged to the account of a permanent establishment in Nigeria.[111]

The import of these restrictions on deductions from the accounts of permanent establishments is, ultimately, to boost the profits left to be taxed in source countries.[112] This provision is lacking under the OECD Model. Until 2010, the OECD Model contained similar provisions on allowable deductions from the accounts of a permanent establishment, limiting those to expenses actually incurred by any such permanent establishment. However, the OECD deleted this clause in 2010, and left the issue of deductibility of expenses to the consideration of what unrelated entities would do in similar circumstances, that is, the arm's length principle.[113]

4.1.1.1.1 The UN Model only Expands Source-Based Taxing Rights in Part

Although the UN Model gives more taxing rights to source countries over the income of non-residents, it does not entirely change the restrictions of source taxing rights under the OECD Model. First, the UN Model, just like the OECD Model, emphasizes the presence of a "fixed place of business" in source countries before non-residents can be taxed on their business income. Although it is true that the exercise of taxing rights by a state requires some connection between that

108 *Ibid*. at Paras. 33 and 34.
109 UN commentary on Para. 3 of *Article 7 supra* note 7, at Paragraph 35.
110 *Ibid*. at Paras. 41 and 42.
111 Section 27 (g) and (h) of Nigeria's Companies Income Tax Act, Laws of Federation of Nigeria, 2010.
112 Brooks *supra* note 39, at 200.
113 History of *Article 7 (2)* of the OECD Model *Supra* note 6, 47.

state and the profit being taxed, the existence of a fixed place of business is not the only proof that such connection exists. The implication is that the current rules deliberately prevent source taxation of business income of non-residents done outside of a fixed place of business.

Second, Articles 10–12 of the UN Model retain the same restrictions that exist in the OECD Model over source taxation of passive income arising from activities carried on in source countries.[114] Although section 12 allows source countries to tax royalty income paid to non-residents, Articles 10–12 of the UN Model fail to specify the ratio for dividing taxing rights over passive income derived in source countries between source and residence countries. By failing to provide a precedent for developing countries to follow, it leaves the ratio to the contracting states.[115] This open-ended approach is, however, dangerous, in light of the economic and political disparities between developed and developing countries which, of course play major roles when countries negotiate.

Altogether, the UN Model does not represent the best alternative to the OECD Model in terms of the extent to which it reflects the inter-nation equity principle. The UN Model is only a modest improvement on the OECD rules. The flaws in the UN Model have led tax scholars to conclude that the UN Model is not particularly different from the OECD Model. Sarcastically, Figueroa notes: "After twelve years, in 1979, the ad hoc group of experts approved a model that is known as the United Nations Model (the yellow book). Notwithstanding the different colour of its cover, this model shows definite and clear similarities with the OECD model".[116] Picciotto also notes:

> The UN Guidelines did not make any new departure in the approach to tax treaties. They took as their starting point the 1963 OECD draft, and merely noted the differing views expressed by experts … . Neither the Guidelines, the Manual nor the Model treaty could be said to challenge the basic principles of the OECD model. Although the report of the UN experts stressed the primacy of taxation at source, this was not expressed in any general principle … [117]

For instance, auxiliary and short-term economic activities, and other economic activities in general, that do not qualify as permanent establishments that are

114 See *Articles 10–12* of the UN Model *supra* note 7, at 16–19.
115 *Ibid*.
116 A.H. Figueroa, *Comprehensive Tax Treaties in Double Taxation Treaties between Industrialised and Developing Countries: OECD and UN Models – a Comparison*, Proceedings of a Seminar held in Stockholm in 1990 during the 44th Congress of the International Fiscal Association (Deventer: Kluwer Law and Taxation Publishers, 1992), pp. 9–13.
117 See Picciotto *supra* note 8, at 56.

carried on in source countries, which form part of the overall business profits of non-resident enterprises, deserve to be taxed where they are earned. This argument is embedded in the concept of economic allegiance which influenced the development of the benefit principle that was used in formulating the allocation rules as far back as in the 1920s.[118] According to Schanz, who developed the concept of economic allegiance, "a source country is entitled to tax most of the income made within its borders".[119] The benefit principle aims to compensate states for their contributions to all forms of income derived from activities carried on in their jurisdictions. Unfortunately, the allocation rules by the League of Nations were the exact opposite of Schanz's idea.[120] The Committee rejected the benefit principle, and favoured the "ability to pay" principle as the basis for dividing taxing rights between source and residence countries. While the ability to pay principle is useful as the basis for income redistribution nationally, by maintaining that individuals who earn higher income should pay more taxes, it does not seem like the best approach to allocating taxing rights between states. It is useful, nationally, as a tool to ensure progressive taxation within states. However, on pure economic grounds, it does not optimize the interests of either source or residence countries in profit allocation. The benefit principle seems more appropriate as the basis for dividing taxing rights between countries, as it ensures that countries are compensated for their actual contributions to the income of MNCs. An example of how the allocation rules can compensate countries for their actual contributions is through the introduction of a more flexible standard for the exercise of taxing rights by source countries in a way that compensates source countries for their contributions to all economic activities carried on within their jurisdictions. This would also require a review of taxing rights that are currently allocated to residence countries to ensure they are only compensated for their actual contributions to the profits of resident enterprises.

The current allocation rules present an ironic situation of regressive redistribution of revenue, that is, more revenue being allocated to developed countries and less to developing countries.[121] Tax waivers by developing countries acting as source countries have been highlighted as a major source of revenue loss. According to a report released by Action Aid in July 2015, three West African Countries, Ghana, Nigeria and Senegal are losing up to $5.8 billion a year to

118 Michael Kobetsky, *International Taxation of Permanent Establishments: Principles and Policy* (United Kingdom: Cambridge University Press, 2011), at 114.
119 Kobestsky *Ibid*. citing Schanz, Zur Frage der Steuerpflicht p. 372 (Finanzarchiv 1892).
120 *Ibid*.
121 Irish *supra* note 21.

corporate tax incentives. Nigeria's loss is the greatest, estimated at $2.9 billion a year.[122] Another report by Action Aid in January 2016 revealed a higher amount lost by Nigeria to oil giants Shell, Total and ENI in the value of $3.3billion.[123]

More than ever before, the increasing rate of poverty and hunger in Nigeria is enough reason for Nigeria to pay attention to gaps in its tax treaties that encourage revenue losses. The most practical way to do this would be for Nigeria to also consider renegotiating its tax treaties, that are based on the UN Model to include source-expanding provisions. The reform should consider source-expanding provisions contained in the recent amendments to the UN Model. These include: the addition to introduction to tax treaties that the purpose of tax treaties is to eliminate tax avoidance; the expansion of the PE status to include a person who habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts; the inclusion of Article 12A to provide for source taxation of fees for technical services; the addition of gains from alienation of shares derived directly or indirectly from immovable property situated in source jurisdictions; and the addition of the limitation-on-benefits rule, anti-abuse rule for permanent establishments situated in third states, and a "principal purpose" test to discourage treaty shopping.

Ultimately, Nigeria's goal in double taxation treaty matters should be to advocate for global equality, which is guaranteed when revenues appropriately belonging to the country are taxed in Nigeria.[124] Improved tax revenue will be guaranteed if Nigeria considers the reform of all its tax treaties. To that end, there is the need for impact assessment of each of Nigeria's tax treaties to ensure that the level of benefits granted to non-residents is commensurate with the corresponding gains derived. For instance, although the Canada-Nigeria treaty, which is based on the UN Model expands source-taxing rights in part, the level of FDI from Canada to Nigeria is minimal,[125] unlike China or the United

122 Action Aid, "Use & Abuse of Corporate Tax Incentives in ECOWAS: The West African Giveaway," available at: <http://www.actionaid.org/publications/west-african-giveaway-use-abuse-corporate-tax-incentives-ecowas>.

123 Action Aid, "Nigeria Loses $3.3b in Tax Revenue to Oil Companies," available at: <https://www.actionaid.org.uk/latest-news/actionaid-report-nigeria-lost-33-billion-in-tax-revenue-to-oil-companies-money-that>.

124 Brooks *supra* note 57, at 169.

125 Although there is no data for foreign investment between Canada and Nigeria, report shows that in 2017, Canadian direct investment in Africa was 0.6%, the lowest in all of Canada's foreign direct investment destinations. It was 61.2% in North America, 25.7% in Europe, 7.5% in Asia and Oceania, 5.0% in South and Central America. Canada Parliament, Trade and Investment: Direct Investment Between Canada and the World. Available at: <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/TradeAndInvestment/PDF/2018/2018-503-e.pdf>.

Kingdom. Studies have shown that the highest level of FDI in Africa is from Western Europe and China.[126] Unfortunately, Nigeria's tax treaties with China and Western European countries, such as the United Kingdom, France, and the Netherlands are based on the OECD Model.

Ultimately, the journey to fairness in international taxation will begin when countries accept the inequities in the current rules governing the allocation of taxing rights, and they take one step further to rectify them. This will entail the design of new rules that emphasize taxation of cross-border income based on genuine economic activities. All of this suggests the need for lower PE thresholds, expansive taxing rights for passive income derived from source countries, and rules that capture the dynamic nature of e-commerce.

5 Conclusion and Recommendations

To conclude, two main points can be drawn from the arguments advanced in this paper. First, the restrictive source-based taxing right is an infraction of the inter-nation equity principle and thus, an injustice to developing countries. Second, both the OECD and the UN Model Tax Conventions contain restrictive source-based taxing rights, although in varying proportions. Indeed, considering the economic loss which the restrictive source-based taxing right causes to developing countries, like Nigeria which I examined in this paper, the gaps in the provisions of both the OECD and the UN Model that facilitate capital flight from developing countries ought to form part of the agenda at international fora. Although at present the OECD recognizes treaty abuse as a form of BEPS,[127] the issue of treaty abuse under the BEPS project is being tackled from the angle of double non-taxation, that is, as shifting of profits from source jurisdictions to low or no tax jurisdictions. In light of this also, it is necessary to expand the definition of "treaty abuse" to include situations where profits which, otherwise, would have become taxable in source countries, are being shifted to resident countries based on the provisions of double tax treaties. Equally, although the UN is discussing the fulfilment of the Sustainable Development Goals in developing countries, there has been no discussion around the reform of the

126 Ronald Wall, Jos Maseland, Katharina Rochell and Mathias Spaliviero, *The State of African Cities 2018: The Geography of African Investment*, United Nations Human Settlements Programme (UN-Habitat) (2018). Available at: <https://unhabitat.org/books/the-state-of-african-cities-2018-the-geography-of-african-investment/>.
127 Action Plan 6, OECD *supra* note 64.

allocation rules which would secure more tax revenue for developing countries to aid, among others, their efforts to achieve those development goals.

This paper therefore recommends that Nigeria revisits its tax treaty network to renegotiate and include in its tax treaties source-expanding provisions that allow for taxation of income derived from economic activities carried out within its territory.

References

Action Aid, "Nigeria Loses $3.3b In Tax Revenue to Oil Companies," available at: <https://www.actionaid.org.uk/latest-news/actionaid-report-nigeria-lost-33-billion-in-tax-revenue-to-oil-companies-money-that≥, accessed November 15, 2018.

Action Aid, "Use & Abuse of Corporate Tax Incentives in ECOWAS: The West African Giveaway," available at: <http://www.actionaid.org/publications/west-african-giveaway-use-abuse-corporate-tax-incentives-ecowas≥, accessed November 15, 2018.

Action Plan 13, OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing, Paris, 2013).

Adeleke, Kunle M, *et al.*, *Impact of Foreign Direct Investment on Nigeria Economic Growth*, 4 International Journal of Academic Research in Business and Social Sciences, no. 8 (2014).

Agreement Between the Government of The Federal Republic of Nigeria And the Government of The United Kingdom of Great Britain And Northern Ireland For the Avoidance of Double Taxation and The Prevention of Fiscal Evasion with Respect to Taxes on Income And Capital Gains.

Ault, High., *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, 22 Intertax (1994).

Barthel, Fabian, *et al.*, "The Relationship between Double Taxation Treaties and Foreign Direct Investment", in M. Lang (ed.), *Tax Treaties: Views from the Bridge – Building Bridges between Law and Economics* (Amsterdam: IBFD, 2010).

Bennett, Mary, Carol Dunahoo, Baker and LLP McKenzie, *Washington the Attribution of Profits to a Permanent Establishment: Issues and Recommendations*, 33 Intertax, no. 2 (2005).

Boluez, Pierre *v*. Commissioner case (1984) 83 T.C. 584.

Braun, Julia and Martin Zagler, *An Economic Perspective on Double Tax Treaties with (In) Developing Countries*, 6 World Tax Journal, no. 3 (2014).

Brauner, Yariv, *An International Tax Regime in Crystallization-Realities, Experiences and Opportunities*, 56 Tax Law Review (2003).

Brooks, Kim, *Tax Treaty Treatment of Royalty Payments from Low-Income Countries: A Comparison of Canada and Australia's Policies*, 5 eJournal of Tax Research, no. 2 (2007).

Brooks, Kim, "Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Value", in Richard Krever and John G. Head (eds.), *Tax Reform in the 21st Century* (Netherlands: Kluwer Law International, 2008).

Brooks, Kim, *Global Distributive Justice: The Potential for a Feminist Analysis of International Tax Revenue Allocation*, 29 Canadian Journal of Women and the Law, no. 2 (2009).

Brooks, Kim, "Canada's Evolving Tax Treaty Policy in Globalization and Its Tax Discontents", in Arthur J. Cockfield (ed.), *Globalization and Its Tax Discontents: Tax Policy and International Investments* (Toronto: London: University of Toronto Press, 2010).

Burgers, Irene, Mosquera Valderrama and Irma Johanna, *Corporate Taxation and BEPS: A Fair Slice for Developing Countries?*, 10 Erasmus Law Review, no. 1 (2017).

Canada Parliament, Trade and Investment: Direct Investment between Canada and the World. available at: <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/TradeAndInvestment/PDF/2018/2018-503-e.pdf≥, accessed January 15, 2019.

Carroll, Mitchell, *Global Perspectives of an International Tax Lawyer* (Hicksville: New York: Exposition Press, 1978).

Christopher, Warren, *In the Stream of History: Shaping Foreign Policy for a New Era* (California: Stanford University Press, 1998).

Cockfield, Arthur, *Balancing National Interests in the Taxation of Electronic Commerce Business Profits*, 74 Tulane Law Review (1999)

Cockfield, Arthur, *Reforming the Permanent Establishment Principle through a Quantitative Economic Presence Test*, 38 Canadian Business Law Journal (2003).

Cockfield, Arthur, "Taxing Foreign Direct Investment in a Non-Cooperative Setting: Contributions by Alex Easson", in Arthur Cockfield (ed.), *Globalization and Its Tax Discontents: Tax Policies and International Investments: Essays in Honour of Alex Easson* (Toronto: University of Toronto Press, 2010).

Commentary and text on the London and Mexico Model Tax Conventions of 1943 and 1946. C.88. M.88.1946-II-A (Geneva, November 1946).

Davies, Ronald, *Tax Treaties, Renegotiations, and Foreign Direct Investment*, 33 Economic Analysis and Policy, no. 2 (2003).

Easson, Alex, *The Evolution of Canada's Tax Treaty Policy since the Royal Commission on Taxation*, 26 Osgoode Hall Law Journal (1986).

Easson, Alex, *International Tax Reform and the Inter-Nation Allocation of Tax Revenue* (Wellington, NZ: Victoria University Press, 1991).

Eyitayo, Oladiwura A., *Profit Shifting by Canadian Multinational Corporations: Prospects of Reversal under Canada's Country-By-Country Reporting Rules*, 26 Dalhousie Journal of Legal Studies (2018).

Figueroa, A.H., *Comprehensive Tax Treaties in Double Taxation Treaties between Industrialised and Developing Countries:* OECD *and UN* Models – *A Comparison*, Proceedings of a Seminar held in Stockholm in 1990 during the 44th Congress of the International Fiscal Association (Deventer: Kluwer Law and Taxation Publishers, 1992).

Graetz, Michael, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfied Policies*, 26 Brooklyn Journal of International Law (2001).

Graetz, Michael and Michael O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 Duke Law Journal (1997).

Hearson, Martin, *Measuring Tax Treaty Negotiation Outcomes: The ActionAid Tax Treaties Dataset Working Paper*, Institute of Development Studies, International Centre for Tax and Development (Brighton, UK, 2016).

Hearson, Martin, "The UK's Tax Treaties with Developing Countries during the 1970s", in Peter Harris and Dominic de Cogan (eds.), *Studies in the History of Tax Law* (United Kingdom: Hart Publishing, 2017).

Hearson, Martin, *When Do Developing Countries Negotiate Away Their Corporate Tax Base?*, 30 Journal of International Development, no. 2 (2018).

Hearson, Martin and Jalia Kangave, *A Review of Uganda's Tax Treaties and Recommendations for Action*, Institute of Development Studies, International Centre for Tax and Development Working Paper (London, UK, 2016).

IMF, *Mobilizing Tax Revenues in Nigeria: Options for Revenue Mobilization in Nigeria*, IMF Country Report Working Paper No. 18/64 (March 2018).

Irish, Charles, *International Double Taxation Agreements and Income Taxation at Source*, 23 International and Comparative Law Quarterly, no. 2 (1974).

Kangave, Jalia, *Taxing TWAIL: A Preliminary Inquiry into TWAIL'S Application to the Taxation of Foreign Direct Investment*, 10 International Community Law Review (2008).

Kaufman, Nancy, *Fairness and the Taxation of International Income*, 29 Law & Pol'y Int'l Bus (1997–1998)

Kobetsky, Michael, *International Taxation of Permanent Establishments: Principles and Policy* (United Kingdom: Cambridge University Press, 2011).

Lang, Michael 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.

League of Nations, Article III (1) of the League of Nations Double Taxation Convention (1935).

Li, Jinyan, "Improving Inter-Nation Equity", in Arthur Cockfield (ed.), *Globalization and Its Tax Discontents: Tax Policies and International Investments: Essays in Honour of Alex Easson* (Toronto: University of Toronto Press, 2010).

Li, Jinyan, *Taxation of Non-Residents on Business Profits*, United Nations Department of Economic and Social Affairs Working Paper No. 5-A (2013).

Musgrave, Peggy, *United States Taxation of Foreign Investment Income: Issues and Arguments* (Cambridge: Law School of Harvard University, 1969).

Musgrave, Peggy, "Combining Fiscal Sovereignty and Coordination: National Taxation in a Globalizing World", in Inge Kaul and Pedro Conceicao (eds.), *The New Public Finance Responding to Global Challenges* (New York: Oxford University Press, 2006).

Musgrave, Peggy and Richard Musgrave, "Inter-Nation Equity", in Richard M. Bird and G. Head (eds.), *Modern Fiscal Issues: Essays in Honor of Carl S. Shoup* (Toronto: University of Toronto Press, 1972).

Musgrave, Richard, "The Carter Commission Report" (1968).

Musgrave, Richard, *Fiscal Systems* (Connecticut: Yale University Press, 1969).

Neumayer, Eric, *Do Double Taxation Treaties Increase Foreign Direct Investment to Developing Countries?* 43 Journal of Development Studies, no. 8 (2007).

Nigeria – Canada Income Tax Treaty Agreement Between the Government of Canada And the Government of The Federal Republic of Nigeria For the Avoidance of Double Taxation and The Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains.

Nigeria's Companies Income Tax Act, Laws of Federation of Nigeria (2010).

OECD, *Draft Double Taxation Convention on Income and Capital* (Paris: OECD, 1963).

OECD, *Fiscal Incentives for Private Investment in Developing Countries: Report of the OECD Fiscal Committee* (Paris, 1965).

OECD, *Explorations in OEEC History* (Paris: OECD Publishing, 2009).

OECD, *Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries* (2014).

OECD, 2017 Update To The OECD Model Tax Convention available at: <www.oecd.org/ctp/treaties/2017-update-model-tax-convention.pdf≥, accessed November 20, 2018.

OECD, *Model Tax Convention on Income and Capital: Condensed Version 2017* (OECD Publishing, Paris, 2017).

OECD, Base Erosion and Profit Shifting, available at: <http://www.oecd.org/tax/beps/>, accessed February 15, 2019.

Picciotto, Sol, *International Business Taxation: A Study in the Internationalization of Business Regulation* (UK: Cambridge University Press, 1992).

Report on Double Taxation submitted to the Financial Committee. Economic and Financial Commission Report by the Experts on Double Taxation. Document E.F.S.73. F.19 (April 5th, 1923).

Report submitted to the G20 Development Working Group by the IMF, OECD, UN and World Bank, *Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment* (2015).

Richman, Peggy, *Taxation of Foreign Investment Income: An Economic Analysis* (Baltimore: Johns Hopkins Press, 1963).

Rixen, Thomas, *The Political Economy of International Tax Governance* (United Kingdom: Palgrave Macmillan, 2008).

Rosenbloom, David and Stanley Langbein, *United States Treaty Policy: An Overview*, 19 Columbia Journal of Transnational Law (1981).

Skaar, Arvid, *Permanent Establishment: Erosion of a Tax Treaty Principle* (Boston: Kluwer Law and Taxation Publishers, 1991).

The Experts' Report on Double Taxation to the League of Nations (1923).

UNCTAD, *Reforming International Investment Governance*, World Investment Report (2015).

UNCTAD, *Investment and New Industrial Policies*, World Investment Report (2018).

United Nations, *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries* (2003).

United Nations, *Model Double Taxation Convention between Developed and Developing Countries* (2017).

United Nations Centre on Transnational Corporations, *International Income Taxation and Developing Countries* (1998).

Vann, Richard J., "Current Trends in Balancing Residence and Source Taxation", in Y. Brauner and P. Pistone (eds.), *Brics and the Emergence of International Tax Coordination* (The Netherlands: IBDF, 2015).

Vogel, Klaus, *Double Tax Treaties and Their Interpretation*, 4 International Tax & Business Lawyer (1986).

Wall, Roland, Jos Maseland, Katharina Rochell and Mathias Spaliviero. *The State of African Cities 2018: The Geography of African Investment*, United Nations Human Settlements Programme (UN-Habitat) (2018), available at: <https://unhabitat.org/books/the-state-of-african-cities-2018-the-geography-of-african-investment/≥, accessed November 15, 2018.