



DYNAMICS OF TAXATION AND NIGERIAN ECONOMY

A publication of the Publicity and Publications Committee
The Chartered Institute of Taxation of Nigeria

EDITED BY:

Godwin E. Oyedokun
Olubukunola R. Uwuigbe
Chukwuemeka Eze



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2023



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ABOUT THE INSTITUTE

The Chartered Institute of Taxation of Nigeria was established on February 4, 1982 as Association of Tax Administrators and Practitioners (ATP). Thereafter, it transformed into Nigeria Institute of Taxation, which was formally launched on February 21, 1982 and statutorily recognized on May 6, 1987 as a company Limited by Guarantee.

The Institute became Chartered by the Federal Government of Nigeria by the enabling Act No. 76 of 1992 (now CITN Act, CAP C10, Laws of the Federation of Nigeria, 2004) and it has over 25,000 members as at today and was charged with the responsibility, among others, of regulating and controlling the practice of the tax profession in its entire ramifications and determining what standards of knowledge and skills are to be attained by persons seeking to become professional Tax Practitioners or Administrators.

Since inception, CITN has contributed immensely to various fiscal policies and reforms aimed at achieving sustainable economic development in the country. CITN also promotes ways of ensuring an increase in national revenue from tax income.

PREFACE

The Nigerian economy has witnessed tremendous changes over time as government expenditure outpaces revenue generation. Also, corruption, money laundering, tax evasion, and misappropriation of funds are other crucial factors that have impeded the realisation of the collected tax targets across all facets of the Nigerian economy. In the same vein, unclear government mandates and policies on tax collection, inadequate integration of the informal economies into the national tax bases, corruption and mismanagement, uncapacious and ineffective tax agencies and under-optimisation of tax collection enhancement technology are some of the myriads of challenges that beset the Nigerian tax system. Thus, to address these avalanches of challenges, it is imperative to understand the dynamics and operations of the Nigerian taxation climate and how it has influenced the economic decisions of firms, households and the macrocosm of the Nigerian economy.

This book chapter, titled “Dynamics of Taxation and the Nigerian Economy”, is aimed at providing relevant theoretical frameworks and current research findings on the changing tax environment and how it affects the economy of the country as a whole. To this end, the first chapter discusses Nigeria's tax system, behaviour, justice, and voluntary compliance culture. It also shows how tax justice affects the voluntary compliance culture in Nigeria. The paper evaluated the effect of tax behaviour on voluntary compliance culture in Nigeria and how tax justice affects voluntary compliance culture in the country. The second chapter looked at corporate governance and tax compliance in the corporate sector of the Nigerian economy. The third chapter looked at tax justification and accountability with evidence from Nigeria. The authors discussed tax digitalisation and economic growth in sub-Saharan African countries in the fourth chapter. The next chapter, which is the fifth discusses the relationship between revenue diversification and economic growth. This was executed by using time series evidence from the Nigerian perspective. The

sixth paper described the value-added tax (VAT) gap in Nigeria. It further provided details on the key determinants and implications of VAT on revenue. The seventh chapter addressed issues related to e-tax management systems and revenue collection efficiency in selected states in Nigeria. The eighth chapter elucidated issues relating to financial inclusion and tax revenue generation in West African countries. The ninth chapter examined issues on gender policy in the composition of the Internal Revenue Service board in Nigeria, while the subsequent chapter discussed issues related to tax practitioners and the Economic and Financial Crimes Commission in Osun State.

The eleventh paper looked at governance quality and voluntary tax compliance in Nigeria, while the twelfth paper investigated the Legal, accounting and tax aspects of mergers and acquisitions transactions in Nigeria. The thirteenth chapter looked at the interactive effect of exchange rate fluctuation and tax structure on sustainable business performance in Nigeria. Interestingly, the fourteenth chapter looked at taxation and the fourth industrial revolution; while the fifteenth chapter discussed in detail issues that are related to random thoughts on the most favoured nation clause in avoidance of double taxation agreements.

Other chapters cover issues on **public service delivery and tax morale of households in developing economies; corporate governance and tax aggressiveness among listed banks in Nigeria and the impact of tax compliance on the performance of small and medium scales enterprises in the Ibadan metropolis.**

We believe that the contributions of this book will be beneficial to academics, policymakers, practitioners, and society at large. Most interestingly, we believe that the suggested solutions from the book will stimulate policy directions in ways that will benefit the country.

Prof. Godwin Emmanuel Oyedokun

Prof. Uwuigbe Olubukunola Ranti

Barrister Chukwuemeka Eze

FOREWORD

Taxation is an important tool for government to raise revenue for public spending, promote economic development and reduce inequality through redistribution of resources. This book, **“Dynamics of Taxation and the Nigerian Economy”**, provides a comprehensive overview of the various intricacies of taxation and how they impact on various sectors of the Nigerian economy.

The Chartered Institute of Taxation of Nigeria (CITN) through the Publicity and Publications Committee has published this book with the intention of providing an authoritative and comprehensive source of information to its members and the public on the dynamics of taxation and impact thereof on the Nigerian economy. It is a comprehensive resource that covers a broad spectrum of topics ranging from tax compliance to tax justification and accountability, digitisation, tax revenue and economic growth, as well as the various taxes and how they are applied. It further examines how technology could be utilised to overcome current tax administration hurdles in Nigeria. The contributors also delved into legal, accounting and tax aspects of mergers and acquisitions, effect of exchange rate fluctuation and tax structure and sustainable business performance, impact of tax compliance on SMEs among others interesting topics.

The book is written in a clear and accessible style, making it easy to understand for readers of all levels. It provides insight into the importance of taxation in the Nigerian economy and how taxation administration and policies can be used to build a more prosperous and equitable economy. It is therefore, a valuable addition to the body of knowledge of Institute and a must read for those seeking knowledge about taxation, fiscal policies and their effect on economy. Members of

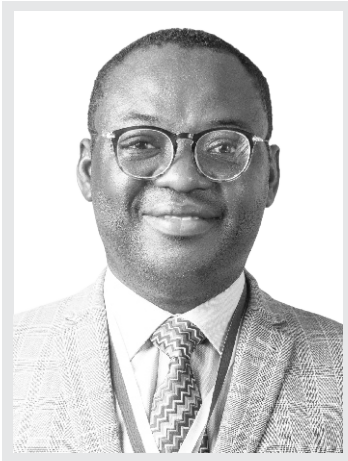
the Institute, the general public and stakeholders alike are thus, encouraged to read this book. It will definitely afford all those who read it the opportunity to upskill their knowledge on current issues as they relate to the dynamics of taxation and the tax profession.

The technical composition of this Book was made possible through the technical contributions of renowned tax professionals/practitioners, respected intellectuals in the Academia, researchers and Legal Practitioners among others. My esteem gratitude goes to them all, especially, the Editorial Team who worked tirelessly to ensure that this book is qualitatively completed. I must also appreciate the Institute's Secretariat for providing the necessary support needed to have this book on the shelves.

Above all, to God Almighty who in his infinite mercies, made it possible for this publication to be consummated.

Adesina ADEDAYO, mni, FCTI
President and Chairman in Council, CITN

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PROFESSOR GODWIN EMMANUEL OYEDOKUN

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Prof. Oyedokun is a multi-talented and multidisciplinary scholar-practitioner of good repute with over 22 years of experience. He is a forensic accountant, public policy analyst, author, and international speaker who is currently a Professor of Accounting & Financial Development at the Lead City University Ibadan, Nigeria. He is a Visiting Professor of Forensic Accounting & Finance at Charisma University, Turks & Caicos Island, West Indies, UK. a visiting Professor at the Department of Management Science of Coal City University, Enugu, he is an Adjunct Professor of Accounting & Finance at both McPherson University, Nigeria & Crawford University, Igbesa, Nigeria. He was an Adjunct Professor of Accounting at the Department of Accounting, Igbinedion University, Okada, Nigeria, and he was a Senior Lecturer in the Department of Accounting and Department of Taxation of Nasarawa State University Keffi. Likewise, he was an adjunct lecturer at Babcock University, and South-Western University.

He is a faculty member at the Joseph Business School Chicago/Lagos, and an international faculty member at the Mississippi State University's Continue Education programmes in Lagos.

Prof. Oyedokun is currently a faculty member for the supervision of Postgraduate Students at the University of South Africa (UNISA). He is also an External Examiner for the undergraduate Accounting programmes of Abia State University, Uturu Nigeria, Atiba University, Oyo, Nigeria, and Dominican University, Ibadan, Nigeria.

Prof. Oyedokun is a sought-after intellectual, who had presented various technical/seminar papers at conferences/training/seminars, and he is an examiner to some professional bodies, both in Nigeria and abroad. He has authored over 50 professional articles, 22 conference papers, 15-chapter contributions, and 171 peer-reviewed academic articles. He has edited 10 books and published 20 books to the Glory of God. He has successfully supervised 121 BSc Projects, 7 PGD Projects, 35 MSc Dissertations, and 11 completed Ph.D. Theses in management, accounting, finance, taxation, and forensic accounting & audit in Nigeria and overseas.

Prof. Oyedokun is the founder of OGE Group and the Principal Partner at Oyedokun Godwin Emmanuel & Co (A Firm of Chartered Accountants, Tax Practitioners & Forensic Auditors), he is an Erudite Contemporary Professor, a Consummate Educationist, and a Human Capital Development Expert who has taught at all levels of education. He has attended several local and international conferences in the last 20 years, including but not limited to the programmes at Lagos Business School, Lagos Nigeria, Joseph Business School, Chicago, USA., University, Dallas Texas, USA, Greenwich University, London, University of Bristol, England, University of Johannesburg South Africa, University of Kenya, Nairobi, among others.

He is currently a Governing Council member of the Chartered Institute of Taxation of Nigeria (CITN), Business Recovery and Insolvency Practitioners of Nigeria (BRIPAN), Global President of the Association of Forensic Accounting Researchers (AFAR), Board Chairman of Association of Certified Fraud Examiners (ACFE, Lagos Chapter) and the Chairman, Ilupeju/Gbagada & District Society of the Institute of Chartered Accountants of Nigeria (ICAN) among others.

Professor Oyedokun is happily married with children.

**PROF. UWUIGBE OLUBUKUNOLA RANTI**

Professor Uwuigbe Olubukunola 'Ranti graduated from Obafemi Awolowo University and she is a Ph.D holder in Accounting. Prof. Uwuigbe Olubukunola joined Covenant University as a lecturer in June 2004 and has since remained in the services of the University. As at January 2022, she was the youngest female professor at Covenant University for over four years. She has served in various capacities which include, but

are not limited to the following: Head, Department of Accounting, Covenant University; She was also Chairman, College of Business and Social Sciences Vision 10:2022 committee, 2018-2021; She is currently the sub-head, research cluster on Corporate Governance and Accounting Ethics.

In her professional quests, she is an Associate member of Chartered Management Accountant (CIMA, UK); Associate member, Chartered Global Management Accountants (CGMA); Associate Member, Chartered Institute of Taxation of Nigeria (ACTI); Fellow International Institute of Certified Forensic Investigation (FCFIP). She is also a Fellow, of the Association of Forensic Accounting Researchers.

She is a recipient and lead researcher of the 2020/2021 grant for Africa Call for Accounting & Finance Research Initiative, by the Pan African Federation of Accountants and African Accounting and Finance Association. She is the chair of the 2022 book project for the Chartered Institute of Taxation of Nigeria. Olubukunola is a member of the Program advisory committee, Namibia University of Science and Technology, Namibia. She is an external examiner at the University of Johannesburg and the University of South Africa. She is a book reviewer for one of the best booksellers in the world (Springer Nature). She is an

associate lecturer for the CBN-Collaborative Postgraduate Program. She is also a research collaborator in the 2022/2023 research grant on “Reshaping teaching excellence through accounting and business students as generators and co-creators of value for business and society” with support from the Chartered Global Management Accountants (CGMA University and Academic Center of Excellence).

Prof. Uwuigbe has published over 60 articles in learned journals and chapters in books. She was a recipient of several achievements/scholarships, fellowships, prizes and awards. She is among the top 20 most productive Nigerian researchers in Economics in 2021 as ranked by Alper-Doger (AD) Scientific Index ranking of Economists. She is married with children.



CHUKWUEMEKA EZE, LL.M., FCTI, NLMD, ACFE, NP

(Taxation Law expert and member, International Association of Tax Judges)

Chukwuemeka Eze is a native of Mgbom-Okposi in Ohaozara L.G.A. of Ebonyi State. He was born on 4th January, 1964. He is married and has children.

He enrolled at St. Brendan’s (later renamed Ikwuano) Primary School, Mgbom-Okposi in 1971 and concluded his primary education in 1976, the same year he was admitted as a student of Government Secondary School, Afikpo in the present Ebonyi State.

On completion of his secondary education in 1981, he engaged in trading and vocational adventures before he got admission to the Federal College of Education, Abeokuta in 1986, where he studied Mathematics & Chemistry Education and obtained NCE in 1989, the same year he got admission to study law at the University of Nigeria, Nsukka.

He obtained an LL.B. (Hons.), Second Class Upper, in February 1994 before attending the Nigeria Law School in 1994. He was called to the Nigerian Bar in March 1995.

In 2007, Eze had a full-time Postgraduate Diploma programme in Mass Communication at the University of Lagos. He subsequently enrolled for a postgraduate degree at the same University of Lagos for his Master of Laws (LL.M.), for which he was certificated in 2014. Eze is currently a Ph.D. student of the Postgraduate School at Nasarawa State University, Keffi.

Eze was a private legal practitioner from 1996 to 2017 in Lagos and became a Notary Public of the Supreme Court in 2013. In the course of his practice, he has appeared in lower and superior courts as well as tribunals.

Chukwuemeka is a chartered mediator and a Neutral of the Lagos Multi-Door Courthouse (LMDC). Eze is a member of Nigerian Bar Association and the International Bar Association. He is the Chairman of the Tax Appeal Tribunal, South East Zone as well as the Chairman of the Forum of Chairmen and Commissioners of the Tax Appeal Tribunal in Nigeria. Eze is a member of the International Association of Tax Judges.

Eze became a Fellow of the Chartered Institute of Taxation of Nigeria (CITN). He was chairman of CITN Ikeja District Society (2009-11), member of CITN Council (2011-14) and member of the Board of the National Advisory Council against Money Laundering of Non-Financial Institutions (2009-2014). Eze is the Legal Adviser of the West African Union of Tax Institutes (WAUTI).

Chukwuemeka is the Lead Legal Adviser of Chartered Institute of Taxation of Nigeria (CITN).

He has been a key participant in conferences within and outside the country including but not limited to the Conferences of West African Union of Tax Institutes in Nigeria, Ghana and Niger, Transfer Pricing Conference in South Africa in 2014, Commonwealth Association of Tax Administrative (CATA) Conference in Rwanda in 2013, Confederation Fiscale Européenne (CFE) Conference in Belgium in 2015 and in Italy in October 2019, International Bar Association Taxation Conference in London, January 2019, Tax Appeal Tribunal-sponsored capacity building training in London in July 2022, and the Conference of the International Association of Tax Judges in Budapest, September 2022.

He is a resource person to many organisations, a regular paper presenter in CITN and Chartered

Institute of Forensic and Fraud Examiners' Seminars and Mandatory Professional Training Programs.

He was a tax columnist in Daily Sun and Union newspapers for two and half years and has been the Editor of the Joint Tax Board Newsletter since 2012.

Eze taught Law of Contract, International Humanitarian Law, Media Law, Revenue and Taxation Law, Diplomatic and Consular Relations Law, Taxation Law and Policy, and International Taxation Law at the Faculty of Law, Nasarawa State University, Keffi. He is a member of the Nigerian Association of Law Teachers (NALT).

He has many publications to his credit.

Eze was Chairman of the Fiscal and Monetary Affairs of Committee of the Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture (NACCIMA) but currently the Chairman, Finance and General Purpose Committee of NACCIMA.

Chukwuemeka is the President of Salt City Chamber of Commerce based in Ebonyi State. He is also a member of the Council and Executive Committee of NACCIMA. He was part of the NACCIMA delegation to South Korea in 2022 as well as one of the Federal Government's 2-man delegation to the Conference of National Delegates on the Chemical Weapons Convention in Qatar in 2022.

Eze has attended relevant programmes of the Bureau for Public Procurement, National Office for Trade Negotiations, the CBN, and the African Continental Free Trade Area Agreement (AfCFTA).

Eze is a member of Markelink Consults Limited, a team of consultants to the World Bank/Federal Ministry of Finance, Budget and National Planning on TRADE TAXATION AND CUSTOMS POLICY STUDY and a researcher on Trade Taxes.

His hobbies include monitoring current affairs, public speaking and swimming.

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17

RANDOM THOUGHTS ON THE MOST FAVOURED NATION CLAUSE IN AVOIDANCE OF DOUBLE TAXATION AGREEMENTS

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ABSTRACT

The growth of bilateral, multilateral and regional trades has gained increased traction in recent times thereby giving rise to a proliferation of trade agreements. In International economic relations and multilateral trading systems, one of the cornerstone features is the Most Favoured Nation Clause (“MFN”). Generally, the import of the Most Favoured Nation (MFN) clauses is to link trade agreements by ensuring that the parties to one treaty provide treatment no less favourable than the treatment they provide under other treaties in areas covered by the clause. MFN Clause in international economic relations is a non-discriminatory trade policy. Characteristically, MFN clauses come in a variety of forms and in relation to diverse subjects. From historical point of view, MFN clauses were often contained in bilateral treaties of friendship, commerce and navigation whose main function was to regiment a variety of matters between the parties which were usually commercially driven in nature. Given this basis, homogeneous interpretation or application could not certainly be expected. Hence this article is a restrictive attempt to explore thoughts on MFN clause in the context of avoidance of double taxation agreements. MFN clause in tax treaties intends to stimulate non-discrimination and parity in business and investment opportunities among

treaty partner countries. In the course of time, different tax treaty models have been developed to wit: United Nations Model Double Taxation Convention between Developed and Developing Countries United (“Nations Model Convention”), the Organization for Economic Co-operation and Development Model Tax Convention on Income and on Capital (OECD Model), African Tax Administration Forum (ATAF), and Nigerian Model of Avoidance of Double Taxation. In principle, mischief that the tax treaty seeks is laudable and it is to ensure incredible potentials. However, the salient question in light of recent disputes arising from tax treaties executed by both South Africa and India with the Netherland is whether parity in business by way of reducing taxation is achievable between high-income and low-income parties to tax treaties. This article is a random review of basic topical subjects and contemporary issues relating to the MFN Clause in avoidance of double taxation agreements. Another limitation of this article is that it does not seek exegetical analysis of the MFN policy but rather a brief inquiry.

Keywords: Most Favoured, Nation Clause, Avoidance, Double Taxation, Agreements

1.0 INTRODUCTION

Most Favoured Nation (“MFN”) clauses are included in many investment treaties and this includes avoidance of double taxation agreements. The growth of bilateral, multilateral and regional trades has gained increase traction in recent times thereby giving rise to the proliferation of trade agreements. In International economic relations and the multilateral trading systems one of the cornerstone features is the Most Favoured Nation Clause (“MFN”). The import of the Most Favoured Nation (MFN) clauses is to link trade agreements by ensuring that the parties to one treaty provide treatment no less favourable than the treatment they provide under other treaties in areas covered by the clause. There is link between the principle of MFN Clause and the avoidance of double taxation. Invariably, the idea of MFN Clause in avoidance of double taxation agreement also intends to

promote non-discrimination and parity in business and investment opportunities among contracting countries to tax treaties. This work has made attempt to set out random thoughts on the most favoured nation clause in avoidance of double taxation agreements.

2.0 OVERVIEW: MEANING, CONCEPTION AND ELEMENTS OF MOST FAVOURED NATION CLAUSE

Most Favoured Nation Clause has been defined or described in different ways and the same has garnered different expressions. It suffices to say that except for semantics, most writers and authors appear striking concurrence on the fundamental ideas and objects of MFN.

In economic relations, the most favoured nation clause was defined as a treaty provision under which the granting state undertakes the obligation towards the beneficiary state to accord to it or to persons or things in a determined relationship, with its most favoured nation treatment based on agreed scope of relations.¹ Adjunct to the MFN policy is the principle of MFN clause treatment. Hence the International Law Commission in its Draft Articles on MFN considers and defines MFN treatment to the effect that:

*“treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.”*²

MFN is a constituent of the principle of non-discrimination under international law. In Bilateral Investment Trade (BIT), MFN demands that the host state extend to the investors

1. See Endre Ustor (1997) “Most-Favoured Nation Clause” in *Encyclopedia of Public International Law*, Volume 3, 468, p. 468 . See Article 4 of the International Law Commission's Draft Articles as relating to the MFN

2. See Article 5 of the ILC's Draft Articles

or investments from the other signatory state the most-favourable treatment that it would have granted to investors or investments from a third state to the BIT. The treaty in which a MFN provision is included is termed the “³basic treaty.” MFN clauses have grown in importance as a tool for economic liberalization.⁴ As observed by Claudia, MFN clauses help to avoid the economic ineptitudes that would result from country-by-country liberalization since investors from any nation are guaranteed to be treated equally to investors from the most powerful countries in their relations with the country where the investment was made.⁵

Characteristically, MFN clauses come in a variety of forms and in relation to diverse subjects. From a historical point of view, MFN clauses were often contained in bilateral treaties of friendship, commerce and navigation whose main function was to regiment a variety of matters between the parties. As reported by the International Law Commission's Group on MFN Clause, the scope of MFN Clause has in recent time been narrowed to the international economic law. According to them:

The circumstances that existed when the Commission dealt with the MFN clause in its reports and the 1978 draft articles have changed significantly. There has been a narrowing of the use of MFN treatment in the economic field, but at the same time a broadening of the scope of MFN treatment within that field. The Special Rapporteurs for the 1978 draft articles had dealt with a wide range of areas where MFN clauses operated, including navigation rights and diplomatic immunities. Today, the MFN principle operates primarily in the realm of international economic law, in particular in respect of trade and investment.

3. See Suzy H. Nikiéma (2017), “The Most-Favoured Nation Clause in Investment Treaties in IISD Best Practices Series”, available at <<https://www.iisd.org/system/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf>> and accessed on 1/9/2022

4. See Osama Obasayo (2022) “Nigeria: Most-Favoured Nation Clauses in Bilateral Investment Treaties” available at <https://www.mondaq.com/nigeria/arbitration-dispute-resolution/1176458/most-favoured-nation-clauses-in-bilateral-investment-treaties#_ftn4> and accessed on 1/9/2022

5. See Claudia Salomon and Sandra Freidrich, Practical Law Arbitration “How Most Favoured Nation Clause in Bilateral Investment Agreement Affect Arbitration” available at <<https://www.lw.com/thoughtLeadership/favoured-nation-clauses-arbitration>> and accessed on 1/9/2022

There are different characteristics of the MFN Clause. First, the obligation to grant MFN treatment is stringently a treaty obligation, thus it does not arise from customary international law. This position restricts a state's obligation to grant MFN treatment if it has made commitments in a treaty and only to the extent of the commitments made therein.⁶ Article 7 of the International Law Commission's Draft Articles equally corroborates this when it provides that advantage of MFN treatment may only be claimed from a state "otherwise than on the basis of an international obligation undertaken by the latter State." Second, MFN Clause is a relative obligation.⁷ Relations of the parties under MFN depend on what is granted to investors of other nationalities and their investments in the host state.⁸ Third, sphere of relationship under MFN Clause can only be compared with parties and subjects connected to the making of the Clause. Thus, MFN Clause can only come into effect if the persons or things benefiting under MFN:

- (a) belong to the same category of persons or things as those in a determined relationship with a third;*
- (b) state which benefits from the treatment extended to them by the granting State and*
- © have the same relationship with the beneficiary State as the persons and things referred to in subparagraph (a) have with that third State.⁹*

Further on MFN treaty characteristics and practices, MFN clauses differ in expression and subjects they address. Some MFN clauses are inclusive in that they apply to "all matters" governed by a treaty while others exclusive; strictly applicable only to specific types of "treatment" such as management, maintenance, use, enjoyment or disposal" of

6. See Suzy H. Nikiéma, op. cit. p. 2

7. Ibid

8. Ibid

9. See Article 10.2 of the International Law Commission's Draft Articles on MFN Clause

the investment.¹⁰ MFN clauses may similarly appear in different parts of a treaty. MFN clauses may be a stand-alone provision or embedded in other obligations.¹¹ In their comprehensive review of MFN Clauses in bilateral agreements, the International Law Commission concludes that notwithstanding common obligation which characterizes MFN treatment in bilateral agreements, the manners by which these obligations are couched vary. To this end, the ILC chronicled six types of these obligations though they raise a caveat to the effect that some of these agreements are hybrid, combining different formats within a single MFN Clause.¹² The six types of obligation identified by the ILC are as follows:

- (I) MFN Obligation strictly based on treatment accorded to the investments or the investors¹³;
- (ii) MFN Obligation with a broadened scope of treatment relating to all matters underlying the agreement¹⁴;
- (iii) MFN Obligation in which the term “treatment” is connected to specific aspects of the investment process, such as “management,” “maintenance,” “use,” and “disposal” of the investment to which MFN treatment applies¹⁵;

10. See Esme Shirlow and Kabir Duggal (2022) “Most Favoured Nation Treatment”, available at <<https://jusmundi.com/en/document/wiki/en-most-favoured-nation-treatment>> and accessed on 1/9/2022

11. Ibid

12. See United Nations Conference on Trade and Development (2010) “Most-Favoured-Nation Treatment” in UNCTAD Series on Issues in International Investment Agreements II , available at <https://unctad.org/system/files/official-document/diaeia20101_en.pdf> and accessed on 2/9/2022

13. The example of this type of obligation in MFN Clause reflects between Austria-Czech and Slovak Republics agreement

14. An example of this format reflects in Argentina-Spain agreement, which sets out that the MFN provision applies “[i]n all matters governed by this Agreement”. See Agreement on the reciprocal promotion and protection of investments, done at Buenos Aires on 3 October 1991, United Nations, Treaty Series, vol. 1699, p. 187.

15.

- (i) MFN Obligation by which where MFN treatment is related to specific obligations under the treaty, such as the obligation to provide fair and equitable treatment¹⁶;
- (ii) MFN Obligation with which MFN treatment is to be provided only to those investors or investments that are “in like circumstances”⁶⁴ or “in similar situations”¹⁷ to investors or investments with which a comparison is being made;¹⁸
- (iii) MFN Obligation which confines MFN treatment to territorial limitations.¹⁹

It is worth mentioning that MFN provisions in investment agreements usually provide for exceptions in order to delimit obligations of the application of the MFN treatment. The most common exceptions relate to taxation, government procurement, or benefits that a party gains through being party to a customs union.²⁰

3.0 INTERNATIONAL LEGAL FRAMEWORK FOR THE MOST FAVOURED NATION CLAUSE IN AGREEMENTS OR TREATIES

Most Favoured Nation Clause belongs to the sphere of the international trade.²¹ However, international trade as well is an offshoot of international law. International law covers

16. Reference has been made to terms in North American Free Trade Agreement (NAFTA). See Article 1103 of NAFTA which provides for MFN treatment in respect of “the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.”

17. See for example the Agreement between the Republic of Turkey and Turkmenistan concerning the reciprocal promotion and protection of investments, done at Ashgabat on 2 May 1992, at art. II, available at <[http://investorstatelawguide.com/documents/documents/BIT-0335%20-%20Turkey%20-%20Turkmenistan%20\(1992\)%20\[English\].pdf](http://investorstatelawguide.com/documents/documents/BIT-0335%20-%20Turkey%20-%20Turkmenistan%20(1992)%20[English].pdf)>

18. Ibid

19. A good example of this variety of obligation is Italy-Jordan agreement executed on 21st July 1996 which provides that the contracting parties agree to provide MFN treatment “within the bounds of their own territory.”

20. A very good example of this reflects in Article 7 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the promotion and protection of investments, executed on 11th December, 1990, available at <>. See also OECD, “Most Favoured Nation Treatment in International Law” (2004) OECD Working Papers on International Investment, Vol. 2, p. 5

21. Ibid

*A publication of the Publicity and Publications Committee
The Chartered Institute of Taxation of Nigeria*

both the conduct of sovereign states in international economic relations, and the conduct of private parties involved in cross-border economic and business transactions.²² The main source of international law affecting inclusion of the MFN in international trade agreement is Vienna Convention on International Treaties (“Vienna Convention”/“VCLT”). This is because MFN Clause is a feature in bilateral or multilateral (rare) investment treaties or agreements. Whether the agreements are bilateral, multilateral or regional in nature, Vienna Convention is a convergence point in terms of legal framework.

Relevant provisions of the Vienna Convention on International Treaties that would bear on the application, construction or interpretation of the MFN Clause are worth considering. This begins with the definitional foundation as provided by Article 2(a) of the Vienna Convention which provides:

“treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

MFN Clause is a provision in a treaty or agreement hence it falls within the contemplation of the VCLT then it derives its legality as enjoyed by the entire treaty under VCLT regardless of nature of the subject treaty or agreement.

Article 6 of the VCLT provides that for parties and their legal capacity to enter into treaty or agreement hence it provides that “every State possesses the capacity to conclude treaties.” Under International Law, recognition of state is defined as acknowledgement or acceptance as an international entity by the existing States of the international community upon fulfillment of certain essential conditions¹.

22. See Legal Information Institute “International Economic Law” available at <https://www.law.cornell.edu/wex/international_economic_law> and accessed on 2/9/2022

In international trade, two agreements pertaining to trade in goods and services. Their ultimate goal is to boost international trade. As at today, more than 90% of the international trades are conducted through GATT. GATS came into existence in 1986 to bridge a gap of members of the WTO trading in services as against the goods which GATTs strictly deal with. GATS mean General Agreement on Trade in Services. It covers mainstream of trade in services internationally. It is worth noting that provisions in both GATT and GATS are very similar perhaps this is partly the reason for calling both agreements “WTO systems”. Invariably, it is not a surprise that provisions for MFN treatment are pervasive in both regimes. Both GATT and GATS are forms of treaties and agreements hence the VCLT to them. Within the WTO system, MFN treatment expanded from its application to trade in goods to the new regime for trade in services.

The principal legal framework regulating the inclusion of the MFN Clause in bilateral agreements is VCLT. Bringing regimes of GATT and GATS is hinged on its global entrenchment in international trade of goods and services.

4.0 MOST FAVOURED NATION CLAUSE IN AVOIDANCE OF DOUBLE TAX AVOIDANCE AGREEMENTS

Taxation is a fiscal power exercised usually by a government by imposing a financial obligation on its citizens or residents.²³ The term “taxation” is the root word of the term “tax” and the latter is end product that the former seeks to achieve as a process. Thus tax has been defined as compulsory payment imposed by government to finance the public sector in a statute enacted specifically for that purpose for which no direct benefit is

23 See Julain Kegan “Taxation”, <<https://www.investopedia.com/terms/t/taxation.asp>>, accessed on 14/12/2021

conferred on taxpayers by government in exchange for the payment.²⁴ Taxation has three major basic components which are: it is imposed by government; it is intended for public purposes and it is a compulsory payment.²⁵

Meanwhile, the source of public revenue revolves around two pillars, that is, tax and non-tax revenues. Therefore, it is clear that taxation remains a distinct class in nature as against a coalesced class termed “non-tax revenues”. Tax, therefore remains a veritable mechanism for national development. Tax has been the major source of revenue for government in providing socio-amenities and infrastructures in developed countries. As observed “taxation as a critical fiscal policy measure is a veritable tool, for social economic development which has been used by several countries in the world, to further their economic objectives”²⁶. Governments have also used taxation as an instrument of fiscal policy in the redistribution of wealth and stimulation of economic growth by creating jobs.²⁷

One of the arrow head issues involved in taxing multinational enterprises or corporations is transfer pricing but it is at the same time connected with other issues. This is because transfer pricing triggers profit sharing and tax fraud which therefore demands response by way of arm's length principles for the allocation of tax revenue between or among the concerned tax jurisdiction. Invariably, the drive of such revenue allocations is to eliminate double taxation.²⁸ The latter, double taxation, occupies a centerpiece in the subject of this discourse.

24. See Sanni, Abiola Olaita, “Division of Taxing Powers in Nigeria- A Paradigm Shift” (DPhil, University of Lagos, 2010), pp. 35-35

25. Graetz, M. J. & Schenk, D.H., *Federal Income Taxation, Principles and Policies*, 4th ed., (2001) Fendof Press, N.Y., p.1,

26. See Newman U. Richard, (2019), 'Overview of National Tax Policy and Its Implication for Tax Administration in Nigeria', *Nnamdi Azikwe University Journal of International Law and Jurisprudence*, Vol. 10, No. 2, p. 42

27. See generally R.A Musgrave, and P.B Musgrave, *Public Finance in Theory and Practice* (2nd Edition McGraw-Hill Kogakusha Ltd, 1976)

28. Ibid, p. 383

Double taxation (DT) denotes the imposition of taxes on the same income, assets or financial transaction at two different points in time. Double taxation can be economic and it can be legal or juridical in nature.²⁹ It is economic for instance where shareholders are taxed on dividends received after corporate earnings from which they had received their dividends had earlier been subject to relevant corporate tax. Double taxation is legal in another sense where two countries would consider that a person (natural or artificial) is a tax resident. Thus, taxes on income are imposed by a country “A” after the same income has already been taxed by country “B”. Corporate Finance Institute (CFI) categorizes double taxation as corporate and international in character.³⁰ According to CFI, double taxation occurs on corporate profits through corporate tax and tax leveled on dividend payouts. On the other hand, international double taxation “involves the taxation of foreign income in the country where the income is derived, as well as the country where an investor is a resident”.³¹

Double taxation poses an obstruction to international trade and investment and the key objective of international taxation is the abolition of double taxation.³² The phenomenon of international related double taxation has occupied subject of concern down the ages and diverse approaches had been offered and initiated through domestic tax legislation by countries which include giving tax reliefs in the form of tax exemption, tax holiday, tax credit or a reduction in the foreign taxes payable. The efforts have however not prospered in curbing the conflicts of taxation as disputes more often than not; arising from the differences in basic tax principles and taxing methods or rights that keeps grinding the progress.³³ The rallying point of scholars for treating double taxation with

29. See Legal Information Institute “Double Taxation”, available at https://www.law.cornell.edu/wex/double_taxation#:~:text=Double%20taxation%20refers%20to%20the,after%20taxation%20as%20corporate%20earnings>.> and accessed on 9/9/2022

30. See Corporate Finance Institute (2021) “Double Taxation”, available at <https://corporatefinanceinstitute.com/resources/knowledge/finance/double-taxation/> and accessed on 9/9/2022

31. Ibid

32. See Rohatgi R 'Basic International Taxation' (2002) London: *Kluwer Law International*, p. 44

33. Ibid

international character is through the formulation of treaties or agreements among concerned countries. This is what is generally referred to as “avoidance of double taxation agreements”. A treaty is equally an international agreement concluded between States and governed by international law.³⁴ Though Nigerian authority suggests that a tax treaty could be made between a sovereign state and an international organization, it is our position that such circumstance is rare and if it exists, the legality may raise some dust in the light of Article 2 of the VCLT.

Bilateral tax treaties donate rights and impose obligations on the two contracting States, but not on third parties such as taxpayers. However, the practical effects of bilateral tax treaties are clearly intended to benefit taxpayers of the contracting States. Whether treaties do so or not depends on the domestic law of each State. In some States, treaties are self-executing which means once a treaty is concluded; it confers rights on the residents of the contracting States.³⁵ In some other States, some supplementary action is necessary before benefits under a treaty can become active for the benefit of the residents of the contracting States. Nigeria falls under the latter.³⁶

Under VCLT,³⁷ treaties are binding on the contracting States and must be performed by them in good faith. This position is based on *pacta sunt servanda* principle. If a country fails to respect its tax treaties,³⁸ other countries have the right to reserve their reciprocity under the same pact. This is because reciprocity is a fundamental underlying principle of tax treaties. Most tax treaties are bilateral. There are very few multilateral income tax treaties. Meanwhile, there are quite a lot of other types of treaties that deal with tax issues. Certain types of treaties deal primarily with non-tax matters but at the same time include

34. See Article 2 of the VCLT

35. See Brian J. Arnold “Introduction to Tax Treaties” available at <https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-06/TT_Introduction_Eng.pdf> and accessed on 9/9/2021

36. See Section 12 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

37. See Article 26 of VCLT

38. See Brian J. Arnold, *op. cit.*

tax provisions in the agreements.³⁹ According to Brian the non-tax treaties include air transportation agreements and trade and investment treaties, such as the agreement governing the World Trade Organization.⁴⁰

There is link between the principle of MFN Clause and the avoidance of double taxation. As earlier posited, Most Favoured Nation (MFN) principle is the substratum of non-discriminatory trade policy. The primary ideology behind MFN Clause is, if a country extends favourable treatment to a country on a certain subject under a given agreement, it must extend the same treatment “to other parties to the agreement equally regarding that subject”⁴¹. Invariably, the idea of MFN Clause in avoidance of double taxation agreement also intends to promote non-discrimination and parity in business and investment opportunities among contracting countries to tax treaties.

5.0 MOST FAVOURED NATION CLAUSE AND TAX TREATY MODEL

Majorly, there are two most influential international tax treaties model convention which serves as guidance for the enactment of tax treaties between countries to wit: OECD model tax convention (MTC) and the United Nations model tax convention (UN Convention)⁴². They are heavily relied by contracting parties. It has been submitted, though African Tax Administration Forum (ATAF) is not a regional economic community; it has a model tax treaty. Finally, many countries, including Nigeria, have their own model tax treaties but Brian has suggested states model tax treaties are not always published but only provided for countries they seek to enter into tax treaty negotiations with⁴³.

39 Ibid

40 Ibid

41 See Deepak Kapoor (2021) “The MFN Clause in Tax Treaties is Jeopardising Tax Revenue for Lower-Income Countries”, available at <<https://www.ictd.ac/blog/mfn-clause-tax-treaties-jeopardising-tax-revenue-lower-income-countries/>> and accessed on 9/9/2022

42 See Brian J. Arnold, op. cit. p. 4

43 Ibid

By nature, the OECD Model Convention appears to favour capital-exporting countries over and above capital-importing countries. OECD model seeks to remove or diminish double taxation by demanding the source country to give up some or all of its tax on definite classes of income earned by the residents of the other treaty-contracting country. This prominent characteristic of the OECD Model Convention tends to be suitable if the flow of trade and investment between the two countries is rationally equal and the residence country levels taxes on any income exempted by the source country. The major criticism against the OECD Model Convention by many tax scholars including Brian is that OECD model may not be suitable for treaties entered into by net capital-importing countries.⁴⁴ Most developing countries fall under the category of capital-importing countries hence they largely consider OECD model unfavourable. Consequently, many developing countries have developed their own model treaty in line with the United Nations model.

Meanwhile, the United Nations Model Convention largely imitates the design established by the OECD Model Convention. Many of UN Convention Model provisions are similar to those in OECD Model Convention save for some limited modification. Brian has even suggested that we should use UN model convention as an extension of the OECD model with sprinkled variations.⁴⁵ In setting out the major lines of differences between the two models, Brian submitted as follows:

the main difference between the two model Conventions is that the United Nations Model Convention imposes fewer restrictions on the taxing rights of the source country; source countries, therefore, have greater taxing rights under it compared to the OECD Model Convention. For example, unlike Article 12 (Royalties) of the OECD Model

44. Ibid

45. Ibid

Convention, Article 12 of the United Nations Model Convention does not prevent the source country from imposing tax on royalties paid by a resident of the source country to a resident of the other country. The United Nations Model Convention also gives the source country increased taxing rights over the business income of non-residents compared to the OECD Model Convention. For example, the time threshold for a construction site permanent establishment under the United Nations Model Convention is only 6 months, compared to 12 months under the OECD Model Convention. In addition, furnishing services in a country for 183 days or more constitutes a permanent establishment under the United Nations Model Convention, whereas under the OECD Model Convention furnishing services is a permanent establishment only if the services are provided through a fixed place of business which, according to the OECD Commentary thereon, must generally exist for more than 6 months

It must be noted that UN model appears to have far more influence than OECD model as its regime has been said to reflect in many bilateral tax treaties based on its wide acceptance.

On ATAF model, while the African Tax Administration Forum (ATAF) is not a regional economic community, it has developed a tax treaty model with supreme purpose to promote common regional (African) policy and enhance a reliable approach. Though ATAF has developed a tax treaty model, there is however no comprehensive statistics on regional tax treaty policy frameworks.⁴⁶ ATAF model has been scathingly criticized as a significant hybrid of the OECD and UN models and for this reason, it has not gained regional respect as expected.

46. See Kiyoshi Nakayama (2021) “How to Design a Regional Tax Treaty and Tax Treaty Policy Framework in a Developing Country”, available at <https://www.imf.org/en/Publications/Fiscal-Affairs-Department-How-To-Notes/Issues/2021/05/04/How-to-Design-a-Regional-Tax-Treaty-and-Tax-Treaty-Policy-Framework-in-a-Developing-Country-50356>

6.0 MOST FAVOURED NATION CLAUSE AND NIGERIAN TAX TREATY MODEL

In order to understand the nature of Nigerian tax treaty ideology, primary attention should be paid to the Constitution of the Federal Republic of Nigeria 1999 (as amended), Treaties (Making Procedure, Etc.) Act (TMPA), and Companies Income Act (CITA) must be borne in mind. They are foundational. Section 12 of the Constitution and TMPA make any treaties entered into by Nigeria subject to the national assembly's ratification before they can become effective. Section 45 of the CITA grants power to the Minister of finance to give effect to any Double Taxation Treaty that Nigeria enters into.

A Nigerian double taxation treaty is made after the order of the OECD Model convention relating to the rules on double taxation. In accordance to adoption of OECD, Nigeria has entered into Double Taxation Agreement (DTA) or Double Tax Treaties (DTT) with 22 countries out of which 13 or 14 have been ratified⁴⁷ in accordance with the statutory and constitutional provisions. The countries that Nigeria has DTA OR DTT with are United Kingdom, Netherland, Canada, South Africa, China, Philippines, Pakistan, Romania, Belgium, France, Mauritius, South Korea, Singapore, Qatar, Spain, Cameron, and Ghana. Some of these DTTs are comprehensive while others are not. This is available record as per 2019 data. All the DTTs cover relevant taxes except Nigeria's DTT with Italy which relates to only Capital Gains Tax arising from shipping and air transportation. The DTTs

<https://www.imf.org/en/Publications/Fiscal-Affairs-Department-How-To-Notes/Issues/2021/05/04/How-to-Design-a-Regional-Tax-Treaty-and-Tax-Treaty-Policy-Framework-in-a-Developing-Country-50356>> and accessed on 9/9/2022

47. See Oladejo Adeyemi and Ikechi Chukwu “A Review of Nigerian Double Taxation Treaty Framework”, available at <<https://www.mondaq.com/nigeria/income-tax/842352/a-review-of-the-nigerian-double-taxation-treaty-framework>> , and accessed on 9/9/2022 . See also Damilola Salawu, Damilola Oyebayo, Damilola Obafemi and Doyinsolami Oyeleye (2021) “International Trade in Goods and Services in Nigeria: Overview”, available at <[https://uk.practicallaw.thomsonreuters.com/w-0164262?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-0164262?transitionType=Default&contextData=(sc.Default)&firstPage=true)> and accessed on 9/9/2022

cover Personal Income Tax, Companies Income Tax, Petroleum Profits Tax, Capital Gains Tax, Tertiary Education Tax, and Information and Technology Tax. While it appears that Nigeria has had MFN Clause with all its effects embedded in some of its DTTs, currently Nigeria seems to consider its agreements on a case-by-case basis. Thus, granting MFN in relation to DTT to contracting states is now restrictive.

CONCLUSION

This work has made attempt to set out random thoughts on the most favoured nation clause in avoidance of double taxation agreements. As the topic suggests, this work was not premised on the in-depth analysis but rather a voyage attempt to the principle of specie of the MFN.