CHAPTER 12

Taxation Systems and Public Policy in Kenya: Unpacking the Unwritten Tax Treaty Policy

Attiya Waris and Elvis Oyare

Introduction

Taxation is an essential governance function and has been the subject of considerable research in the context of both democratization and state-building (Levi 1988; Tilly 1990; Brautigam et al. 2008). This literature has largely focused on the role that taxation plays in the domestic political arena. It has focused on the "social contract"—the notion that citizens pay tax in return for services and benefits by the state. This is an important aspect of governance in African countries, but it has already been covered elsewhere in this volume, especially in the previous chapter by Onyango on state-society relations. In recent decades, globalization has fuelled attention to the external dimension of national taxation systems: how individual countries sign agreements that regulate the taxation of foreign

A. Waris (✉)
School of Law, University of Nairobi, Nairobi, Kenya
e-mail: waris@uonbi.ac.ke

E. Oyare
Committee on Fiscal Studies, University of Nairobi, Nairobi, Kenya

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G. Onyango, G. Hyden (eds.), *Governing Kenya*,
https://doi.org/10.1007/978-3-030-61784-4_12

entities, notably multinational corporations that are needed for investment purposes, yet because of their transnational character pay little, if any, tax, in the countries where they operate. The purpose of this chapter is to discuss the role of tax treaties in the international fiscal system and how this issue specifically affects Kenya. It begins with a discussion of why tax treaties are important to governments, before proceeding to an examination of what goes into tax policy. The second half of the chapter covers issues specific to Kenya, both what the country needs to do to enhance its capacity to gain from entering into double tax agreements and what the barriers to success might be.

Why Tax Treaties?

Double taxation agreements (DTAs), also referred to as tax treaties, have developed out of a need by contracting individual states to find a common scheme of taxation to deal with transnational entities that may be liable to taxation in more than one jurisdiction (Smith 1959). DTAs are instruments for the creation of favourable investment climates, as confirmed in the preamble of the model tax convention of the United Nations (UN) and the Organisation for Economic Cooperation and Development (OECD). While the avoidance of double taxation has always been their primary role, states are increasingly concluding DTAs in pursuance of other complementary objectives, for instance, to attract foreign direct investment through ensuring fiscal certainty to investors and to facilitate cross-border trade through the provision of fiscal and other incentives (Hearson 2015).

The rationale for tax treaties, therefore, is twofold: to attract investment while also regulating transactions to minimize revenue losses. They are easily at cross-purpose and striking an acceptable balance is a political act. For the first few decades after independence, the balance was in favour of regulation—to stop capital flows from African countries to “tax havens” in Switzerland and elsewhere. Those regulations were often flouted by African leaders who transferred massive amounts of money into private accounts or private investments in developed countries. Tax treaties in those days were few and national taxation systems ineffective. The flow of money out of Africa by well-placed political leaders negated much of the foreign aid that these countries received. According to one source, a staggering US$ 1.2–1.4 trillion left the African region illicitly between 1980 and 2009 (Global Financial Integrity and African Development Bank

2013). This figure far exceeds what these countries received in the form of foreign aid. It further confirms that wherever governance is not transparent, tax evasion is rampant.

Tax evasion is only one side of the problem African states face in obtaining revenue for their administration and development. Because the domestic revenue base in these countries is limited, they must also ensure that they can tax corporations and individuals that invest in their countries but are residents elsewhere. For this purpose, they sign tax treaties to "catch" corporations and individuals who are ready to invest but do so on the best available terms. Thus, as African states aim at increasing their revenue from foreign actors within their jurisdiction, these same actors approach investment intending to pay as little tax as possible. It is not uncommon, therefore, for multinational corporations to engage in what amounts to "treaty shopping", a practice that tends to affect African states to sign unfavourable treaties to be able to attract foreign investors. African countries, therefore, are victims of tax evasion by their own citizens and tax avoidance by their foreign investors. Their difference is summarized in Table 12.1.

The tax avoidance issue has gained increased attention in recent decades with foreign aid on the decline and foreign investment becoming the preferred mode of transaction with other countries. Political leaders have embraced the notion that tax treaties are beneficial and will contribute to accelerating national development although Treasury officials have often pointed out that costs may exceed benefits. The issue has gained further prominence by the fact that the developed countries—under the auspices of a special programme of the Organisation for Economic Cooperation and Development (OECD) titled "Base Erosion and Profit Shifting"—have questioned the value of tax treaties since their impact tends to be

Table 12.1 The differences between tax evasion and tax avoidance

	Tax evasion	*Tax avoidance*
Purpose	Private gain	Corporate gain
Method	Illicit transfer of money	"Treaty shopping"
Effects	Loss of integrity and revenue	Rush into questionable treaties
Impact	Loss of political legitimacy	Threat to sustainable development

Source: Author and editors

undercutting the 2030 Agenda on Sustainable Development (Brumby and Keen 2016; Beer and Loeprick 2018).

This "race to the bottom" by African governments to secure foreign investment has been detrimental to African countries that rushed to sign tax treaties in the last couple of decades. It must be noted that African countries have not adopted a common stand in the past, and in the case of one country, in particular—Mauritius—it has served as a facilitator of tax avoidance in other African countries. Its national policy has been that as a small island country it can earn revenue by signing treaties with other governments in Africa—and elsewhere—thereby positioning itself as an "entry point" for investors on the African continent. This role of intermediary has enabled Mauritius to shave off a significant portion of the revenue that would otherwise have gone to the African country hosting the investor. It seems that in the case of African governments, these treaties were signed without experience in a rush when foreign direct investments became common in Africa and it was possible to set one country against the other. According to the Mauritius Revenue Authority (2020), the country had signed 46 tax treaties to avoid double taxation, many of them with African governments. These were at different degrees of finalization, some already ratified, others still awaiting signature by the head of state.

More recently, however, African countries like Senegal and Zambia have reversed course and opted out of the tax treaties they signed with Mauritius. Rwanda and South Africa have done the same (*The Economist*, 24 November 2018). There is a more global reassessment of the value of tax treaties to facilitate capital investment. While multinational corporations no doubt will continue to play an important role in the global economy, the heyday of free capital flows seems to be much more in question today. Actors in both developed and developing countries are nowadays ready to accept that both benefits and potential costs arise out of the conclusion of a tax agreement. The decision to negotiate and eventually conclude such a treaty should not be taken lightly (Mutava 2019). The very need to enter and conclude DTAs has recently come under the spotlight with the results of several empirical studies postulating that the revenue loss anticipated after the provision of incentives within these agreements far exceeds the resultant foreign direct investment that actually occurs. There is simply no correlation between the conclusion of a double tax agreement and a subsequent increase in foreign direct investment (Beer and Loeprick 2018). Surprisingly, these findings have not deterred the conclusion of DTAs with at least 3000 of these agreements said to be in

current operation globally with more in various stages of negotiations (Hearson 2016).

These findings have resulted in a significant legitimacy crisis as countries struggle to justify reasons for the conclusion of DTAs. Areas of conflict are particularly rife between the obligations of states under these agreements, on the one hand, and the requirement of fiscal responsibility, on the other, under their constitutions and different domestic laws, even extending to accusations that avenues for tax abuse provided under these agreements result in violation of human rights (Georgopoulos 2004). Particularly as regards human rights, Waris (2013) notes that the recognition of human rights in the fiscal state could help to marshal its development to the ultimate fiscal achievement—the improvement and maintenance of the well-being and social welfare of society, as envisaged by Schumpeter (1942).

Tax Treaty Policy

Tax treaties are often an outcome of a series of fiscal compromises from the negotiating partners as countries generally have different motivations when concluding these agreements (Tinhaga 2016). Such motivations may include pressure on governments in the form of diplomatic or political representations or, as alluded to above, the creation of incentives to woo countries which have the superior financial muscle to leverage on these tax benefits and invest into a country (Pickering 2015). Such agreements to allocate taxing rights, therefore, are said to depend primarily on the negotiating powers of the jurisdictions that are parties to these agreements. African governments have often come woefully unprepared for treaty negotiations. The next section will discuss the importance of a tax treaty policy as the foundation on which negotiations can be effectively conducted.

Anatomy of Tax Treaty Policy

At the onset, it is pertinent to mention that tax treaty policies in most states, although being legal, are not binding per se and consequently cannot bind their treaty partner, only their own negotiators. The documents are intended to act as guidelines that are right and principled encapsulating all issues in and around the area of double tax agreements that a country needs to consider (Rosenbloom 1991). Such policy documents are

historically developed by the Treasury or its equivalent in the specific state in conjunction or under advisement from their revenue administration. Such policies are not drafted by parliamentary committees because legislators are often regarded as lacking the requisite technical capacity to develop them. Furthermore, because these are sensitive issues of national security, they need to be developed independently of short-term political considerations (Rosenbloom 1991). Such documents, however, are not expected to be kept secret and even how they are written should be in clear enough terms to be understood both by legislators and the general public (ibid.). Commentators have argued that to ensure accountability in the treaty negotiation and conclusion process, the draft treaty should be submitted to an oversight body such as parliament or a committee appointed by it (e.g. Mutava 2019).

The basic content of a tax treaty policy would generally delineate what is and what is not appropriate in both the form and content of double tax agreements. In this regard, scholars like Pickering (2015) have argued that the approach is essentially a three-pronged process: (1) establishment of minimum deliverables that the negotiators are bound to include in any treaty negotiation, (2) policy commentary on the most favourable outcomes to expect from the treaty negotiations, and (3) the extent of leeway granted to negotiators on various provisions within these agreements. Even as countries are drafting such policies, it is expected that they be reflective of international treaty norms as well as have regard to their domestic law.

Through the authoritative guidance of a tax treaty policy, it is possible to know in advance on exactly which model agreement a country's tax treaty should be based and the extent to which it would be reflective thereof. Most tax treaties around the world are modelled on either the United Nations Model Convention (UN 2017) or the OECD Model Convention (OECD 2017). Most capital-exporting (developed) countries follow the OECD Model in their DTAs with a few of them introducing deviations borrowed from the UN Model Convention wherever they are favourable. As a rule, capital-importing (developing) countries are encouraged to formulate their tax treaties along with the UN model. The rationale for this recommendation is that the UN model was produced with regard to the peculiar needs of developing countries. Its provisions are adaptable to tax treaties between developed and developing counties allowing the latter stronger tax rights than those provided under the OECD Model (Whittaker 1982).

Tax Treaty Policy Frameworks in Africa

The importance of tax treaty policy documents especially for African countries cannot be overstated as it has been numerously observed that DTAs adopted in these countries are often reflective of the demands of the treaty partner—usually a developed country—and less of their own needs. Notably, African countries began entering into DTAs as far back as 1956 with the conclusion of the tax agreement between South Africa and Zambia (then Northern Rhodesia) being the first of its kind in the region (United Nations Economic Commission for Africa 2016). Mutava (2019) notes that because African states are capital-importing, they increasingly cede most of their taxing rights away through the conclusion of DTAs that are residence-based rather than source-based because the former is viewed as more favourable in their circumstances. She further argues that while the nature of these agreements might be justified as a means of fostering investment in these countries, they typically do not consider other factors that give the negotiators some leverage of their own. Hearson (2015) adds the observation that negotiators from mostly developing countries tend to cede their taxing rights because they are not fully aware of the future implications of some of the provisions they accept.

Concerning the specific experience of tax treaty negotiations in Africa, a few things stand out according to Mutava (2019) who has made the most extensive review of the subject. Firstly, the use of DTAs is uneven. Secondly, the degree of success varies and she attributes this to a series of factors, notably the lack of sufficient capacity of treaty negotiators and a similar lack of accountability in the treaty negotiation process due to shortage of requisite expertise to review these agreements in the oversight institutions. Generally, there is little transparency, which is evident, for example, in the negotiations that Ghana, Mauritius, and South Africa are conducting with the three East African countries, Kenya, Tanzania, and Uganda. As this chapter is being written, it has been impossible to get access to the relevant documents because they do not exist in the public domain.

The Case for a Kenyan Tax Treaty Policy

Kenya has concluded about 16 double taxation agreements (DTAs) over the last 42 years with a variety of countries ranging from developed states like Canada, Denmark, and France to developing countries, Zambia, and

Mauritius being amongst them (Waris 2018). Possessing such an expansive treaty network, with continued indications by the Kenyan government that it is still looking to enter into more treaties, it is no surprise that there is no uniform approach regarding format, nature, and provisions within these DTAs. As issues concerning how to tackle illicit financial flows, tax drainage, and the exploitation of developing countries through DTAs are becoming increasingly pertinent, the need for formulating a tax treaty policy, especially for a developing country like Kenya, has never been more apparent.

The deficiency in this regard was made clear during the 2019 case concerning the Kenyan-Mauritius DTA (*Petition 494 of 2014—Kenya Law*). Tax Justice Network Africa, an umbrella group reflecting wider fiscal interests among NGOs, successfully petitioned for the invalidity of the DTA signed between the two countries. Commentators have delineated that the petition was an act of three parts: firstly, the argument that the provisions of the treaty were unconstitutional, secondly that the treaty was invalid under international law, and, finally, that the treaty had not been properly ratified as it had not undergone public scrutiny through a presentation for discussion before Parliament (Waris 2019).

Of importance to the present discussion is the first part which concerns the unconstitutionality of the provisions within the agreement. The petitioners argued that the tax incentives given to Mauritius in the treaty would not only erode Kenya's revenue base by giving companies a legal leeway to shift profits to Mauritius but also possessed a massive potential for treaty abuse (Waris 2019). They argued that through a variety of provisions, the DTA included several avenues through which Kenya could potentially lose significant revenue and the imposition of a minimum five-year duration before the treaty could be terminated—an unreasonable condition (*Kluwer International Tax Blog* 2019). It thus violated the principle of sustainable development, a key national value of Article 10 in the Kenyan Constitution and at the same time Article 201(b) on sharing the tax burden fairly as it would eventually fall back on Kenyans as the state sought funds to run the country's affairs and development. Nevertheless, in a surprising turn of events, the declaration of invalidity did not mark the end of a Kenyan-Mauritius DTA. Soon after, it was reported that Kenya had entered into a tax treaty with Mauritius surprisingly with similar terms and no substantive overhauls (Michira and Kamau 2019).

Against this background, it is evident that a tax treaty policy is not only needed but is very much necessary for Kenya. To this end, to effectively

bring to the fore this necessity, the deficiencies observed in the invalidated Kenya-Mauritius agreement will serve as the basis for a discussion of what should be done.

Motivations

As has been mentioned above, the reason why the country seeks to enter into a DTA is very significant as it mandates the negotiators to always ensure that outcomes of the negotiations are aligned to the agenda of the country within that moment and for the future. Negotiators must be aware that DTAs are just as likely to propagate incidences of aggressive tax planning by subjects affected by such an agreement meaning that Kenya could lose a lot of tax revenue instead of the intended outcome of promoting investment and international trade. An appropriate tax policy, therefore, would make it clear what is at stake and provide criteria for negotiators to bear in mind and use as measures of how they are doing. The point is that with the right tax policy in place, those representing Kenya in tax treaty negotiations will be both smarter and more effective.

Selection of Treaty Partners

The selection of treaty partners is connected to the issue of the motivations around the conclusion of double tax agreements. While Kenya, as suggested above, possesses a healthy network of DTAs with around 16 of them in force, commentators are increasingly putting forward the argument that the clamour to enter into more DTAs is essentially a race to the bottom (*Tax Justice UK blog* 2017). To be tax competitive, developing countries are particularly affected as they try to give preferential tax concessions to their treaty partners in the hope that it leads to increased foreign direct investment (Hines 2000). This assumption, however, is questionable as it has been recently proven that low rates within DTAs do not subsequently result in higher rates of foreign direct investment (Barthel et al. 2010). The primary concern, therefore, is not the number of DTAs concluded but rather their nature, and it is at this point that the issue of a tax treaty policy becomes especially essential.

A tax treaty policy would enable the quest for treaty negotiations to be more selective and based on where the benefits are the highest. As Waris (2018) notes, most of DTAs in force in Kenya have not been concluded with its major trading partners who should ordinarily also be key treaty

partners considering that double taxation imposes an unfair burden on investments already made and are potentially arbitrary barriers towards the free movement of international capital and goods, as well persons. The formulation of a tax treaty policy, therefore, would assist the country from the outset to identify adequate preconditions for the choice of the treaty partner. It is key to ensuring that the country does not enter an arrangement that produces unintended negative consequences. Further, the policy would allow treaty partners to be aware early on what Kenya's position is regarding certain issues of concern in negotiations, for example, the establishment of conduit companies and the incentives for foreign investment it can provide. Referring to Kenya's double taxation agreement with Mauritius, it can be argued that had Kenya had a tax treaty policy that adequately delineated preconditions for the selection of a tax treaty partner, the tax agreement between the two states would most probably never have been concluded. A tax treaty policy would also reduce the risk of extensive treaty shopping (Odari 2015). Mauritius is a tax haven which means that plenty of foreign direct investment is routed through Mauritius. Its conclusion of a DTA with Kenya sadly means that the latter has been added to the list of countries, which multinationals registered in Mauritius can use to reroute profits and thus reduce the benefits of foreign direct investment in the host country (ibid.). The treaty, in essence, undermines the intention of concluding such an agreement, notably to increase FDI, and runs afoul of the spirit of international double tax agreements because it would lead to practices that cause unintended revenue loss not contemplated by the treaty "bargain".

Anticipation of Statutory and Constitutional Changes

Had Kenya had a tax treaty policy, it would be in a much better position to alter its proposed tax treaties in line with existing statutory provisions or anticipation of possible statutory alterations. The treaty negotiation process is often long and winding and as such may take place over several years and when eventually concluded may be the subject of a lengthy review. During the period of negotiation, the statutory provisions that directly or indirectly affect the arrangement may change. Existing statutory provisions and anticipated statutory provisions, therefore, must be considered in the tax policy so that it is clear when and how they become pivotal in the treaty negotiation process.

While it is easier to align a treaty with the current statutory provision, the issue of anticipated statutory changes is murkier because what is anticipated might never occur and thus the treaty consideration accorded to such anticipated statutory change could have potentially detrimental effects on the treaty concluded (Rosenbloom and Langbein 1981). The formulation of a tax treaty policy, therefore, will assist negotiators to have a standard or benchmark for assessing a reasonable probability that legislation substantively or procedurally affecting the treaty will be enacted and what the detrimental effects to the treaty might be if enacted as is. Such a policy would allow the negotiators to be more flexible on certain matters of importance even if there is little or no legislation in the country on the said issue, but legislation is strongly anticipated or at its final stages.

Treaty Negotiating Process

A major point of concern that has affected a lot of developing countries is the capacity of the treaty negotiators during the negotiating process. Often, most developing countries simply do not have the capacity in terms of personnel to effectively participate in the treaty bargaining process. As a result, they easily get strong-armed into giving away more than they intended through their DTAs. In the process of bilateral bargaining, it is not uncommon that negotiators begin making concessions in the direction of their positions. If they are not fully aware of the implications of certain issues or novel questions that may arise and on which their model (UN or OECD) is silent, negotiators are confined to their own knowledge and experience which rarely is enough to avoid serious impairment of the country's interests in the future.

Accordingly, the formulation of a tax treaty policy will allow the negotiators to begin bargaining on a solid basis and with a clear sense of direction even when models are unclear, silent on certain provisions, or are in stark opposition to the detriment of both parties. Where the negotiators have the discretion to make certain judgements, the treaty policy will enable such judgements to be made based on what the country wants to achieve and not just on any personal inclinations that could eventually affect the overall balance of the treaty bargain. This would also reduce instances where treaty negotiators are bribed to allow certain concessions to these other countries that would not otherwise have been granted. Furthermore, a clear tax treaty policy mandating the roles, functions, and authority granted to each of the treaty negotiators would allow effective

negotiation of treaties representing the national interest. Treaties would not be similarly copied and pasted from one treaty partner to another as the policy would ostensibly view each treaty as a separate bargain depending on various listed factors and accordingly mandate the negotiators to move forward with this in mind.

Hindrances to the Implementation of Kenya's Tax Treaty Policy

Ultimately, it is clear from the above that a tax treaty policy is a fundamental instrument as it is a representation of the boundaries and allowances that a country imposes and grants, respectively, to itself when entering into the negotiation and the eventual conclusion of DTAs. Essentially, it acts as a proclamation of the country's position towards certain fiscal issues, the degree of flexibility allowed towards these issues, as well as the declaration of areas where the country would otherwise be positionally immovable as their alteration would have the effect of undermining its position within the arrangement. At this juncture, it is especially fundamental to note that the existence of a tax treaty policy document on its own does not necessarily result in its success. As has been the case in the implementation of several government policies in the country, nothing is easier than sketching majestic plans, nothing more difficult than their actual execution.

At this point, it is fundamental to state that indeed numerous quarters have confirmed that Kenya is on course to formulate its tax treaty policy and the paper proceeds fully aware of this fact. Nevertheless, this section seeks to anticipate issues that might impede the actual success of the tax treaty policy upon its completion. These issues include the lack of (1) political will, (2) state commitment, (3) capacity, and (4) transparency.

Lack of Political Will

Given the benefits of formulating a tax treaty policy as indicated above, one would have thought that such a policy would already be in place in Kenya, but such is not the case. A key issue that has plagued the formulation of tax treaty policies in many developing countries, including Kenya, is the lack of political will to ensure their completion and eventual implementation. The absence of a tax treaty policy gives the executive, charged

in most countries with concluding DTAs, broad discretion to seek treaty partners and conclude tax agreements. Government, therefore, does not have an incentive to formulate and implement a tax treaty policy. Change of government, each seeking to implement its own policy, as has happened in Kenya, has resulted in the lack of a clear and coordinated path towards the conclusion of DTAs. It is only recently that there has been the requisite political backing to mandate the draft of the treaty policy and it remains to be seen how this will affect Kenya's future DTAs going forward.

Lack of Continuous State Commitment to Policy

Upon the formulation of the tax treaty policy, the Kenyan state must remain committed to the continuous implementation of its directives even when there is a change of political guard. As has been stated earlier, change in government often leads to a pursuit of separate fiscal policies as one government may have different priorities from the other, for instance, regarding tax treaties. While it can be assumed that each government will seek to imprint its fiscal policy even towards the conclusion of double tax agreements, such changes should not be allowed to undermine active policy positions but rather complement them in the light of what might be new circumstances. Furthermore, it would be essential for the tax treaty policy document itself to offer provisions on how it can be amended while at the same time ensuring uniformity in the country's approach towards DTAs.

Lack of Appropriate Capacity

The effective implementation of government policy is often caused by the lack of appropriate managerial skills and technical capacity. Tax treaties are an increasingly important policy area which calls for skills that go beyond the standard educational qualifications offered by local universities. There is a shortage in Kenya of public servants with the requisite experience and education to effectively manage a national tax treaty policy. It is important, therefore, that government continues to invest in building capacity in this field.

Lack of Transparency

Another important step towards ensuring the success of Kenya's tax treaty policy would be to ensure that such a policy is formulated in a public and transparent manner. Drafts of such treaties should be made available to the public and should not be a matter shrouded in secrecy (*Business Daily* 2018). Making such documents public would ensure that negotiators remain accountable and in line with the policy as well as giving members of the public an adequate opportunity to discuss and seek clarifications on the major issues of the proposed negotiating positions.

Concluding Remarks

This chapter has drawn attention to a dilemma that affects Kenya, like most other developing countries: the low level of domestic revenue collection in relation to economic development needs. The average 17.5% of GDP that African countries collect every year falls well short of budgetary needs to finance its administrative and developmental needs. It is against this background that foreign aid over the years has played a vital complementary role in financing development in these countries. More recently both donors and recipient African governments have realized that there has been "too much" foreign aid, leading to politically embarrassing levels of aid dependence. In the absence of generous aid flows and growing reliance on foreign direct investment, the issue of effectively earning revenue from corporations investing in developing countries has become increasingly pertinent.

The discussion above has focused on demonstrating the role that tax treaties play in the international fiscal space and how a policy for guiding tax negotiations can make them more effective. It has further shown that these treaties have generally been asked to perform multiple, often contradictory, functions ranging from the alleviation of double taxation, the creation of legal and economic certainty for various taxpayers, and the promotion of foreign direct investment. These agreements have often fallen short of promise because they have been asked to deal with too many issues at once. The result is a series of unintentional revenue losses as multinational investors engage in treaty shopping and tax planning through the use of conduit companies to shift profits to low tax jurisdictions.

There is a growing consciousness in the international community today that many of the ambitious goals of sustainable development to which member states are committed are at risk of being untenable unless there is a fairer deal between developed and developing countries, including taking steps to stop—or at least reduce—existing tax avoidance practices. The OECD programme titled "Base Erosion Profit Shifting" (BEPS) is such a step indicating that international action is needed to reach a better balance between investment incentives and revenue protection in low- and middle-income countries. Another measure that the OECD countries have offered is an "Inspectors without Borders" scheme to assist developing countries in strengthening their capacity to monitor and oversee how tax treaties are being implemented. There is even a bold proposal to create a uniform rate of taxing multinational companies regardless of location although the prospect that governments across the world would be able to agree on it seems low.

Each developing country, however, must take its own measures. Double taxation agreements, as we have shown in this chapter, are not enough per se. Many such agreements have been signed by African governments, including that of Kenya, but few of them have been effective largely because negotiating skills have been insufficient, and an overall tax treaty policy has been missing. In the Kenyan case, a controversial example has been the double taxation treaty with Mauritius which was signed by President Uhuru Kenyatta despite criticism from both economic and political sources. Tax treaties are crucial to the national economy of Kenya, and it is important that they are signed with a clearly defined national interest in mind. A tax treaty policy should be reflective of current international principles and practices and fine-tuned to reflect the special characteristics of Kenya's international fiscal space. Such a policy is about to be adopted in Kenya, and part of this chapter has been devoted to showing what should go into such a document and what the hindrances might be to its successful implementation. It can be expected that the issue of tax treaty policy will continue to feature in the Kenyan political discourse.

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