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Wolfgang Alschner

THE OECD MULTILATERAL TAX INSTRUMENT: A MODEL FOR REFORMING THE INTERNATIONAL INVESTMENT REGIME?

*Wolfgang Alschner**

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* PhD, LLB, BA, MA, JSM (Stanford). Assistant Professor, University of Ottawa. Email: wolfgang.alschner@uottawa.ca. I am grateful for comments and discussions on earlier versions of this article from Nicolas Lamp, Anthony VanDuzer, Graham Mayeda, David Gaukrodger, Anthea Roberts, Mona Pinchis-Paulsen, Vincent Arel-Bundock, Allison Christians and Irma Mosquera, as well as form the participants of the Joint North American Conference on International Economic Law Incorporating the 2018 ASIL IECLIG Biennial, held in Montreal, on 21-22 September 2018.

INTRODUCTION

On July 1, 2018, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Tax Base Erosion and Profit Shifting, called the Multilateral Instrument (MLI) for short, entered into force.[1] The MLI, negotiated under the auspices of the Organization for Economic Cooperation and Development (OECD), provides an efficient solution to update thousands of international double taxation treaties

1. Organization for Economic Co-operation and Development [OECD], Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Sharing (June 7, 2017), http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf [hereinafter MLI].

(DTTs) in one stroke. It introduces novel provisions that curb tax avoidance, close loopholes for treaty shopping, and strengthen enforcement in order to reduce tax base erosion and profit shifting (BEPS).[2] This article uses a comparative international law framework to investigate the extent to which the MLI provides a model for reforming the more than three thousand mostly bilateral international investment agreements (IIAs).

The international tax and investment regimes display striking similarities when it comes to their policy goals, structure, and normative evolution, which make them natural comparators. Both regimes underpin the global flow of capital by disciplining fiscal and regulatory host state conduct in relation to foreign investment. They are each built on a decentralized network of thousands of mostly bilateral treaties that have been concluded over several decades and connect countries across the globe. Finally, they share common historical foundations, underwent parallel codification efforts at the League of Nations and OECD, experienced failed attempts at multilateralization, and survived similar periods of contestation that first pitted capital exporting against capital importing nations and later corporations against taxpayers. Yet, in spite of their many commonalities, there has been relatively little scholarly work that systematically compares both regimes.[3]

Recent developments make a comparison between both fields even more worthwhile. The MLI promises to efficiently alleviate a decades-long legitimacy crisis in international tax law. The tax regime had long focused on easing cross-border capital flows by preventing double taxation, but in so doing, it inadvertently facilitated double *non*-taxation, corporate fiscal eva-

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2. Samuel Johnston, *Multilateral Tax Convention to Prevent Base Erosion and Profit Shifting Legislation Notes*, 23 AUCKL. UNIV. L. REV. 384, 384–93 (2017). On BEPS, see OECD, EXPLANATORY STATEMENT TO THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BEPS (2015), http://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf.

3. Notable examples include Julien Chaisse, *International Investment Law and Taxation: From Coexistence to Cooperation*, (International Centre for Trade and Sustainable Development, E15 Work. Pap. 24, 2016); Julien Chaisse, *Making Tax Dispute Resolution Mechanisms More Effective – The Base Erosion and Profit Shifting Project and Beyond*, 10 CONTEMP. ASIA ARBITR. J. 1, 1–50 (2017); Rodrigo Polanco Lazo et al., *The Relationship Between Investment and Double Taxation Treaties: The Chilean Case*, 29 CAD. CRH 151, 151–70 (2016).

sion, and harmful tax competition.[4] The MLI counters such practices by closing gaps in existing DTTs through new multilateral minimum standards that address the field's legitimacy concerns. International investment law, in turn, has been facing its own legitimacy crisis. States and stakeholders are debating how much protection to afford investors and how to structure investor-state dispute settlement (ISDS).[5] Multilateral efforts to reform the investment regime have just begun under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).[6] Investment law may thus have an opportunity to learn from the successful reform of the tax regime to resolve its own legitimacy crisis.[7]

This article will argue that there are three lessons in particular that investment lawyers and policymakers can draw from the MLI experience. First, the *mechanics* of the MLI can guide investment law reform. By modifying— but not replacing— parallel DTTs, the MLI retains the bilateral governance structure of the tax regime while complementing it with a carefully tailored multilateral superstructure.[8] This is an attractive pro-

4. Philipp Genschel & Thomas Rixen, *Settling and Unsettling the Transnational Legal Order of International Taxation*, *in* TRANSNATIONAL LEGAL ORDERS 154–84 (Terence C. Halliday & Gregory Shaffer eds., 2015).

5. *See, e.g.,* S. A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037–75 (2010) (highlighting the need to preserve state policy space); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2004); Michael Waibel, Asha Kaushal, Kwo–Hwa Chung & Claire Balchin, *The Backlash Against Investment Arbitration: Perceptions and Reality, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, (Michael Waibel ed., 2010); Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?*, 29 EUR. J. INT'L L. 551, 551–80 (2018).

6. Stephan W. Schill, *Investor–State Dispute Settlement Reform at UNCITRAL: A Looming Constitutional Moment?*, 19 J. WORLD INVEST. & TRADE 1, 1–5 (2018).

7. International organizations have already begun pointing to the MLI as a potential model for reforming investment law: U.N. Conference on Trade and Development [UNCTAD], *World Investment Report 2015: Reforming International Investment Governance*, 175, U.N. Doc. UNCTAD/WIR/2015 (June 24, 2015). OECD, *4th Annual Conference on Investment Treaties: Treaty Shopping and Tools for Treaty Reform* (Mar. 12, 2018).

8. Yariv Brauner, *McBEPS: The MLI – The First Multilateral Tax Treaty that Has Never Been*, 46 INTERTAX 6, 6–17 (2018) ("the MLI was primarily devised to preserve the conservative evolution of the international tax re-

spect for investment law as it offers an alternative to the more radical option, unsuccessfully pursued in the past, of a multilateral investment treaty that replaces existing bilateral investment treaties (BITs).[9]

Second, the *scope* of the MLI can inspire investment law reform. The MLI modifies parallel DTTs, both in substance and procedure, to address shortcomings in the existing tax system. Similarly, the weaknesses of the investment regime identified in the current reform process include not only procedural concerns, such as the independence and impartiality of arbitrators, but also substantive ones, namely the inconsistency and incorrectness of arbitral decisions.[10] The latter cannot realistically be solved through procedural fixes alone, but also require substantive reforms that clarify (and potentially harmonize) the scope and content of core obligations—such as the requirement to provide investment with "fair and equitable treatment,"—and that regulate normative grey areas, such as the valuation of damages in case of a treaty breach.

Finally, the *design* of the MLI offers valuable lessons to investment treaty negotiators. The MLI sets firm international minimum standards, but also offers states the opportunity to select from different compliance options and to contract out of or around its provisions. The combination of harmonization, on the one hand, and flexibility, on the other, is arguably similarly crucial for successful investment law reform, which equally needs to accommodate divergent state interests and approaches while establishing common standards that promote normative consistency. The MLI thus provides investment lawyers with a useful template for how to reform a largely bilateral regime on a multilateral basis.

Achieving an MLI for investment law, however, will not be easy. The tax regime has benefitted from gradual political, normative, and epistemic *convergence* over time, whereas the

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gime, based on bilaterality, reciprocity and competition, and not as a multilateral tax treaty based on which a new regime shall arise").

9. The most prominent of these efforts was the OECD's Multilateral Agreement on Investment (MAI), which failed in the late 1990s, *see* UNCTAD, *Lessons from the MAI*, U.N. Doc. UNCTAD/ITE/ITT/Misc.22 (1999); Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, INT'L L. 1033 (2000).

10. UNCITRAL Secretariat, *Possible reform of investor–State dispute settlement (ISDS)*, A/CN.9/WG.III/WP.149 (Sep. 5, 2018).

investment regime is currently experiencing a period of *divergence*. The MLI is a product of the financial crisis; it was forged through the ensuing G20 political consensus to combat BEPS.[11] Normative convergence facilitated the MLI as DTTs have become more similar over time.[12] Finally, a strong transnational tax expert community underpins the regime,[13] which enabled the swift translation of the BEPS action plan into hard law. The conditions that gave rise to the MLI are absent in investment law. Among the G20, there is growing disagreement over how to reform investment treaties.[14] Normatively, IIAs have become more dissimilar as states disagree on the appropriate design for investment agreements.[15] Finally, investment law does not benefit from a strong epistemic consensus as the field is divided along national and professional boundaries. The current UNCITRAL reform process, however, may offer an opportunity to start a course of political, normative, and epistemic convergence for investment law reform that can then pave the way for a later MLI in investment law.

This article is structured as follows: Parts I and II introduce international tax and investment law, respectively. Part III reviews the similarities between both regimes to show that they are natural comparators. Part IV identifies three common structural challenges that lie at the heart of current reform efforts in both systems, notably: (1) preserving a bilateral governance structure while adding multilateral elements ("mechanics"), (2) efficiently modernizing thousands of existing treaties in both procedure and substance ("scope"), and (3) setting minimum standards where necessary while allowing for

11. Irma Johanna Mosquera Valderrama, *Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative*, 72 BULL. INT'L TAX. 11 (Jan. 31, 2018).

12. Vincent Arel-Bundock & Lisa Lechner, *The Power of Boilerplate: Decentralized Multilateralism and the International Tax Regime* (working paper, 2018) (on file with the author).

13. Allison Christians, *Networks, Norms and National Tax Policy*, 9 WASH. U. GLOBAL STUD. L. REV. 1, 9 (2010).

14. *See, e.g.,* Anthea Roberts, *Investment Treaties: The Reform Matrix*, 112 AJIL UNBOUND 191 (2018).

15. Wolfgang Alschner & Dmitriy Skougarevskiy, *Convergence and Divergence in the Investment Treaty Universe – Scoping the Potential for Multilateral Consolidation*, 8 TRADE L. DEV. 152 (2016); Wolfgang Alschner, *The Global Laboratory of Investment Law Reform Alternatives*, 112 AJIL UNBOUND 237 (2018).

flexibility where possible ("design"). Part V introduces the MLI and explains how it tackles these three structural challenges. Part VI argues that the mechanics, scope, and design deployed by the MLI make it an attractive model for investment law reform. Part VII then considers the feasibility of an MLI for investment law. It shows that the conditions that have given rise to the MLI are not (yet) present in the investment regime. The article concludes by arguing that the current UNCITRAL process can be a venue for consensus-building in order to create the necessary conditions for a future MLI in investment law.

I. THE LAW OF DOUBLE TAXATION TREATIES

Before comparing the regimes of international tax and investment, it is important to clarify what both are about, beginning with the law of international taxation. International tax treaties are concerned with the avoidance of double taxation by allocating taxation rights between the home and host state of taxpayers.[16] Substantively, DTTs seek to ensure that the same income is not taxed twice. In addition, they also prohibit discrimination between national and foreign taxpayers. Procedurally, they resolve disputes over the right to tax. They do so primarily through diplomatic channels, although more recent agreements also foresee a simple arbitration procedure.

A. Substantive Tax Norms: Allocating Taxation Rights

Double taxation avoidance treaties are not about harmonizing domestic taxation choices.[17] Taxation sovereignty remains in the hands of states.[18] DTTs instead seek to manage the interaction between national tax jurisdictions where they apply to the same income. Think of a German company investing in Canada: which country should tax the revenue generated from the foreign investment? The country where the investor is from

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16. Reuven S. Avi-Yonah, *Double Tax Treaties: An Introduction*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 99–100 (Karl P Sauvant & Lisa E. Sachs eds., 2009).

17. THOMAS RIXEN, THE POLITICAL ECONOMY OF GLOBAL TAX GOVERNANCE 64–65 (Achim Hurrelmann et al. eds., 2008).

18. DTTs are thus often described as providing a sovereignty preserving approach to international tax coordination. Richard J. Vann, *A Model Tax Treaty for the Asian–Pacific Region?* 45 BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION, 99, 102 (2010).

and where it is headquartered—that is, the *residence state* (in the example, Germany)? Or, the country where the revenue is generated and "sourced"—that is, the *source state* (in the example, Canada)? When both countries exercise their national jurisdiction to tax on the same asset, the same income is taxed twice, creating severe disincentives for companies to invest abroad.

DTTs solve the problem of double taxation by allocating taxation rights over income and capital between the residence and source countries. Residence states can mitigate double taxation unilaterally through tax credits and exemptions for foreign-sourced income.[19] The "grand bargain" underlying DTTs, however, makes such unilateral relief measures less costly by dividing taxation rights between source and residence states.[20] Broadly speaking, *active* business income is subject to taxation in the source state.[21] Hence, income generated from sales or the provision of services is taxed in the country where it is generated. In contrast, *passive* business income, such as royalties, dividends, or interests, as well as personal income, is generally subject to taxation in the residence country.[22] The specific allocation rules in DTTs, while generally following this distinction, determine in detail which country has the right to tax what income.[23]

Two concepts are crucial threshold questions for structuring the allocation of taxation rights in DTTs. One is the notion of a "resident" for tax purposes. Residents are normally fully liable to pay taxes in their state of residence.[24] DTTs define residency

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19. RIXEN, *supra* note 17 at 76, 156–61.

20. Allison Christians, *BEPS and the New International Tax Order*, 2016 BYU L. REV. 1603, 1612–13 (2016).

21. This allocation follows the so-called "benefits principle" whereby taxpayers should pay tax where they benefit from ensuing public expenditures. REUVEN S. AVI-YONAH, INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME 9–13 (2007); See also RIXEN, *supra* note 17, at 65–66.

22. Avi-Yonah, *supra* note 21, at 9–13; *see also* RIXEN, *supra* note 17, at 65–66.

23. This section is based on the 2017 version of the OECD Model Tax Convention. OECD, *Model Tax Convention on Income and on Capital: Condensed Version* (2017), http://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm [hereinafter OECD Model Tax Convention].

24. RIXEN, *supra* note 17, at 65.

by reference to the domestic law of each contracting party, typically based on factors such as the place of incorporation or domicile.[25] Since an individual or company can be a resident of more than one state under the respective domestic laws of those states, DTTs also resolve conflicts of double residence.[26] The second concept concerns the notion of "permanent establishment" (PE). If the foreign resident's presence constitutes a PE in the source country, that country has the right to tax their profits.[27] In contrast to residency, which is defined by reference to domestic law, DTTs set out in the treaty text what constitutes a PE and what does not.[28] For instance, factories, branches, or mines count as PEs and would thus be taxed by the source rather than residence state, but temporary storage facilitates or offices for the mere collection of information do not. [29]

The majority of substantive provisions in DTTs allocate taxation rights between the residence and source country based on the type of income.[30] Immovable property, for instance, is exclusively taxed in the source country,[31] whereas most capital and royalty payments are taxed in the country of residence.[32] Business profits are taxed in the country of residence unless the entity has a PE in the source country.[33] In practice, that means that the profits of multinational enterprises are apportioned between the residence country (where the parent corporation is located) and the source country (where the subsidiary is located as a PE). To make this division work, transactions between parent and subsidiary are typically considered against the "arms-length standard," (i.e., as if they were made between distinct entities).[34] Establishing free market equivalents for intra-firm transactions is difficult in practice, and such transfer-pricing rules are amongst the most complex and controver-

25. OECD Model Tax Convention, *supra* note 23, arts. 4(1) & (3).

26. *Id.,* art. 4(2).

27. Avi-Yonah, *supra* note 16, at 100–01.

28. OECD Model Tax Convention, *supra* note 23, art. 5.

29. *Id.*

30. C. John Taylor, *Twilight of the Neanderthals, or are Bilateral Double Taxation Treaty Networks Sustainable*, 34 MELB. U. L. REV. 268, 271 (2010).

31. OECD Model Tax Convention, *supra* note 23, art. 6.

32. *Id.* art. 12.

33. *Id.* art. 7.

34. AVI-YONAH, *supra* note 21, at 6–7.

sial aspects of international tax law.[35] Finally, for some types of income, such as taxes on dividends and interests, taxation rights are shared between the source and the residence country.[36] The latter will then credit or exempt taxes already paid at the source to avoid double taxation.

Although the primary purpose of DTTs is to prevent taxing the same income twice, the treaties also contain a limited set of broader taxation principles. One of them is the principle of non-discrimination, which guarantees that the source state cannot subject nationals of another contracting party to more burdensome taxation than its own nationals.[37] DTTs thus contain a form of national treatment standard similar to what is found in other international economic law fields.[38] In contrast to trade and investment treaties, however, DTTs generally do not provide for most favored nation treatment.[39] Source states can thus treat foreign nationals from one DTT party better than those of another DTT party. Finally, DTTs also tend to contain basic rules to prevent tax evasion through the exchange of taxation information and assistance in the collection of taxes.[40]

B. Procedural Tax Norms: Inter-State Enforcement

The enforcement structure of DTTs is rudimentary compared to international trade and investment treaties. DTTs resolve disputes by inter-state consultations through a so-called mutual agreement procedure (MAP). Several more recent DTTs additionally provide for arbitration. Taxpayers can also pursue their claims in domestic courts.[41]

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35. RIXEN, *supra* note 17, at 69.

36. OECD Model Tax Convention, *supra* note 23, arts. 10 & 11.

37. *Id.* art. 24.

38. For distinctions between non-discrimination in tax and in trade law, see Michael Lennard, *The GATT 1994 and Direct Taxes: Some National Treatment and Related Issues*, *in* WTO AND DIRECT TAXATION 73, 96–99 (Michael Lang et al. eds., 2005); *see also* Avi-Yonah, *supra* note 16, at 104 (arguing that the national treatment obligation in DTTs is weaker than in BITs or in the GATT as it is difficult to enforce it).

39. The GATT 1994 and Direct Taxes: Some National Treatment and Related Issues, *supra* note 38, at 98–99; RIXEN, *supra* note 17, at 74, 93–94 (citing deliberations at the League of Nations to explicit reject such clauses in DTTs to preserve the reciprocal character of concessions).

40. OECD Model Tax Convention, *supra* note 23, arts. 26 & 27.

41. While this does not preclude a MAP, a court decision bars a subsequent arbitration claim, see *id.* art. 25(5).

The MAP is an intergovernmental process involving the competent tax authorities of the contracting states.[42] Taxpayers suffering from double taxation or other treatment inconsistent with the DTT can initiate the MAP, but they are not directly involved in the remainder of the proceedings, which take place behind closed doors.[43] The contracting parties are not obliged to come to an agreement, but in practice they overwhelmingly do.[44] The process is a political rather than legal one.[45] Aside from solving individual grievances brought by taxpayers, the MAP also serves as a vehicle to monitor, interpret, and, if necessary, adjust the DTT over time.[46]

Recent DTTs, particularly those concluded by the United States, have gone a step further towards greater legalization by providing for an arbitration procedure in cases where the competent authorities fail to reach an agreement.[47] Again, individual taxpayers can initiate the procedure, but are not involved directly.[48] The 2017 version of the OECD Model Convention is silent on the arbitration procedure, but most treaties, including the MLI, follow the model of final-offer arbitration, also known as "baseball arbitration," in which arbitrators side with the position advanced by either of the competent state authorities without providing reasons and without citing legal authorities.[49] The arbitration decision is binding on the contracting states, but they can mutually agree on an alternative solution.[50] Moreover, the affected taxpayer can reject the arbitration outcome.[51]

Overall, the enforcement structure of DTTs is thus relatively rudimentary. One explanation for this is that the allocation of

42. *Id.* art. 25.
43. SOL PICCIOTTO, INTERNATIONAL BUSINESS TAXATION 291–92 (1992).
44. *Id.* at 287.
45. *Id.* at 291.
46. RIXEN, *supra* note 17, at 74, 174; *Id.* at 295–99.
47. Hans Mooij, *Tax Treaty Arbitration*, 35 ARBITR. INT'L., 195, 195 (2018); *see also* Reuven S. Avi-Yonah & Haiyan Xu, *A Global Treaty Override? The New OECD Multilateral Tax Instrument and Its Limits*, 39 MICH. J. INT'L L., 155, 159 (2018) (stating that most DTTs do not provide for arbitration).
48. OECD Model Tax Convention, *supra* note 23, art. 25(5).
49. Mooij, *supra* note 47, at 214; Joost Pauwelyn, *Baseball Arbitration to Resolve International Law Disputes: Hit or Miss?*, 22 FLA. TAX REV. 40, 46–47 (2018).
50. OECD Model Tax Convention, *supra* note 23, art. 25(5).
51. *Id.*

taxation rights is partially self-enforcing.[52] States with large amounts of reciprocal investment flows are both residence and source states simultaneously, and consequently have little interest in prioritizing one over the other. Compliance with tax treaties is therefore generally high.[53] Furthermore, all states provide at least partial unilateral tax relief to their companies in addition to DTTs, indicating that they consider the prevention of double taxation to be in their interest even if that means foregoing tax revenue.[54] The political economy of double taxation avoidance thus does not give rise to the type of enforcement problems present in international investment law.

II. The Law of International Investment Agreements

IIAs protect foreign investment against undue governmental interference by imposing protective obligations on host states, which can be directly enforced by foreign investors through international investment arbitration. This potent and frequently-used enforcement mechanism makes investment law one of the most dynamic, but also most controversial, fields of international law.

A. Substantive Investment Norms: Protecting Investment

IIAs protect foreign investment against different types of undue regulatory interference by the host state.[55] First, they prohibit the host state from discriminating against foreign investment relative to national investment ("national treatment"), and they forbid discriminating against foreign investments from different countries ("most favored nation treatment").[56] Second, they oblige states to provide a minimum

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52. Rixen, *supra* note 17, at 41, 168, 173–74.

53. *Id.* at 173.

54. *Id.* at 157–58 (arguing that effective lobbying by businesses is partially responsible for states' preferences to avoid double taxation).

55. There is no regularly updated model convention in international investment law that is as widely accepted as the OECD Model Convention in tax. Hence, this section will provide examples from the 2012 national model BIT of the United States.

56. *See, e.g.,* U.S. Dep't Of State, Treaty Between The Government Of The United States Of America And The Government Of [Country] Concerning The Encouragement And Reciprocal Protection Of Investment (2012), arts. 2 & 3, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.

standard of treatment for investment, which typically includes protection from arbitrary or unjust action ("fair and equitable treatment") and from physical interference ("full protection and security").[57] Third, they ensure that property can only be taken, directly or indirectly, against the payment of full and prompt compensation ("expropriation").[58] Fourth, they guarantee investors the ability to move and repatriate capital ("transfer of funds").[59] Finally, some IIAs limit the ability of host states to impose restrictions on the conduct and management of business operations (e.g., prohibiting "performance requirements" and nationality-based limitations on the appointment of "senior management and boards of directors").[60]

These protective standards have given rise to varying judicial interpretations.[61] In practice, a multitude of governmental acts and omissions can have an impact on foreign investment. The question then arises: what conduct is a legitimate exercise of a state's regulatory prerogatives, and what amounts to an illegitimate interference with investment in violation of the treaty?[62] Whereas early investment agreements only contained broadly-

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pdf. Some treaties extend the non-discrimination obligations to the treatment of the "investors" in addition to the "investment."

57. *See, e.g.*, *id.* art. 5.

58. *See, e.g.*, *id.* art. 6.

59. *See, e.g.*, *id.* art. 7.

60. *See, e.g.*, *id.* arts. 8 & 9.

61. Franck, *supra* note 5. For inconsistent arbitral decisions, compare, for instance, (1) on the notion of investment between the award and annulment decision in Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7 (Feb. 9, 2004) (disagreeing on whether a contribution to the host state's development is required to count as an "investment"); (2) on the reading of umbrella clauses SGS Société Générale de Surveillance *S.A.* v. Republic of the Phil., ICSID Case No. ARB/02/6 (Jan. 29, 2004) and SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13 (Oct. 16, 2002) (disagreeing on whether an umbrella clause converts contractual breaches into violations of the BIT); and (3) the interpretation of the necessity defense LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentina, ICSID Case No. ARB/02/1 (July 25, 2007) and CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8 (May 12, 2005) (on the conditions and application of the exception in the US-Argentina BIT Art. XI).

62. *See generally* Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT'L ECON. L. 507 (2009).

worded protective principles,[63] case law and an evolving treaty practice have sought to draw clearer lines between investment protection and the host state's right to regulate. Tribunals have developed new normative theories to translate vague principles into operational standards, and they have drawn from customary international law (e.g., a state's police power to regulate in the public interest) to delineate protective standards.[64] Recent investment treaties have added clarifying language to further circumscribe the scope of primary obligations and provided for explicit policy safeguards, exceptions, and flexibilities.[65] In spite of this evolving case law and the trend towards greater precision in treaty language, the line between permissible and impermissible host state conduct remains blurry, as fundamental interpretive questions, such as the scope of protective obligations and the role and effect of exceptions, remain unresolved.[66]

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63. The obligation to provide "fair and equitable treatment" illustrates this point. As the Saluka tribunal stated: "The 'ordinary meaning' of the 'fair and equitable treatment' standard can only be defined by terms of almost equal vagueness." Saluka Investments B.V. v. Czech Republic, UNCITRAL, Partial Award, Mar. 17, 2006, ¶ 297. *See*, similarly, Joseph C. Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010, ¶ 258; Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, ¶ 504.

64. The concept of investor's "legitimate expectations" proved to be one of the most controversial judicial developments, *see* Michele Potesta, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV. 88 (2013). Tribunals also read flexibilities into vaguely worded standards, *see, e.g., Methanex v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, Aug. 3, 2005, Part IV, Chapter D, ¶ 7, or Saluka Investments, *supra* note 63, at ¶ 262.

65. Spears, *supra* note 5; Caroline Henckels, *Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP*, 19 J. INT'L ECON. L. 27 (2016); Mark S. Manger & Clint Peinhardt, *Learning and the Precision of International Investment Agreements*, 43 INT'L INTERACT. 1 (2017).

66. Federico Ortino, *Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Investment Treaty Making*, 28 ICSID REV. 152 (2013); Federico Ortino, *The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?*, 21 J. INT'L ECON. L. 845 (2018); Caroline Henckels, *Scope Limitation or Affirmative Defense? The Purpose and Role of Investment Treaty Exception Clauses*, *in* EXCEPTIONS AND DEFENSES IN INTERNATIONAL LAW (Lorand Bartels & Federica Paddeu eds., 2018).

Aside from protecting investment, an increasing number of IIAs also address other aspects of international investment relations. Some treaties contain explicit rules on the liberalization of investment flows[67] or enshrine specific investment promotion or facilitation agendas.[68] Recent investment treaties also purport to discipline the conduct of foreign investors, but thus far this has primarily taken the form of hortatory language promoting corporate social responsibility standards.[69] Other public policy considerations connected to foreign investment, such as the fight against corruption[70] or the preservation of the environment,[71] are also increasingly prominent features in investment agreements.

B. Procedural Investment Norms: Investment Arbitration

International investment law, however, is most (in)famous for its potent ISDS mechanism. The majority of IIAs allow private investors to bring treaty violation claims directly against the host state to international arbitration.[72] Investment arbitration tribunals can award monetary damages to investors that may amount to billions of U.S. dollars. Although IIAs also contain provisions on inter-state consultation and arbitration,

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67. *See, e.g.,* Comprehensive Economic and Trade Agreement, Can.–EU, Oct. 30, 2016, O.J. (L 11) 23, art. 8.4.

68. *See*, for instance, the new Brazilian BITs, Vivian Gabriel, *The New Brazilian Cooperation and Facilitation Investment Agreement: An Analysis of the Conflict Resolution Mechanism in Light of the Theory of the Shadow of the Law*, 34 CONFL. RESOLUT. Q. 141 (2016); C. Titi, *International Investment Law and the Protection of Foreign Investment in Brazil*, 13 TRANSNATL. DISPUTE MANAG. 1, 8 (2016).

69. *See, e.g.,* Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 9.17, Mar. 8, 2018, https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf [hereinafter CPTPP].

70. Joost Pauwelyn, *Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti–Corruption Policy*, *in* ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE? 1–18 (Susan Rose-Ackerman ed., 2013).

71. Wolfgang Alschner & Elizabeth Tuerk, *The Role of International Investment Agreements in Fostering Sustainable Development*, SSRN ELECTRONIC LIBRARY (2013), http://papers.ssrn.com/abstract=2295440.

72. The IIA contains a unilateral offer of consent to arbitration, which is perfected when the investor initiates a claim. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 232 (1995).

compared to ISDS claims whose numbers have risen to more than nine hundred,[73] inter-state arbitration is rarely used.[74]

Historically, investment treaties began including this potent enforcement mechanism to deal with a dual asymmetry. A first asymmetry between powerful capital exporting and poorer capital importing countries in the early 20th century turned investment disputes into armed conflicts ("gunboat diplomacy").[75] ISDS was meant to prevent such escalation by removing investment disputes from the inter-state sphere ("depoliticization").[76] A second asymmetry existed between investors and host states. Once a factory or mine was built and the capital was sunk, investors were at the whims of a host state and its legal system.[77] ISDS sought to level the playing field by lifting investment disputes from the domestic to the international sphere ("internationalization").[78] For these historical reasons, international investment law is among the few international

73. These statistics are based on UNCTAD's Investment Policy Hub in December 2018, see UNCTAD, *Investment Dispute Settlement Navigator*, https://investmentpolicyhub.unctad.org/ISDS (last visited Dec. 14, 2018).

74. Michele Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?*, *in* INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW 753–68 (Nerina Boschiero et al. eds., 2013).

75. Wealthy industrialized states thereby sought to protect the capital of their nationals abroad from unfavorable governmental interventions by threating the use of force and by sending warships to project their power, especially vis-à-vis the newly independent states of South America. *See* Jonathan Gimblett & O.Thomas Johnson, Jr., *From Gunboats to BITs: The Evolution of modern International Investment Law*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 649, 651–664 (Karl P. Sauvant ed., 2011).

76. *Id.*; *see also* Martins Paparinskis, *The Limits of Depoliticisation in Contemporary Investor-State Arbitration*, SSRN ELECTRONIC LIBRARY (2010), http://papers.ssrn.com/abstract=1716833.

77. Formally, this is conceived of as a "time inconsistency problem," whereby the host state promises protection to attract investment but has an incentive to renege on that promise once the investment is made. The investor, anticipating such reneging, may then not invest in the first place. BITs are said to solve that problem by making the host state's promise of protection credible, *see* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 58–66 (1997).

78. Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 369 (2003) ("Arbitration was justified as a way to level the playing field and to reduce the prospect of host state 'home town justice,' thereby safeguarding assets from expropriation without compensation.").

regimes that provides private actors with direct access to international dispute settlement for public international law claims.

International arbitration conventions support treaty-based investment arbitration. Enforcement of investment arbitration awards either takes place under the framework of the International Centre for Settlement of Investment Disputes Convention ("ICSID Convention") or as ad hoc arbitration under the framework of the New York Convention, which also governs international commercial arbitral awards.[79] Review and enforcement mechanisms differ between the two routes. ICSID awards are reviewed on limited grounds by special ad hoc annulment committees, and the awards are treated as if they were the final judgments of the highest court of the state of enforcement.[80] The New York Convention, in contrast, relies on domestic courts for review and enforcement.[81] Neither system, however, allows a full appeal, hence awards are not scrutinized for substantive correctness.[82]

IIAs, in concert with the respective institutional arbitration rules, determine the scope and procedure of the arbitration. Early IIAs only provided for rudimentary arbitration rules; recent BITs, however, often devote half of their treaty text to ISDS.[83] Moreover, institutional arbitration rules, such as those applicable to ICSID arbitration or ad hoc arbitration under UNCITRAL rules, have been revised over time.[84] These chang-

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79. Susan Choi, *Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions*, 28 N. Y. UNIV. J. INT'L L. POLIT. 175 (1995).

80. Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 FOREIGN INVEST. L. J. 287 (1987).

81. Choi, *supra* note 79.

82. David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 FOREIGN INVEST. L. J. 21 (1992); Giorgio Sacerdoti, *Appeal and Judicial Review in International Arbitration: The Case of the WTO Appellate Review*, *in* INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 245–80 (Ernst-Ulrich Petersmann ed., 1997) (contrasting review in investment to a WTO appeal).

83. Compare, for instance, the Canada-Argentina BIT (1991) Article 10 on ISDS with the Canada-Tanzania BIT (2013), devoting Articles 19–35 to ISDS.

84. Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 L. BUS. REV. AM. 885 (2007).

es responded to successive waves of criticism directed against ISDS. A first wave of criticism starting in the early 2000s related to the secrecy and lack of public participation in investment arbitration.[85] Recent treaties and arbitration rules mandate the publication of awards, public hearings, and allow for *amicus curiae* submissions.[86]

A second, more recent wave of criticism has focused on perceived conflicts of interest of investment arbitrators. These conflicts may arise from "double hatting," where arbitrators also act as counsel or expert witnesses in other proceedings, or they result from perceived biases in connection with an arbitrator's financial interest in reappointments.[87] To respond to these concerns, recent investment treaties have included ethical codes for arbitrators and tightened appointment rules.[88] As discussed further below, ISDS remains controversial despite these incremental adjustments, and it continues to be at the center of the investment regime's current legitimacy crisis.

III. NATURAL COMPARATORS: THE TAX AND INVESTMENT REGIMES

International economic law scholarship increasingly deploys a comparative international law perspective to study similarities and differences among its sub-disciplines. Most such studies, however, focus on comparing international trade and in-

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85. Jack J. Coe Jr., *Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership*, 54 UNIV. KANS. L. REV. 1339, 1339 (2005); J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681, 695 (2007).

86. Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 200, 201 (2011).

87. *See generally,* Malcolm Langford, Daniel Behn & Runar H. Lie, *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECON. L. 301 (2017); for a general public law critique, see GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007); Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fueling an Investment Arbitration Boom*, CORP. EUR. OBSERVATORY (2012), http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf.

88. *See, e.g.,* CPTPP, *supra* note 69, art. 9.22(6).

vestment law.[89] The trade and investment regimes share key norms, such as the national treatment and most favored nation principles,[90] possess active dispute settlement arms that, at times, involve related disputes,[91] encounter similar interpretive issues,[92] occasionally cite jurisprudence from the other field,[93] and are increasingly found in the same treaty instruments.[94] International tax law, in contrast, deals with distinct legal issues, consists of mostly dissimilar norms, and relies primarily on political rather than judicial forms of dispute settlement.[95] Even the nascent tax arbitration bears little resemblance to trade and investment adjudication since its arbitrators merely side with one of the positions advanced by the disputing parties without providing reasons or citing legal authorities.[96] Unsurprisingly then, scholarship contrasting tax and trade[97] or investment and tax has been rare.[98] Yet, tax and investment law

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89. *See, e.g.,* Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48 (2008); Tomer Broude, *Investment and Trade: the "Lottie and Lisa" of International Economic Law?*, 8 TRANSNAT'L DISPUTE MGMT. TDM (2011); JÜRGEN KURTZ, THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS (2016).

90. *See generally*, Jürgen Kurtz, *The MFN Standard and Foreign Investment: An Uneasy Fit?*, 5 J. WORLD INVEST. TRADE 861 (2004); DiMascio and Pauwelyn, *supra* note 90.

91. *See generally,* Joost Pauwelyn, *Editorial Comment: Adding Sweeteners to Softwood Lumber: the WTO–NAFTA 'Spaghetti Bowl' is Cooking*, 9 J. INT'L ECON. L. 197 (2006); Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT'L L. J. 383, 399 (2016).

92. J. Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EUR. J. INT'L L. 749, 756 (2009).

93. *See generally*, Damien Charlotin, *The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis*, 20 J. INT'L ECON. L. 279 (2017).

94. Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 ST. CLARA J. INT'L L. 35, 38–40 (2014).

95. RIXEN, *supra* note 17, at 74.

96. Mooij, *supra* note 47; PAUWELYN, *supra* note 49.

97. Yariv Brauner, *International Trade and Tax Agreements May Be Coordinated, but Not Reconciled*, 25 VA. TAX REV. 251 (2005); Horst Raff, *Preferential Trade Agreements and Tax Competition for Foreign Direct Investment*, 88 J. PUBLIC ECON. 2745 (2004); Joel Slemrod & Reuven S. Avi-Yonah, *(How) Should Trade Agreements Deal with Income Tax Issues*, 55 TAX L. REV. 533 (2001); The GATT 1994 and Direct Taxes: Some National Treatment and Related Issues, *supra* note 38.

98. Asif H. Qureshi, *Coherence in the Public International Law of Taxation: Developments in International Taxation and Trade and Investment Re-*

are, in fact, strikingly similar in some respects. This section shows that there are important similarities between the policy rationales, structure, and historical evolution of the tax and investment regimes. These similarities make tax and investment law natural and highly insightful comparators.

A. Common Policy Goals

As recently as 2011, the United Nations Conference on Trade and Development (UNCTAD) consistently referred to both DTTs and BITs as "international investment agreements," and grouped them under the umbrella of a single regime for the facilitation, promotion, and protection of foreign direct investment.[99] Similarly, the World Trade Organization (WTO) has referred to DTTs as "Bilateral Investment Treaties for the Avoidance of Double Taxation."[100] Upon reflection, this conflation of BITs and DTTs is not surprising given that tax and investment treaties share a common policy goal: facilitating the free flow of international capital.[101]

Would-be capital exporters face two sets of political risks in the host state that are respectively addressed through DTTs and BITs. First, companies investing abroad fear that their revenues could be detrimentally affected by *fiscal measures*. Their income could be taxed twice: once by the company's home

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lated Taxation, 10 ASIAN J. WTO INT'L HEALTH L. POL'Y 193 (2015); Lazo et al., *supra* note 3; Chaisse, *supra* note 3.

99. The WIR 2005, for instance, explained that international investment agreements "include[s] bilateral treaties for the promotion and protection of investment (or bilateral investment treaties), treaties for the avoidance of double taxation (or double taxation treaties), other bilateral and regional trade and investment agreements as well as various multilateral agreements that contain a commitment to liberalize, protect and/or promote investment." *See* UNCTAD, *World Investment Report 2005: Transnational Corporation and the Internationalization of R&D*, at 37, U.N. Doc. UNCTAD/WIR/2005 (2005).

100. WTO Secretariat, *Trade Policy Review East African Community, Annex 2 Tanzania*, WT/TPR/S/171/TZA, Sept. 20, 2006, https://www.wto.org/english/tratop_e/tpr_e/s171-02_e.doc.

101. THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, xxvii (Karl P. Sauvant & Lisa E. Sachs eds., 2009). While this section focuses on their common economic goals, it should also be pointed out that both types of instruments were also seen and originally conceived of as pillars for stable, rule-based international relations and world peace. *See* Christians, *supra* note 13, at 9; Gimblett &Johnson, Jr., *supra* note 75.

state and a second time by the company's host state where the revenue is generated.[102] DTTs solve that problem by allocating taxation authority between the residence and the source country, thereby ensuring that the same income is not taxed twice.[103]

Second, companies considering investing abroad also fear detrimental *regulatory measures* in host states.[104] A host state may decide to expropriate foreign assets or discriminate against foreign investors. The laws and courts of the host state may be perceived to not offer reliable protection against these risks, as the former can be changed and the latter may be biased, inefficient, or lacking expertise, which compounds the risks that the investor faces.[105] BITs protect foreign investments from such political risks by creating immutable international legal obligations that are directly enforceable by foreign investors through international arbitration.[106] The division of labor between DTTs and BITs to deal with political risks arising from fiscal and regulatory measures, respectively, is apparent in the treaties themselves: BITs have historically carved out taxation from the treaty's scope and left it instead to parallel DTTs to address fiscal measures.[107]

A second division of labor underscores the complementarity between tax and investment treaties. DTTs deal with the upside of investment relations by determining how the *gains* from investment should be distributed. DTTs allocate taxation rights and thereby determine what share of the generated revenue is taxed in the source country, what share is taxed by the resi-

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102. Ke Chin Wang, *International Double Taxation of Income: Relief Through International Agreement 1921–1945*, 59 HARV. L. REV. 73, 73 (1945) (explaining the distinction between residence and source countries).

103. Avi-Yonah, *supra* note 16, at 100–01.

104. Hermann Abs & Hartley Shawcross, *The Proposed Convention to Protect Private Foreign Investment-Introduction*, 9 J. PUB. L. 115, 119 (1960).

105. Jan Paulsson, *Third World Participation in International Investment Arbitration*, 2 FOREIGN INVEST. L. J. 19, 63 (1987); Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 TRADE L. DEV. 19, 33–35 (2010) (for a critical discussion).

106. Jürgen Voss, *The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies*, 31 INT'L COMP. L. Q. 686, 705–08 (1982).

107. UNCTAD, *Trade and Development Report*, at 33, U.N. Doc. UNCTAD/TDR/(2000) (2000). More recent investment treaties, however, cover taxation issues in more detail. *See generally*, M. Davie, *Taxation-Based Investment Treaty Claims*, 6 J. INT'L DISP. SETTL. 202 (2015).

dence country, and what share remains with the investor (i.e., is not deducted as taxes at all). BITs, conversely, deal with the downside of investment by allocating how the *losses* from investment should be distributed. BITs determine what losses are compensable (e.g., losses arising from a treaty breach) and thus borne by the host state, and what losses are non-compensable and thus borne by the investor (e.g., losses arising from pure commercial risks).[108] An UNCTAD study summarized this complementarity as follows: "[t]he principal purpose of DTTs is to deal with issues arising out of the allocation of revenues between countries; the principal purpose of BITs is to protect the investments that generate these revenues."[109]

Finally, both types of agreements complement each other when it comes to compensating for weak domestic institutions. As Charles Irish writes, "foreign investors generally view the tax systems of developing countries as less stable than the systems of their home countries," and therefore ask for DTTs to ensure fair tax treatment.[110] The conclusion of BITs has similarly been motivated by fears of bias in domestic courts and arbitrary changes to local laws in developing states; these fears have induced investors to rely on international rules and institutions instead.[111] States, particularly those with weaker domestic institutions, have also used BITs and DTTs to signal a favorable investment climate with attendant hopes of attracting more foreign investment and gaining an upper hand in the international competition for foreign capital.[112] In short, tax

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108. Wolfgang Alschner, *Aligning Loss and Liability – Towards an Integrated Assessment of Damages in Investment Arbitration*, *in* THE USE OF ECONOMICS IN INTERNATIONAL TRADE DISPUTES: LESSONS LEARNED AND CHALLENGES AHEAD (Theresa Carpenter, Marion Jansen, & Joost Pauwelyn eds., 2017).

109. UNCTAD, *Trade and Development Report*, *supra* note 107, at 27.

110. Charles R. Irish, *International Double Taxation Agreements and Income Taxation at Source*, INT'L COMP. L. Q. 292, 302 (1974).

111. Prosper Weil, *The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage À Trois*, 15 ICSID REV. 401, 402–05 (2000); Van Harten, *supra* note 105.

112. Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORGAN. 811, 819–27 (2006) (on BITs); Fabian Barthel & Eric Neumayer, *Competing for Scarce Foreign Capital: Spatial Dependence in the Diffusion of Double Taxation Treaties*, 56 INT'L STUD. Q. 645 (2012) (on DTTs); *see also* Avi-Yonah, *supra* note 16, at 106.

and investment treaties pursue the same goal of facilitating international investment, but through complementary means.

B. Common Roots and Similar Codification Efforts

In addition to pursuing common goals, both regimes share common historical roots. Origins of both regimes can be traced back to the bilateral treaties of the nineteenth century, including Friendship, Navigation and Commerce (FCN) agreements covering both tax and foreign property.[113] Early multilateral efforts to codify disciplines governing states' economic relations, including on taxation and foreign investment protection, followed with the work of the League of Nations in the interwar period.[114] Article 23(e) of the 1920 League of Nations Covenant provided the organization with the task "to secure and maintain . . . equitable treatment for the commerce of all Members of the League."[115] This clause sparked international codification efforts, which bore fruit in the 1929 Draft Convention on the Treatment of Foreigners that jointly dealt with the property protection (Article 11) and fiscal treatment (Articles 12–14) of aliens.[116] Disagreement amongst states, however, prevented the Draft Convention from ever becoming law.[117]

Such failed multilateralization attempts are another point that both regimes have in common. International organizations repeatedly pushed for the coordination of international taxation and investment protection through multilateral rules, but pushback from states led to the realization that a common mul-

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113. On investment treaties, see Abs & Shawcross, *supra* note 104; Wolfgang Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, 5 GOETTINGEN J. INT'L L. 455, 461–63 (2013); on tax treaties, see Lara Friedlander & Scott Wilkie, *Policy Forum: The History of Tax Treaty Provisions — And Why It Is Important To Know About It*, 54 CAN. TAX J. 907, 909 (2013).

114. *See generally,* SUNITA JOGARAJAN, DOUBLE TAXATION AND THE LEAGUE OF NATIONS (2018); Mona Pinchis, *The Ancestry of 'Equitable Treatment' in Trade: Lessons from the League of Nations during the Inter-War Period*, 15 J. WORLD INVEST. & TRADE 13 (2014); RIXEN, *supra* note 17, at 87–93.

115. League of Nations Covenant art. 23(e).

116. *International Conference on the Treatment of Foreigners*, League of Nations Doc. C.36. M.21. 1929. II, 1929.

117. John Ward Cutler, *The Treatment of Foreigners: In Relation to the Draft Convention and Conference of 1929*, 27 AM. J. INT'L L. 225 (1933).

tilateral framework was out of reach.[118] After the first multilateralization efforts failed under the auspices of the League of Nations during the inter-war period, the taxation and investment protection dossiers passed to the OECD after the Second World War.[119] The 1960s then saw renewed efforts to multilateralize the investment and tax architecture under the leadership of the OECD.[120] Revealing the striking parallels of the two fields, the OECD published in quick succession a Draft Convention on the Protection of Foreign Property in 1962 and a Draft Double Taxation Convention on Income and Capital in 1963.[121] Yet again, disagreement amongst states prevented either draft from becoming a multilateral treaty.[122]

In both cases, however, the OECD salvaged the work by recommending the Draft Conventions be used as models for future bilateral treaties, setting the stage for the bilateral governance structure that came to dominate both regimes. In July 1963, the OECD Council adopted a resolution calling on its members to conform their bilateral tax treaty practice to the OECD Double Taxation Draft Convention.[123] A similar OECD Council decision followed in October 1967, recommending the Draft Convention on Foreign Property Protection as the basis for bilateral investment agreements.[124]

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118. *See, e.g.,* MICHAEL KOBETSKY, INTERNATIONAL TAXATION OF PERMANENT ESTABLISHMENTS: PRINCIPLES AND POLICY 158 (2011) (ebook); Muchlinski, *supra* note 9.

119. RIXEN, *supra* note 17, at 96–97.

120. *Id.* at 97; STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 36 (2009).

121. *See* M. J. Van Emde Boas, *The O.E.C.D. Draft Convention on the Protection of Foreign Property*, 1 COMMON MARKET L. REV. 265 (1963); *see generally* Adrian A. Kragen, *Double Income Taxation Treaties: The OECD Draft*, 52 CAL REV 306 (1964).

122. RIXEN, *supra* note 17, at 97; SCHILL, *supra* note 120, at 36–38.

123. OECD, *Recommendation on the Draft Convention for the Avoidance of Double Taxation with respect to Taxes on Income and Capital* (adopted July 30, 1963), OECD/LEGAL/0056, *available at* https://legalinstruments.oecd.org/public/doc/405/405.en.pdf.

124. OECD, *Resolution on Draft Convention on the Protection of Foreign Property* (adopted Oct. 12, 1967) OECD Pub. 15637, *available at* http://www.oecd.org/daf/inv/internationalinvestmentagreements/39286571.pdf.

C. Common Bilateral Governance Structure

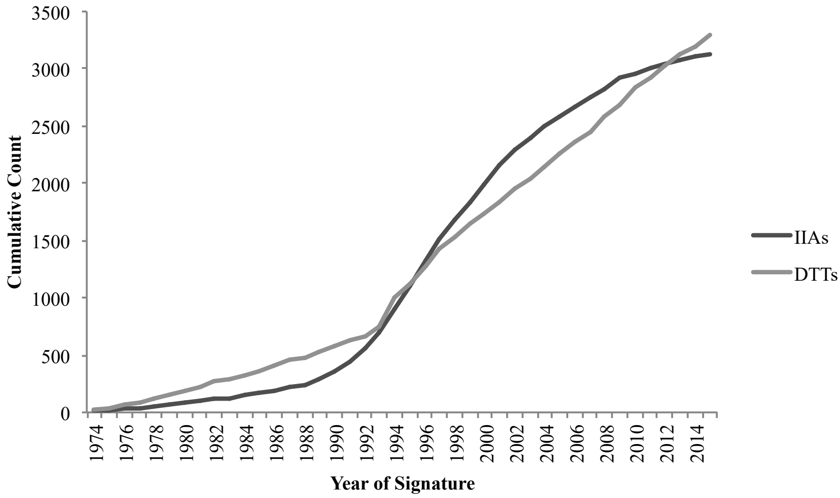
Following the work of the OECD in the 1960s, the tax and investment regimes evolved into two global but decentralized networks of mostly bilateral treaties. Bilateralism thus became the common, defining structural feature of the tax and investment regimes. This distinguishes them from the international trade regime, which developed around the common multilateral rulebook of the General Agreement on Tariffs and Trade (GATT), and later WTO.[125]

The tax and investment regimes each number around three thousand mostly bilateral agreements today.[126] Between the 1960s and 1980s, tax and investment treaties gradually grew in numbers, and in the 1990s and early 2000s their numbers expanded particularly rapidly (Figure 1). For most of this period, DTTs and BITs closely trailed each other. Over the past decade, however, the growth of IIAs, which includes both BITs and investment chapters in free trade agreements, has slowed down considerably, whereas the number of DTTs has continued to increase relatively steadily.

125. While WTO members can use free trade agreements to liberalize their trade further and broaden their commercial cooperation to areas not covered by the WTO, they cannot bilaterally contract out of their multilateral obligations.

126. RIXEN, *supra* note 17, at 108. Numbers of DTTs are based on the OECD's Exchange of Tax Information Portal, http://eoi-tax.org. Numbers for IIAs are based on UNCTAD's Investment Policy Hub in December 2018, *see* UNCTAD INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/international-investment-agreements (last visited Dec. 14, 2018); *see also* UNCTAD, *World Investment Report 2019: Special Economic Zones*, 99, U.N. Doc. UNCTAD/WIR/2019 (2019).

Figure 1: The parallel expansion of the tax and investment regimes



Source: Data from UNCTAD (for IIAs) and OECD (for DTTs).

The two treaty networks are different in some respects. Whereas BITs connect primarily developed and developing countries, DTTs link all major developed countries.[127] In 2002, there were roughly equal numbers of DTTs and BITs in existence, yet while the former were estimated to cover eighty-eight percent of world foreign direct investment (FDI) stock, the latter only protected seven percent.[128] These differences have become less pronounced over time, though. DTTs connected OECD countries, but then also spread to developing countries.[129] Conversely, whereas investment agreements proliferated first in North-South relations, today they also connect developed countries in the form of investment chapters in larger free trade agreements, such as the North American Free Trade Agreement (NAFTA) or the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.[130] Hence, the coverage of IIAs and DTTs is converging.

127. RIXEN, *supra* note 17, at 111–15.; PICCIOTTO, *supra* note 43, at 54.
128. UNCTAD, *World Investment Report 2003: FDI Policies for Development*, 89, U.N. Doc. UNCTAD/WIR/2003 (2003).
129. *See infra* Part III.D.
130. Barton Legum, *The Innovation of Investor-State Arbitration under NAFTA Focus: Emerging the for International Litigation (Part 1)*, 43 HARV. INT'L L. J. 531, 537–38 (2002); MARC BUNGENBERG ET AL., SECOND THOUGHTS:

Although tax and investment law developed around distinct bilateral treaties, their networks were never completely decentralized. Unifying norms, principles, and institutions bound the individual bilateral treaties in each field together. The text that emerged from the two OECD Draft Conventions of the 1960s provided tax and investment lawyers with a common language that was reproduced in subsequent DTTs and BITs, respectively, and contributed to the emergence of shared norms and principles within each field.[131] On the institutional side, the creation of ICSID in 1965 provided a multilateral framework for settling disputes in the investment field.[132] Similarly, in tax, the OECD and its inter-governmental Fiscal Committee became a fixed venue for international deliberations on tax governance and regularly updated the OECD Model text and its commentary.[133] In sum, common norms, principles, and institutions created a level of cohesion that justifies calling each formally decentralized treaty network an "international regime."[134] Yet, particularly as compared to the multilateral trading system, this label should not obscure the fact that the international tax and investment system remained decentralized and lacked a formal, comprehensive multilateral superstructure.

As they are based on decentralized networks of mostly bilateral treaties, the tax and investment regimes have come to face common governance challenges. In both spheres, states have to comply with rules and commitments across dozens of treaties that may be similar in overall design but often differ significantly in their fine print.[135] Aside from such normative frag-

INVESTOR STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES (Armand De Mestral ed., 2017).

131. SCHILL, *supra* note 120, at 39; RIXEN, *supra* note 17, at 66; Yariv Brauner, *Treaties in the Aftermath of BEPS*, 41 BROOK. J. INT'L L., 973, 977 (2016).

132. Joost Pauwelyn, *At the Edge of Chaos: Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29 ICSID REV. 372, 393–94 (2014).

133. Genschel & Rixen, *supra* note 4, at 160.

134. J. W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L. J. 427, 431 (2010); Christians, *supra* note 13; AVI-YONAH, *supra* note 21, at 3.

135. Nathalie Bravo, *The Multilateral Tax Instrument and Its Relationship with Tax Treaties*, 8 WORLD TAX J. 279, 281 (2016); Wolfgang Alschner &

mentation, states also grapple with normative modernization. DTTs and BITs have been concluded over multiple decades. As rules evolve, states must find efficient ways to update existing agreements.[136] Hence, the similar decentralized structure of bilateral treaty networks exposes the tax and investment regimes to comparable governance challenges. This article will return to these issues in the context of recent reform efforts in both fields.

D. Similar Policy Diffusion to Developing Countries

The commonalities between the tax and investment regimes also extend to the process by which treaties spread across the globe. In the 1960s, it was not at all clear whether DTTs and BITs would become global networks; much depended on whether newly decolonized developing countries would accept an agenda hitherto primarily shaped by industrialized nations in the OECD.

Even though both types of agreements are *de jure* reciprocal, *de facto* the advantages and burdens associated with them strongly depend on the underlying capital flows.[137] Absent a DTT or BIT, a host country to a foreign investor can tax and regulate largely at will.[138] DTTs curtail the right to tax income sourced in the host country, while BITs curtail the right to regulate activities taking place in the host country. When bilateral capital flows are symmetrical, these fiscal and regulatory limitations are reciprocated by each contracting state. But if capital flows are starkly asymmetrical, the capital importer *de facto* bears a higher compliance burden than the capital exporter.[139] For instance, while German companies have invested in Ivory Coast, companies from Ivory Coast have not invested in Ger-

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Dmitriy Skougarevskiy, *Mapping the Universe of International Investment Agreements*, 19 J. INT'L ECON. L. 561 (2016).

136. Taylor, *supra* note 30, at 297–306; UNCTAD, *Lessons from the MAI*, *supra* note 9.

137. Avi-Yonah, *supra* note 16, at 100.

138. It will, of course, face some constraints by customary international law and its minimum standard for the treatment of aliens.

139. Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 663–64 (1990); José E. Alvarez, *The Evolving BIT*, 7 TRANSNAT'L DISP. MGMT. 1, 3 (2010); TSILLY DAGAN, INTERNATIONAL TAX POLICY: BETWEEN COMPETITION AND COOPERATION 3 (2018).

many.[140] In the absence of foreign investors, Germany's regulatory and source taxation policy is *de facto* unrestrained by the BIT (1966) and DTT (1982) concluded with Ivory Coast, whereas Ivory Coast has to limit its regulatory and source taxation prerogatives vis-à-vis German investors. Hence, even though treaty obligations are reciprocal *de jure*, both DTTs and BITs *de facto* place a greater compliance burden on the capital importing country in bilateral relationships characterized by asymmetrical capital flows.

Scholars of BITs and DTTs have thus been puzzled that both types of agreements spread so successfully to developing countries. In 1997, Andrew Guzman asked why developing countries sign investment treaties that hurt them.[141] Almost twenty years earlier, Charles Irish asked the same question in relation to DTTs: "why [were] unfavorable double taxation agreements [...] assumed by developing countries?"[142] The answers scholars have given as to why developing countries signed on to DTTs that eroded their tax base and agreed to BITs that sacrificed part of their regulatory autonomy mirror each other.

First, developing countries joined the bandwagon of BITs and DTTs hoping to attract FDI. According to Guzman, the diffusion of BITs was driven by a competition for capital amongst developing countries.[143] Similarly, having a DTT was widely seen by states as a precondition for attracting foreign investment and a means to gain an advantage over regional competitors.[144] In hindsight, these expectations appear overly optimistic. Economic studies have thus far failed to conclusively establish a causal link between BITs or DTTs and increased investment flows.[145]

Second, in addition to overestimating the FDI-attracting effects of these treaties, developing countries also seemed to have underappreciated their costs. As Lauge Poulsen shows for BITs, developing countries long mistook investment treaties as

140. Based on the OECD International direct investment database until 2010 (last reported year).

141. Guzman, *supra* note 77.

142. Irish, *supra* note 110, at 300.

143. Guzman, *supra* note 77.

144. Irish, *supra* note 110, at 303; Barthel & Neumayer, *supra* note 112.

145. Guzman, *supra* note 77, at 370–71; *see also* Jeswald W. Salacuse & Nicholas Sullivan, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67, 111 (2005).

mere pieces of paper or tokens of good will without appreciating the risks they posed in enabling foreign investors to sue host states for millions of dollars in damages.[146] Similarly, Charles Irish notes that developing countries were typically unaware of the negative consequences flowing from the allocation of taxation rights between the residence and the source country in double taxation treaties.[147]

Third, a lack of expertise and sophistication on the part of developing states seems to have fueled this double miscalculation and resulted in one-sided negotiations. In the context of BITs, Poulsen shows how many developing countries signed on to BITs with little or no meaningful negotiations.[148] In the BIT regime, developing countries tended to be rule-takers opting into the model agreements proposed by their developed country counterparts as rule-makers.[149] In the same vein, Irish notes that "new tax agreements are too often the product of unquestioned acceptance of the developed country's position after little or no substantive negotiation."[150] More recent qualitative and econometric research by Martin Hearson confirms that many developing states initially approached DTT negotiations with relatively little sophistication and then learned over time, as their experience grew, to negotiate more advantageous treaties.[151] In short, the diffusion of DTTs and BITs bears striking similarities.

E. Similar Contestation Efforts

Even though most states sooner or later bought into the treaty models put forth by developed countries, both fields also experienced periods of contestation that followed similar patterns.

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146. LAUGE N. SKOVGAARD POULSEN, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES (2015).

147. Irish, *supra* note 110, at 300.

148. POULSEN, *supra* note 146.

149. Alschner & Skougarevskiy, *supra* note 135, at 562; Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions*, 54 INT'L STUD. Q. 1, 23 (2010).

150. Irish, *supra* note 110, at 300.

151. Martin Hearson, *What Makes Countries Negotiate Away Their Corporate Tax Base?* 21 (UN Uni. World Inst. For Dev. Econ. Res., Working Paper No. 122, 2017).

First, from the 1960s to the early 1980s, developing countries used the United Nations (UN) to contest the taxation and investment protection norms forged by developed countries in the OECD. In the context of investment, developing countries asserted sovereignty over their natural resources and sought to limit the property rights of foreign investors in favor of state-driven economic development and industrial policy.[152] This New International Economic Order (NIEO) was formalized through several UN General Assembly resolutions and draft conventions in the 1960s and 70s, which, amongst others, sought to challenge the standard of compensation for expropriation advanced by developed states.[153] The texts stipulated that compensation was to be appropriate (rather than full) and subject to review by domestic courts (rather than international tribunals).[154] These efforts were a frontal attack against the expropriation norms advanced by developed countries, including through the OECD Draft Convention.

In the realm of taxation, contestation followed similar arguments but took a different form. Increasingly conscious of the fact that contemporary DTTs disadvantaged developing states by effectively privileging the interests of the residence country over the source country in asymmetric investment relations, the UN set up an expert group in the 1970s to rebalance DTTs in favor of developing countries.[155] The work of the expert group resulted in a new UN sponsored DTT model tailored to the relationship between developed and developing countries ("the UN Model"), which allocated more taxation rights to the source country.[156] Rather than challenge the status quo outright, the UN Model largely followed the OECD Model, but modified it in key passages so as to allocate more taxable revenue to source countries.[157] The contestation in both fields thus followed similar patterns of using the UN to target perceived

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152. Gimblett & Johnson, Jr., *supra* note 76, at 669–81.

153. Guzman, *supra* note 77.

154. G.A. Res. 3281 (XXIX), at 52 (Dec. 12, 1974). *See also*, G.A. Res. 1803 (XVII), at 15 (Dec. 14, 1962).

155. Genschel & Rixen, *supra* note 4, at 161.

156. Jan de Goede & Wim Wijnen, *The UN Model in practice 1997–2013*, 68 BULL. INT'L TAX'N 118, 146 (2014).

157. Thomas Rixen, *From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance*, 18 REV. INT'L POL. ECON. 197, 208 (2011).

asymmetries in existing bilateral treaties, although the strategies differed in their fine print. While the response in taxation was more measured and expert-driven, the reform sought with respect to investment protection was more far-reaching and political. This difference partially explains the varying success of both strategies. Whereas the UN tax model was subsequently used in some North-South DTTs,[158] the NIEO approach to expropriation never took hold in BITs.[159]

A second more recent effort of parallel contestation did not pit developing against developed countries, but multinational companies against national taxpayers. This contestation has led to a legitimacy crisis in both fields. In investment law, beginning in the 1990s, investors started using the long-dormant investor-state arbitration clauses in IIAs to bring over nine hundred claims against host states.[160] Roughly half of all concluded claims have resulted in some kind of payout to the investor, either through a (often secret) settlement or a damage award for the foreign investor.[161] Some claims are perceived to be particularly controversial, such as Philip Morris' challenge of Australia's tobacco control legislation,[162] and some award values were particularly high, such as two awards rendered against Ecuador[163] and Venezuela[164] of 1.8 and 1.6 billion dollars, respectively. These claims created a backlash against ISDS and sparked a global debate over whether this special form of protection for investors, which can entail significant monetary transfers from taxpayers to companies, is justified.[165]

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158. de Goede & Wijnen, *supra* note 156.

159. Guzman, *supra* note 77.

160. Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality*, 42 YALE J. INT'L L. 1, 6 (2017).

161. Data based on the UNCTAD Investment Policy Hub, *Investment Dispute Settlement Navigator* (Feb. 2018), https://investmentpolicy.unctad.org/investment-dispute-settlement.

162. Philip Morris Asia Ltd. v. Commonwealth of Australia (H.K. v. Austl.), PCA Case No. 2012-2 (2015).

163. Occidental Petroleum Corporation & Occidental Exploration & Production Company v. Republic of Ecuador (II), ICSID Case No. ARB/06/11 (Sept. 24, 2012).

164. Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27 (Sept. 24, 2014).

165. Waibel et al., *supra* note 5.

The rise of investor-state arbitration thus plunged the investment regime into what is widely perceived as a legitimacy crisis.[166] This has triggered a variety of policy responses from system exit (e.g., Venezuela and Ecuador),[167] to system redesign (e.g., Brazil),[168] to a plethora of more or less ambitious reforms to national investment treaty programs[169] turning the world into a quasi-laboratory of investment law reform experiments.[170] Starting in 2017, this global reform debate has been lifted to the multilateral level, as state representatives have begun to gather under the auspices of the UNCITRAL as Working Group III to debate the future of investor-state dispute settlement.[171] Specifically, the mandate of Working Group III consists of (1) identifying concerns relating to ISDS, (2) considering whether reform is needed, and (3) developing reform options.[172] As of this writing, Working Group III has affirmed that the investment regime is in need of reform, and has proceeded to step three to consider viable reform proposals.[173]

In the tax domain, the rising problem of tax evasion and avoidance similarly saw the interests of national taxpayers and multinational companies clash, plunging the international taxation regime into a legitimacy crisis. Tax avoidance had occupied tax experts since the early days of the regime,[174] but it re-

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166. *See* Franck, *supra* note 5; Charles N. Brower & Stephen W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law Symposium: International Judges*, 9 CHIC. J. INT'L L. 471, 471–76 (2008); ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY (2017); Waibel et al., *supra* note 5.

167. Frédéric G. Sourgens, *Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements*, 11 ST. CLARA J. INT'L L. 335, 360–61 (2013).

168. Gabriel, *supra* note 68; Titi, *supra* note 68.

169. Roberts, *supra* note 14.

170. Alschner, *supra* note 15.

171. Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, AM. J. INT'L L. 410, 426–27 (2018).

172. UNCITRAL, *Annotated Provisional Agenda, Working Group III (Investor-State Dispute Settlement Reform)*, Thirty-fourth session, ¶10, U.N. Doc. A/CN.9/WG.III/WP.141, (Sept. 15, 2017).

173. Anthea Roberts, *UNCITRAL and ISDS Reforms: Moving to Reform Options … the Process*, EJIL TALK! (Nov. 7, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-moving-to-reform-options-the-process/.

174. RIXEN, *supra* note 17, at 120–22.

mained an ancillary issue until the late 1980s, even though DTTs were typically called treaties for "the Avoidance of Double Taxation *and the Prevention of Fiscal Evasion*"[175] (not unlike BITs that were formally concerned with the "*Promotion* and Protection of Investment"[176] but focused almost exclusively on the latter). Increased liberalization of capital flows coupled with differing national taxation rates soon created incentives for wealthy individuals, as well as companies, to engage in tax planning to limit their exposure to domestic taxation.[177] When corporations shift revenue from high-tax to low- (or no) tax jurisdictions, they erode the tax base in high-tax jurisdictions, deprive governments of revenue, and undermine the legitimacy of the international tax system.[178] International efforts to curb harmful tax competition and tax planning began in earnest in the mid-1990s under the auspices of the OECD,[179] but it took the 2008 economic and financial crisis to catapult the issue to the top of the political agenda.[180] This led, amongst other initiatives, to the MLI in 2018. The MLI represents the most significant multilateral attempt yet to consolidate new rules to protect taxpayers against abusive tax planning by multinational companies.[181]

IV. COMMON STRUCTURAL CHALLENGE: SQUARING BILATERALISM WITH MULTILATERALISM

This latest contestation that pitted the interests of taxpayers against those of multinational companies not only triggered ambitious efforts to reform both systems, but also exposed a common structural tension that each field needed to resolve in

175. *See, e.g.,* Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gain, Canada-UK BTT, 3 CAN. TAX REP. (CCH) 19,700–19,792 (1978) (emphasis added).

176. *See, e.g.,* Canada-Argentina BIT (1993) (emphasis added).

177. RIXEN, *supra* note 17, at 117–18.

178. Brauner, *supra* note 131, at 976 ("The [BEPS] project was triggered by public outrage over aggressive corporate tax planning and was fueled by the media exposure of such schemes, which mandated the reform of the international tax regime.").

179. RIXEN, *supra* note 17, at 132–38.

180. Sissie Fung, *The Questionable Legitimacy of the OECD/G20 BEPS Project*, 10 ERASMUS L. REV. 76, 76–79 (2017).

181. Brauner, *supra* note 8.

order to overcome its legitimacy crisis. On the one hand, a massive renegotiation of thousands of existing treaties to address the legitimacy concerns of each regime through purely bilateral reforms would be impractical, if not impossible. On the other hand, states had consistently rebuked past attempts at multilateralization and continued to show little willingness to replace the existing bilateral governance structure with a multilateral one. So, how were the investment and tax regimes to square bilateralism with multilateralism in order to resolve their legitimacy crises?

The structural tension between bilateralism and multilateralism in reforming tax and investment law can be further broken down into three dimensions relating to the (1) mechanics, (2) scope, and (3) design of reform. First, how can a multilateral mechanism reform but not replace the existing bilateral governance structure ("mechanics")? Second, how can the rules in older treaties be modernized and streamlined with those in newer agreements in substance and procedure ("scope")? Third, how could states retain the flexibility to accommodate diverging policy preferences while simultaneously accepting necessary multilateral harmonization ("design")? This section will unpack each of these tensions between bilateralism and multilateralism underlying the reform of the tax and investment regimes.

A. Mechanics: How to Infuse a Bilateral Governance Structure with Multilateralism?

The tax and investment regimes have experienced repeated attempts to create a multilateral treaty. This is not surprising given that multilateralism comes with distinct advantages. Most importantly, it allows for the creation of uniform international rules that can be centrally administered and policed, lowering transactions costs.[182] The tax and investment Draft Conventions of the past suggest that negotiators believed a multilateral framework for allocating taxation rights and setting uniform norms of investment protection to be both possible and desirable. At the same time, the fact that these attempts failed suggests that states find it challenging to agree on universal norms. In addition, states may willingly choose bilateralism over multilateralism to benefit from the inherent flexibility

182. VANN, *supra* note 18, at 26.

of bilateral arrangements. Indeed, there is evidence of customization in tax and investment treaties.

At their core, both the investment and tax regimes solve what game theorists would call a coordination problem.[183] In coordination games, players want to cooperate, but they struggle to agree on the terms of cooperation because these terms have distributional consequences.[184] By the same token, states enter into IIAs and DTTs because it is in their mutual interest to avoid double taxation by foregoing some rights to tax, as well as to make their markets more attractive to foreign capital by compensating investors for some losses. Yet, states often disagree on what specific taxation rights to forego and what specific losses to compensate.

Bilateralism gives states flexibility to solve the same coordination game in different ways.[185] In international investment law, states only engage in minor tailoring of treaty texts to specific bilateral relationships.[186] However, countries do use the flexibility bilateralism offers to design tailored national investment protection policies, often expressed through unique model agreements that vary from one state to another.[187] The Gulf States, for example, offer generous investment protection in their investment agreements.[188] Turkey, Japan, and Canada, in contrast, safeguard comparatively greater regulatory flexibility by including general exceptions into their treaties.[189] Bilateralism in IIAs thus allows states to develop different answers to the question of what investment losses should be tak-

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183. For tax law, see Thomas Rixen, *Bilateralism or Multilateralism? The Political Economy of Avoiding International Double Taxation*, 16 EUR. J. INT'L RELAT. 589 (2010).

184. Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 CAL. REV. 209, 222, 236–38 (2008).

185. RIXEN, *supra* note 17, at 169–72.

186. For instance, the BIT between Uruguay and the United States is almost identical to the BIT between Rwanda and the United States.

187. Investment treaties are characteristically based on national treaty models, see CHESTER BROWN & DEVASHISH KRISHAN, COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (Chester Brown ed., 2013); Alschner & Skougarevskiy, *supra* note 135, at 565.

188. Wolfgang Alschner, Dmitriy Skougarevskiy & Mengyi Wang, *Champions of Protection? A Text-as-Data Analysis of the Bilateral Investment Treaties of GCC Countries*, 2016 INT'L L. REV. 5, 17–19 (2016).

189. Alschner and Skougarevskiy, *supra* note 15.

en up by the host state and what losses should stay with the investor.

The same logic applies to the universe of double taxation treaties. Here, the question is how to allocate the right to tax. The OECD Model convention and the UN Model treaty distribute taxation rights differently, and states can base their DTTs on either of these templates or opt for an altogether different allocation.[190] Bilateralism allows states to eschew a one-size-fits-all approach to the allocation of taxation rights and investment obligations, and to tailor rules to specific contexts.[191]

The flexibility advantages of bilateralism, however, are accompanied by costs. First, bilateral systems are difficult to reform in the aggregate as it is extremely costly to renegotiate large networks of bilateral agreements treaty-by-treaty.[192] A multilateral reform would be more efficient. Second, bilateral regimes struggle to address externalities, that is, situations where the actions of third parties create costs for the contracting parties. That is why there is a tendency to strive for multilateral regimes in fields with strong externalities, such as trade or climate change.[193] As this article will discuss in detail below, both cost factors, large-scale treaty modernization and externalities, are at the heart of the current tax and investment law reform debate, and they make it difficult for states to retain a governance model purely based on bilateralism.

The first structural challenge states face in squaring multilateralism and bilateralism in both tax and investment is thus one of legal mechanics. On the one hand, states have repeatedly failed to agree on a multilateral replacement treaty and have seized the flexibility bilateralism offers. On the other hand, states also find it increasingly costly to rely exclusively on bilateralism to solve problems multilateral solutions would tackle more efficiently. So, what legal mechanisms would allow

190. RIXEN, *supra* note 17, at 172; Rixen, *supra* note 183.

191. Avi-Yonah, *supra* note 16, at 100; Brauner, *supra* note 131, at 1019.

192. Avi-Yonah & Xu, *supra* note 47, at 161; Taylor, *supra* note 30, at 305–06. While a multilateral treaty may be difficult to amend as well, it benefits from centralized negotiation and a single ratification process, whereas bilateral agreements need to be renegotiated between pairs and require individual ratification.

193. *See, e.g.,* Thomas Rixen & Ingo Rohlfing, *The Institutional Choice of Bilateralism and Multilateralism in International Trade and Taxation*, 12 INT'L NEGOT. 389, 407–09 (2007).

states to create a middle ground that infuses some multilateralism into an otherwise bilateral governance structure?

B. Scope: How to Modernize Treaties in Substance and Procedure?

A principal cost of bilateralism, as well as a cause for the latest legitimacy crises in both systems, is a large treaty stock in need of modernization. The BIT and DTT networks have been built up over several decades, which means that treaties signed in the 1960s coexist today with agreements from the 2010s. This is problematic insofar as normative answers to the questions of "who is to tax?" and "what losses are to be compensated?" have evolved over time, leaving older agreements outdated. The existing treaty stock thus raises the challenge of how to align the normative content of yesterday's treaties with today's policy concerns and best practices.

Investment and tax treaties have been likened to *incomplete contracts*.[194] The idea of incomplete contracts is that contracting parties find it impossible to foresee all future contingencies at the time of contracting and invariably leave contractual gaps open.[195] These contractual gaps can be filled *ex post*, including through third party interpretation in the course of adjudication, or, alternatively, by the parties themselves when they spot contractual gaps and update the bargain (e.g., through renegotiation or amendment).[196] In practice, such incremental updating often takes a *path-dependent* form as contracting parties refine, rather than replace, existing language in order to close contractual gaps.[197]

The incomplete contracts model aligns closely with what is observable in investment and tax treaty practice: states learn

194. RIXEN, *supra* note 17; Aaken, *supra* note 62; Wolfgang Alschner, *Interpreting Investment Treaties as Incomplete Contracts: Lessons from Contract Theory*, SSRN ELECTRONIC LIBRARY (2013), http://papers.ssrn.com/abstract=2241652.

195. Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1582 (2004).

196. SIMON A. B. SCHROPP, TRADE POLICY FLEXIBILITY AND ENFORCEMENT IN THE WORLD TRADE ORGANIZATION: A LAW AND ECONOMICS ANALYSIS 83–94 (2009).

197. RIXEN, *supra* note 17; WOLFGANG ALSCHNER, *Locked in Language: Historical Sociology and the Path Dependency of Investment Treaty Design*, *in* EDWARD ELGAR RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW (Mosche Hirsch & Andrew Lang, eds., 2018).

from their experience with older agreements to draft new treaties that close contractual gaps that had hitherto been left open.[198] Initially ambiguous notions, such as a PE or "fair and equitable treatment," for instance, have been clarified over time in a path-dependent manner through successive treaty generations.[199] At the same time, these modernizations have been largely restricted to newly concluded agreements. Renegotiations of existing agreements take place, but are relatively rare.[200] As a result, older treaties, whose contractual gaps have been left unaddressed, remain in force.

The obsolescence of treaty stock has become one of the root causes for the legitimacy crises in both systems, as older agreements—with their larger normative gaps—have become prone to abuse or misinterpretation. In taxation, normative ambiguity and indeterminacy of substantive provisions of older agreements make it difficult to clearly delimit taxation rights of residence and source states, which facilitates tax evasion as companies exploit gaps left open in the treaty.[201] Moreover, technological change complicates the task of fitting new types of business transactions, such as e-commerce, into existing structures for the allocation of taxation rights, creating new gaps.[202] Furthermore, the relatively weak enforcement and in-

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198. Manger & Peinhardt, *supra* note 65 (finding that investment treaties become more precise over time); Arthur J. Cockfield, *The Rise of the OECD as Informal World Tax Organization Through National Responses to E-commerce Tax Challenges*, 8 YALE J. L. & TECH. 136 (2006) (highlighting the role of the OECD Model and its commentary in helping to gradually update tax treaties in response to unforeseen developments, such as the rise of e-commerce).

199. RIXEN, *supra* note 17; ALSCHNER, *supra* note 197.

200. Yoram Z. Haftel & Alexander Thompson, *When do States Renegotiate Investment Agreements? The Impact of Arbitration*, 13 REV. INT'L ORGAN. 25 (2017).

201. Avi–Yonah & Xu, *supra* note 47, at 160 ("Although tax treaties have played an important role in eliminating double taxation and facilitating globalization of liberal investment and trade in past decades, the loopholes and mismatches in existing treaties are one of the root causes of widespread unregulated BEPS opportunism"). For an in-depth discussion of normative indeterminacy in the context of tax treaties, see Sol Picciotto, *Indeterminacy, Complexity, Technocracy and the Reform of International Corporate Taxation*, 24 SOC. LEG. STUD. 165, 169–72 (2015).

202. Leonardo F. M. Castro, *Problems Involving Permanent Establishments: Overview of Relevant Issues in Today's International Economy*, 2 GLOB. BUS. L. REV. 125, 150–52 (2012).

formation sharing structure in the majority of older DTTs mean that these normative gaps remain largely unaddressed through inter-state consultations or judicial gap filling. In sum, contractual gaps in older double taxation avoidance norms are partially responsible for the double *non*-taxation legitimacy crisis.[203] While states have responded by incrementally adjusting the substance and procedures in the OECD Model,[204] these changes serve as benchmarks for new treaties but do not alleviate the need for updating existing ones.

Similarly, in investment law, vaguely worded investment protection clauses, which are particularly pervasive in older IIAs, are partly to blame for the inconsistent and overly investor-friendly interpretations that are undermining the system's legitimacy.[205] Interpretative gap filling by arbitral tribunals has exacerbated, rather than alleviated, these concerns.[206] Tribunals are constituted ad hoc for every dispute, are not bound by formal precedent, and are not subject to appeal for inconsistency or incorrectness. Unsurprisingly then, tribunals have interpreted similarly worded provisions very differently in some cases.[207] The UNCITRAL Working Group III has accordingly identified substantive inconsistency and incorrectness as one of the key targets for investment law reform.[208] Recent agreements have sought to close contractual gaps through more precise and clarifying language in treaty preambles, obligations, exceptions, footnotes, and annexes, in part to provide more firm direction to tribunals.[209] Yet, most investment arbitration cases are launched under treaties that pre-date these

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203. Genschel & Rixen, *supra* note 4, at 164–66.

204. Picciotto, *supra* note 201, at 172–79.

205. UNCTAD, *Interpretation of IIAs: What States Can Do*, U.N. DOC. UNCTAD/WEB/DIAE/IA/2011/10 (2011), https://unctad.org/en/Docs/webdiaeia2011d10_en.pdf.

206. Franck, *supra* note 5.

207. *See, e.g.,* Filip De Ly et al., *Who Wins and Who Loses in Investment Arbitration – Are Investors and Host States on a Level Playing Field: The Lauder/Czech Republic Legacy*, 6 J. WORLD INVEST. TRADE 59 (2005). *See also* UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters,* Secretariat Note, A/CN.9/WG.III/WP.150, Aug. 28, 2018.

208. UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS)*, A/CN.9/WG.III/WP.149, Sept. 5, 2018.

209. Spears, *supra* note 5; Henckels, *supra* note 65; Manger & Peinhardt, *supra* note 65.

recent changes in treaty practice.[210] Moreover, the co-existence of old and new agreements fuels treaty shopping practices as claims are channeled through older agreements that lack the policy space safeguards inserted into more recent treaties, which undermines treaty design innovation.[211] Hence, unless older treaties are updated and normatively aligned with more recent ones, the contractual gaps and ambiguities that plague the investment regime will remain in place.

As such, outdated treaties contribute to inconsistent interpretations and facilitate treaty shopping and abuse, all of which are at the heart of the tax and investment regimes' current legitimacy crises. A second challenge that states face in tax and investment law reform thus consists of modernizing the scope of existing treaties, both in substance and procedure, to align them with current treaty practices.

C. Design: How to Harmonize Rules While Accommodating Diversity?

A final common structural challenge relates to the need to harmonize norms while accommodating differing policy preferences. On the one hand, as part of their current legitimacy crises, the tax and investment law systems each grapple with policy challenges that by their nature give rise to externalities, which cannot be effectively addressed bilaterally and require multilateral cooperation. For tax treaties, that policy challenge involves reigning in non-taxation; for investment treaties, it turns on achieving predictability in dispute settlement. On the other hand, states continue to make use of bilateralism, which enables them to customize agreements to suit national policy preferences. So, how can a system be designed that strikes a balance between harmonizing rules and accommodating diversity?

In international tax, profit shifting and tax base erosion are a multilateral, rather than bilateral problem.[212] In an ideal world of full tax neutrality, investment decisions would be made

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210. UNCTAD, *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, U.N. Doc. UNCTAD/DIAE/PCB/2017/3 (2017), https://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf.

211. Wolfgang Alschner, *Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?*, 17 J. INT'L ECON. L. 271, 289 (2014).

212. *See* Brauner, *supra* note 131, at 977–84.

based on economic fundamentals, rather than varying tax rates between states. In practice, however, differences in taxation rates create externalities: they incentivize taxpayers to engage in tax arbitrage to exploit differing tax rates.[213] States, in turn, can attract more capital by lowering their tax rate, thereby fueling tax competition.[214] Tax arbitrage and competition, in contrast to taxation rights allocation, cannot be resolved through bilateral treaties alone.[215] As discussed above, avoiding double taxation mimics the features of a *coordination* game, in which states have an interest in coordinating but struggle to agree on terms because these terms have distributional consequences. DTTs solve that coordination game by codifying a compromise on the allocation of taxation rights. The political economy of the avoidance of double non-taxation, in contrast, follows the logic of a prisoners' dilemma *cooperation* game.[216] While states in the aggregate would benefit from avoiding tax arbitrage and competition, individually, they have an interest in lowering their tax rate unilaterally to snatch capital away from other states.[217] Cooperation games, therefore, turn on the question of how unilateral defection can be prevented and mutually beneficial cooperation can be achieved.[218]

The purely bilateral governance structure of the pre-MLI tax system is ill-equipped to solve such a cooperation problem.[219] If two states agree to curb tax arbitrage and competition, a third state can easily undercut that deal by unilaterally reducing its tax rate and thereby free-riding on the commitments of the others.[220] Moreover, even if all states were part of the bilateral tax treaty network, the existing enforcement mechanism in

213. Vincent Arel-Bundock, *The Unintended Consequences of Bilateralism: Treaty Shopping and International Tax Policy*, 71 INT'L ORGAN. 349 (2017).

214. Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State,* 7 HARV. L. REV. 105, 113; Rixen, *supra* note 157, at 209.

215. KOBETSKY, *supra* note 118, at 94–104.

216. RIXEN, *supra* note 17.

217. Robert T. Kudrle, *Tax Havens and the Transparency Wave of International Tax Legalization*, 37 UNIV. PA. J. INT'L L. 1153, 1155–56 (2015).

218. RIXEN, *supra* note 17; McAdams, *supra* note 184.

219. Kudrle, *supra* note 217, at 1158–68; KOBETSKY, *supra* note 118, at 94–105.

220. Brauner, *supra* note 131, at 1019 ("Enhanced coordination of tax laws and policies is the key insight of the BEPS project: countries are now unable to apply unilaterally their tax system, independent of all other countries.").

DTTs would be inadequate to deal with defection. The prevalent inter-state MAP was created for the largely self-enforcing issue of tax coordination, but not the more acute enforcement problem of tax cooperation where the risk of defection is higher.[221] Addressing tax arbitrage and competition thus requires multilateral elements that curb externalities, prevent free-riding, and deter defection.

International investment law faces a different challenge, but one that similarly gives rise to externalities that cannot be solved effectively absent a degree of multilateral harmonization. Formally, investment tribunals are constituted ad hoc to settle one-off disputes. Yet, their publicly available awards are routinely used as de facto precedents by investors, state respondents, and tribunals to support their arguments in unrelated subsequent cases.[222] Awards thus produce important externalities by serving as informal but sometimes highly influential sources of legal reasoning for future decisions. The decentralized nature of ad hoc arbitration, however, means that investment awards are ill equipped to serve a systemic precedential function; differences between the underlying facts and treaties, varying tribunal compositions, and divergent interpretive approaches mean that there is necessarily a high degree of inconsistency between awards.[223]

For a system created to promote tailored and predictable investment protection norms, the reliance on a pool of inconsistent decisions amounts to a negative externality. Divergent prior investment case law leaves litigants guessing as to which of a range of potential jurisprudential authorities a tribunal

221. *See id.* at 1017–18.

222. O. K. Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 333–43 (2008); J.P. Commission, *Precedent in Investment Treaty Arbitration A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129, 135–37 (2007); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 368 (2007).

223. Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT'L L. 418 (2013); Rudolf Dolzer, *Perspectives for Investment Arbitration: Consistency as a Policy Goal?*, 11 TRANSNAT'L DISP. MGMT. 1 (2014) (noting the decentralized nature of the field); Gabrielle Kaufmann-Kohler, *Is Consistency a Myth?*, *in* PRECEDENT IN INTERNATIONAL ARBITRATION 137, 143 (Emmanuel Gaillard & Yas Banifatemi eds., 2008) (noting that some solutions are treaty- or fact-specific).

will follow.[224] States cannot easily address these externalities through bilateral contracting given that, even if they change their treaty, they have no control over tribunals constituted under third treaties whose awards may affect the interpretation of their agreements. Furthermore, reliance on precedent is informal anyway, and as much a social phenomenon as a legal practice, which makes it more difficult to regulate.[225] Finally, the minimalist and equally decentralized review through annulment or set-aside proceedings is insufficient to impose meaningful quality control on the correctness of arbitral decisions.[226] Wrong and inconsistent decisions can thus continue to serve as precedents.[227] Institutional solutions, such as a new multilateral appeal tribunal or a standing court, are being floated as part of the ongoing UNCITRAL Working Group III deliberations.[228] The intuition is that, if the investment arbitration system is to produce correct, consistent and predictable results, a greater degree of standardization, harmonization, and centralization is necessary.

As a result, the investment and tax regimes experience pressures for greater multilateral governance elements. Yet, as discussed above, states have shown little appetite for altogether relinquishing their ability to develop varying answers to the coordination problems of how to allocate the right to tax gains of foreign investments, and of how to delineate the obligation to compensate their losses. In both regimes, multilateral harmonization can thus only go as far as necessary to resolve each system's most pressing legitimacy concern, and it has to preserve, to the extent possible, states' abilities to tailor their tax and investment policies to their specific needs. The tax and investment regimes thus face a similar challenge: how to design multilateral reform in a way so as to balance the need for

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224. UNCTAD, *Interpretations of IIAs: What States Can Do*, *supra* note 205.

225. *See* G. Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISPUTE SETTL. 5 (2011).

226. Caron, *supra* note 82; Sacerdoti, *supra* note 82. As discussed in *supra* Part II.B, unlike an appeal, the annulment or set-aside proceedings do not assess the normative correctness of an award.

227. Wolfgang Alschner, *Correctness of Investment Awards: Why Wrong Decisions Don't Die*, *in* THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS (forthcoming).

228. Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410 (2018).

greater harmonization and centralization with the continuing necessity to accommodate divergent state preferences.

In short, common challenges emerge from the legitimacy crises in tax and investment law on how to square multilateralism with bilateralism when it comes to the mechanics, scope, and design of reform. The remainder of this article will assess how the tax regime managed to square that circle and discuss whether the solution it adopts in the MLI is a viable template for investment law reform.

V. The MLI: A Multilateral Opt-in Agreement to Reform DTTs

The international tax regime addressed these three structural challenges of squaring bilateralism with multilateralism in relation to the mechanics, scope, and design of reform through the MLI. The MLI is a multilateral opt-in convention that updates covered DTTs in substance and procedure in order to curb double non-taxation. The MLI thereby plays a crucial role in mitigating the legitimacy crisis facing the tax regime. It is not, however, supposed to eradicate tax arbitrage and tax competition by itself. Instead, it is part of the larger BEPS reform package, which also comprises changes to domestic law and other inter-governmental actions,[229] and it is accompanied by parallel efforts beyond BEPS to strengthen international administrative cooperation in tax matters.[230]

A. The Path to the MLI

The MLI is a consequence of the global financial crisis of 2007 and 2008. Following the crisis, the world's leading developed and developing countries, acting through the G20, identified tax havens and harmful tax competition as a major source for global financial instability and inequality.[231] In the 2009 Lon-

229. Brauner, *supra* note 131, at 1022–23 (arguing that these complementary changes in domestic law and soft law may well be more significant than the MLI); Christians, *supra* note 20, at 1621–40; Valderrama, *supra* note 11, at 2.

230. These efforts center around the improved exchange of tax information and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, see Miranda Stewart, *International Tax, the G20 and the Asia Pacific: From Competition to Cooperation?*, 1 ASIA PAC. POL'Y STUD. 484, 490–92 (2014).

231. Christians, *supra* note 20.

don Summit Declaration, the G20 pledged "to take action against non-cooperative jurisdictions, including tax havens," and tasked the OECD to study the issue.[232] Progressively, BEPS came to describe companies' practices of minimizing exposure to taxation by exploiting tax differences between jurisdictions and the harmful effects of these practices on the tax revenue of high taxation jurisdictions. To support the G20 agenda, OECD produced a report on BEPS in February 2013.[233] The report resulted in a fifteen point Action Plan, which stated, in relation to DTTs, that "[w]hilst bilateral tax treaties have been effective in preventing double taxation, there is a concern that they often fail to prevent double non-taxation."[234] The 2013 Action Plan noted the need for a timely modification of existing treaties and recommended the development of an MLI within two years (Action Point 15) to efficiently amend existing DTTs in order to close loopholes that lead to BEPS.[235]

In line with the ambitious timeline set, work on the MLI proceeded swiftly. In 2014, an OECD report outlined the possible legal contours of the MLI.[236] In February 2015, endorsed by the G20 and supported by the OECD, negotiations on the MLI started in earnest through an open and inclusive ad hoc group that in the end comprised representatives from more than one hundred economies.[237] Negotiations concluded more than a year later in November 2016, and the MLI was signed in June 2017.[238] Three months after receiving its fifth ratification, the MLI entered into force on July 1, 2018. At the time of this writing, eighty-three jurisdictions have signed the MLI, including

232. Group of Twenty [G-20], *London Summit Action Plan for Recovery and Reform* ¶ 15 (Apr. 2, 2009); *see also* G-20, Los Cabos Summit Leaders Declaration ¶ 48 (June 19, 2012).

233. OECD, ADDRESSING BASE EROSION AND PROFIT SHIFTING (2013).

234. OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 13 (2013).

235. *Id.* at 24, 34.

236. OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, OECD, DEVELOPING A MULTILATERAL INSTRUMENT TO MODIFY BILATERAL TAX TREATIES (2015).

237. OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, OECD, ACTION 15: A MANDATE FOR THE DEVELOPMENT OF A MULTILATERAL INSTRUMENT ON TAX TREATY MEASURES TO TACKLE BEPS (2015).

238. OECD, MULTILATERAL INSTRUMENT – INFORMATION BROCHURE 3 (2015).

all G20 countries apart from Brazil and the United States, and nine states have ratified it.[239]

B. The MLI Mechanics: A Multilateral Opt-in Convention

The MLI takes the form of a multilateral opt-in convention, which modifies DTTs under its scope. The MLI thereby leaves the bilateral governance structure of the tax regime intact, but adds a lightweight multilateral superstructure.[240] Furthermore, as an opt-in convention, the MLI only applies to countries that are signatories to the convention. If all states were to sign on to the MLI, it could thus apply to all of the more than three thousand DTTs.

The legal mechanics underlying the MLI are inspired by general international law.[241] According to Article 30(3) of the Vienna Convention on the Law of Treaties (VCLT), a later treaty will prevail over an earlier one covering the same subject matter, provided that all parties to that later treaty are also party to the earlier agreement. Article 30(3) of the VCLT is a conflict rule, which means that the later treaty does not amend, suspend, or supersede the earlier one, but merely displaces it to the extent that the earlier treaty is incompatible with the later agreement. Differently put, the later treaty *coexists* with the earlier agreement, albeit in a hierarchical relationship.[242]

The MLI follows the same model. Article 2 defines covered agreements as DTTs in force between parties to the MLI, which have been notified as falling under the MLI. Article 30 clarifies that these parallel DTTs continue to exist and can in their turn be amended. The MLI and DTTs thus apply in parallel. The individual provisions of the MLI then determine how they relate to provisions on the same subject matter in covered DTTs.

239. Signatories and parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Status as of July 23, 2018, http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

240. Brauner, *supra* note 131, at 1030–31.

241. OECD Directorate for Legal Affairs, OECD, *Note, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Functioning under Public International Law, Note by the OECD Directorate for Legal Affairs*, ¶ 16 (2015), http://www.oecd.org/tax/treaties/legalnote-on-the-functioning-of-the-MLI-under-public-international-law.pdf.

242. *See generally* Bravo, *supra* note 135.

Some MLI clauses will replace overlapping DTT language,[243] others will modify parallel clauses,[244] and again others will complement them.[245] Hence, the MLI and DTTs are in a hierarchical relationship: where conflicting MLI provisions exist, they will displace the parallel DTT clauses.[246]

The MLI thus creates an efficient alternative to the piecemeal amendment of individual DTTs. It allows states to opt into a multilateral convention that updates, but does not replace, their bilateral treaties. The MLI thereby constitutes a creative solution to square bilateralism with multilateralism. The coexistence of the MLI and DTTs, however, also creates complexities since DTTs are not formally altered. The treaty text of DTTs covered by the MLI remains formally unchanged, but has to be read in light of the modifications introduced by the MLI.[247] To better navigate this complex web of interacting norms, contracting states have to notify treaty provisions that conflict with the MLI to the Secretary-General of the OECD, the treaty's Depositary.[248] Moreover, the OECD Secretariat has helpfully created an online tool kit that shows how the MLI modifies individual agreements.[249]

C. The MLI Scope: Modernizing Substance and Procedure in Older DTTs

The MLI implements several of the substantive and procedural concerns identified in the OECD BEPS project by modifying bilateral tax agreements falling under its scope. The most important of these are the substantive minimum standards on treaty abuse (BEPS Action 6) and the procedural minimum

243. MLI, *supra* note 1, art. 4(2).

244. *Id.* art. 5(3).

245. *Id.* art. 16(4)(b)(i); OECD, EXPLANATORY STATEMENT TO THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING 6 (2016). *See also* Avi-Yonah & Xu, *supra* note 47, at 164.

246. OECD, *supra* note 245, at 6.

247. *See also* Picciotto, *supra* note 201. He points out that tax treaties have to be interpreted in light of an increasingly growing web of soft law and hard law, which make the tax system more complex than the plain and simple language of DTTs would otherwise suggest.

248. MLI, *supra* note 1, art. 3(6); Avi-Yonah & Xu, *supra* note 47, at 168.

249. OECD, *MLI Matching Database (beta),* http://www.oecd.org/tax/treaties/mli-matching-database.htm.

standards on strengthening dispute settlement procedures (BEPS Action 14).

In terms of substance, the MLI addresses three major areas. First, it closes loopholes arising from varying rules on tax deductions (so-called Hybrid Mismatch Arrangements of Part II of the MLI), which can result in double non-taxation. The interplay between tax jurisdictions can result in two deductions being awarded for the same tax payment, or a deduction being granted in the residence country without a corresponding taxation occurring in the source country.[250] The MLI provides greater clarity on when an entity counts as resident of a contracting party for tax purposes, and it limits deductions to the income actually taxed to prevent a mismatch between the two.[251]

Second, the MLI sets minimum standards to ensure that a DTT is not used as a vehicle to facilitate non-taxation (Part III of the MLI). This includes several components. The first is the insertion of new preambular language into DTTs that clarifies the parties' common intention that the treaty should not create opportunities for taxation avoidance or evasion.[252] The second component seeks to prevent treaty abuse by enabling states to deny tax benefits derived through strategic treaty shopping.[253] The clause gives taxation authorities broad discretion through a Principal Purpose Test[254] that allows a denial of tax benefits where one of the principal purposes of corporate restructuring was to gain access to that DTT benefit.[255] Finally, the MLI contains several specific rules to curb tax evasion in relation to specific transactions, such as short-term dividend transfers, capital gains from stakes in immovable property, and the channeling of funds through permanent establishments in third jurisdictions.[256]

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250. OECD, NEUTRALISING THE EFFECTS OF HYBRID MISMATCH ARRANGEMENTS, ACTION 2 – 2015 FINAL REPORT 11–12 (2015).

251. *See* MLI *supra* note 1, arts. 3–5 and the accompanying commentary in OECD, *supra* note 245, at 12–19.

252. MLI, *supra* note 1, art. 6.

253. *Id.*, art. 7.

254. The test asks whether "obtaining that [tax] benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit." MLI *supra* note 1, art. 7(1).

255. Johnston, *supra* note 2, at 387.

256. MLI, *supra* note 1, arts. 8–10.

Third, the MLI broadens and clarifies the definition of a PE for tax purposes (Part IV of the MLI). As discussed above, PE is a crucial threshold concept defined in DTTs to establish the source country's authority to tax. The MLI prevents companies from artificially avoiding that status to escape taxation through commissionaire arrangements (Article 12), exempted activities that are more than of a preparatory or auxiliary character (Article 13), and contract-splitting to undercut time-limits that establish a PE (Article 14). [257]

In addition to these substantive innovations, the MLI also introduces several procedural modifications aimed at improving the dispute settlement procedures under DTTs. First, the MLI strengthens and streamlines the inter-state mutual agreement procedures (Part V of the MLI). Whereas most DTTs require that a taxpayer initiate a MAP in their country of residence, the MLI now allows them to launch the procedure in either contracting state.[258] The MLI also provides a set of rules to render the MAP more effective, including by stipulating specific timelines. Second, the MLI introduces a complementary arbitration procedure for those disputes that cannot be resolved through the mutual agreement procedure (Part VI of the MLI). The default procedure follows the model of final offer arbitration (sometimes called baseball arbitration) whereby a panel of three arbitrators selects the solution proposed by one of the contracting parties.[259] The arbitrators do not provide reasons, proceedings are conducted in confidentiality, the final award has no precedential effect, and the parties remain bound by the decision unless they agree on an alternative solution.[260] Even though the procedure thus remains relatively rudimentary compared to trade and investment dispute settlement, it is a step towards greater legalization given that the majority of DTTs do not yet contain such an arbitration mechanism.[261] Moreover, the improvements to the enforcement mechanism are important insofar as the tighter substantive rules aimed at preventing non-taxation will likely trigger more disputes on alleged over-taxation.

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257. Johnston, *supra* note 2, at 389–90.
258. MLI, *supra* note 1, art. 16(1).
259. *Id.*, arts. 20, 23.
260. *Id.*, arts. 21, 23, 24.
261. Mooij, *supra* note 47.

By codifying minimum standards that apply to all DTTs, the MLI marks a radical departure from the status quo ante that saw older treaties with contractual gaps coexist with newer agreements where these gaps had been filled. While the OECD Model had been continuously updated over the years to reflect changes in international tax policy, it primarily served as a focal point for states to design newer generations of DTTs; apart from the occasional renegotiation or a potential evolutionary interpretation, older DTTs that had been signed on the basis of earlier versions of the OECD Model remained unaffected by these changes.[262] The MLI overcomes this deficiency through codifying "OECD soft law into hard law"[263] by incorporating innovations that used to be confined to the OECD Model into binding multilateral treaty language that applies to all covered DTTs. This explicitly aligns the norms of old and new DTTs on matters covered by the MLI and thereby ends the coexistence of treaties that differ drastically in their level of contractual completeness.

In sum, the MLI does not fundamentally alter the normative structure of the tax regime. States remain free to set their own tax rates, and dispute settlement is still primarily in the hands of state agencies. At the same time, the MLI introduces tailored yet ambitious adjustments to the regime in an effort to modernize the stock of outdated agreements and lift all covered DTTs up to the same level. Its substantive and procedural innovations close contractual gaps and make it considerably more difficult to use DTTs as a vehicle for tax avoidance. These modifications help reorient the regime normatively in response to its legitimacy crisis over non-taxation.[264]

D. The MLI Design: Squaring Flexibility with Minimum Standards

Perhaps the most impressive aspect of the MLI is its elegant design, which squares deference to states' varying preferences

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262. Christians, *supra* note 20, at 1610, 1614–17. The new BEPS minimum standards are also incorporated into the latest version of the OECD Model Convention.

263. *Id.* at 1643.

264. For a critical evaluation of the reform and its potentially missed opportunities, *see* Brauner, *supra* note 131, at 1034–38.

with the setting of minimum standards.[265] From the outset, the OECD's BEPS report noted that the MLI would need to offer as much flexibility as possible to ensure that a maximum number of states can join.[266] Accordingly, the Convention provides contracting states with flexibility at every corner.[267] First, it applies only to DTTs that contracting states notify and list as explicitly covered by the Convention.[268] Signatories can thus exclude specific DTTs from the scope of the MLI, particularly in instances where the DTTs already meet the BEPS standard or are currently being renegotiated. Second, states can opt out of certain MLI provisions in relation to all its notified treaties.[269] Importantly, the flexibility to opt out does not extend to the MLI substantive and procedural minimum standards—that is, provisions on treaty abuse and improvements to the MAP—except where DTTs already meet these minimum standards.[270] Third, specific MLI articles allow signatories to deviate from them for specific and limited purposes where alternative arrangements meet the same underlying policy goal.[271] Fourth, signatories can choose between varying versions of the same clause.[272] Finally, the MLI provisions on arbitration are of an altogether different kind as signatories have to explicitly opt into the mechanism,[273] but can subsequently opt out of aspects of the procedure[274] or exclude it vis-à-vis specified DTTs.[275] In short, the MLI leaves contracting states with a great deal of flexibility.

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265. Avi-Yonah & Xu, *supra* note 47, at 162 (stating that the MLI is "both principled and flexible").

266. OECD, DEVELOPING A MULTILATERAL INSTRUMENT TO MODIFY BILATERAL TAX TREATIES, ACTION 15, FINAL REPORT 19, 22 (2015), https://www.oecd-ilibrary.org/docserver/9789264241688-en.pdf?expires=1544716425&id=id&accname=guest&checksum=7722DD48648A9B6A2D81267B8357D403.

267. OECD, *supra* note 245, at 3–4. *See also* Avi-Yonah & Xu, *supra* note 47, at 163–64.

268. MLI, *supra* note 1, art. 2(1)(a)(ii).

269. *See, e.g., id.,* art. 11(3).

270. *See id.,* art.6(4).

271. *See id.,* art. 7(15)(a).

272. *See id.,* art. 5. This follows the OECD's BEPS report, which proposed different solutions for the same non-taxation problem.

273. *See id.,* art.18.

274. *See id.,* art. 23(2).

275. *See id.,* art. 26.

At the same time, the MLI also achieves a hitherto unseen degree of harmonization through its minimum standards discussed above. The substantive standards on tax abuse and the procedural standards on streamlining the MAP produce a normative convergence of all covered DTTs around the BEPS agenda.

It remains to be seen how the MLI flexibilities interact with this harmonization. Under the MLI, states enjoy discretion to auto-determine what DTTs meet the BEPS minimum standard and can exclude DTTs from the Convention. The OECD envisions a peer-review-based monitoring system through the Inclusive Framework on BEPS, a group consisting of 115 countries and jurisdictions, which is charged with monitoring compliance with the BEPS agenda generally.[276] Starting in 2019, the state representatives of this Inclusive Framework, together with the OECD Fiscal Committee's Working Group 1, began publishing annual reports to monitor the implementation of the minimum standards.[277] The first such report on treaty abuse was published in February 2019.[278] This monitoring system will place a check on states' self-assessments and help ensure that DTTs indeed met the minimum standards.

In sum, the MLI achieved a significant reform of the international tax system. It created a slim multilateral superstructure that left parallel DTTs intact, updated thousands of DTTs in substance and procedure, and managed to impose collective minimum standards while allowing states the flexibility to contract out of and around other parts of the MLI. To be sure, the MLI did not eradicate the problem of tax arbitrage and tax competition.[279] Given that the MLI is merely one piece in the larger BEPS and tax reform agenda, that was never its ambi-

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276. OECD, *supra* note 245, at 3.

277. OECD, *BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Peer Review Documents* ¶¶ 5–8 (2017), http://www.oecd.org/tax/treaties/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf.

278. OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, PREVENTION OF TREATY ABUSE – PEER REVIEW REPORT ON TREATY SHOPPING: INCLUSIVE FRAMEWORK ON BEPS: ACTION 6 (2019), https://www.oecd-ilibrary.org/docserver/9789264312388-en.pdf?expires=1572563265&id=id&accname=guest&checksum=8D44A6162B05C51A0E635DF3EBA099AF.

279. Stewart, *supra* note 230, at 492 (clarifying that BEPS did not directly tackle tax competition).

tion. It did, however, achieve a considerable realignment of the tax treaty universe from an almost exclusive focus on double taxation avoidance to an increasingly important mitigation of non-taxation. This far-reaching reform was accomplished rather unobtrusively in a manner that preserved, stabilized, and, in the eyes of some commentators, even strengthened and reinforced the tax system's existing bilateral governance structure.[280]

VI. A MULTILATERAL INSTRUMENT FOR THE INVESTMENT REGIME?

Given the feat of the MLI to square bilateralism with multilateralism, and the fact that tax and investment law reform shares similar structural challenges, the question naturally arises whether the MLI experience can inspire similar efforts in the investment regime. This article will argue that the MLI indeed provides a useful blueprint for the mechanics, scope, and design of a multilateral investment law reform. While there is already precedent for using its mechanics in investment law reform, there is much less debate about whether a reform of similar scope, covering both substantive and procedural elements, should be pursued in investment law, or to what extent the design of MLI could inspire equivalent multilateral minimum standards paired with necessary flexibilities in investment law.

A. Mechanics: Multilaterally Reforming BITs

Of the three aspects considered, the argument that the mechanics of the MLI can inspire investment law reform should be the least controversial. Both regimes are built on thousands of mostly bilateral treaties that can be reformed efficiently through a multilateral opt-in treaty. Indeed, there is already precedent for such an undertaking in investment law.

In 2017, the UN Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention") en-

280. That is because unilateral measures and soft law alternatives are institutional substitutes to DTTs. By reforming and reorienting the regime around existing DTTs, the MLI supplies new justifications for their purpose and existence. *See* Brauner, *supra* note 133, at 1038; Avi-Yonah & Xu, *supra* note 47, at 213.

tered into force,[281] which employs similar legal mechanics. Not unlike to the MLI, the Mauritius Convention is an opt-in convention covering and modifying IIAs between its signatories.[282] In terms of scope, it incorporates the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration adopted in 2013, which are otherwise only applicable to recently concluded IIAs that specifically refer to the Rules.[283]

Michele Potestà and Gabrielle Kaufmann-Kohler have further suggested that the mechanics of the MLI and the Mauritius Convention could be used to implement a more ambitious ISDS reform, such as the introduction of a new multilateral investment court or an appeal mechanism in existing IIAs.[284] There is no legal reason, however, why such a reform needs to be limited to procedure. The MLI, as seen above, modifies DTTs that fall under its ambit in both substance and procedure. Similarly, an MLI in investment could also cover investment protection obligations in addition to, or even instead of, ISDS.

IIAs and DTTs cover a triangular relationship between host state, home state and investor. The substantive obligations of IIAs and DTTs are framed as inter-state promises, but the ultimate beneficiaries are the foreign investors whose income is only taxed once and whose investment is protected against regulatory interventions.[285] What distinguishes IIAs from DTTs is that dispute settlement under the latter remains

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281. G.A. Res. 69/116, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency") (Dec. 10, 2014), http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html.

282. According to Article 1, the Convention applies by default to all IIAs concluded by the signatories to the Convention before April 1, 2014. However, signatories can exclude specific IIAs from the scope of the Convention pursuant to Article 3.

283. *See generally*, Lise Johnson, *The Mauritius Convention on Transparency: Comments on the Treaty and its Role in Increasing Transparency of Investor-State Arbitration*, CCSI POL'Y PAP. (2014), https://doi.org/10.7916/D8959J4C.

284. Gabrielle Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor–State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?*, CIDS - GENEVA CENTER FOR INT'L DISPUTE SETTLEMENT (2016).

285. Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L. J. 353, 353–54, (2015).

largely inter-state, whereas the arbitration mechanism in the former creates a new and distinct legal relationship between investor and host state once ISDS is triggered.[286] Seen in this light, reforming ISDS with its implications on direct procedural investor rights should, if anything, be more controversial than reforming substantive investment protection obligations, which are framed as inter-state promises that create benefits but not direct rights for investors.

In any event, the mechanics of the MLI can inspire reform in investment law. They have already been used in the investment law sphere through the Mauritius Convention and could, in the future, implement more ambitious reforms of IIAs in both substance and procedure.

B. Scope: Completing Incomplete Contracts

The MLI experience also provides intriguing lessons for a procedural and substantive modernization of the existing IIA stock. Like IIAs, DTTs are incomplete contracts that need to be updated over time. The MLI remedies shortcomings in older agreements by closing loopholes that gave rise to treaty abuse. It thereby mitigates the field's legitimacy crisis surrounding corporate non-taxation. Similarly, an MLI in investment could plug contractual gaps in outdated IIAs by incorporating state-of-the-art language on how to balance investment protection concerns with a host state's regulatory interests, as well as how to reform ISDS and regulate hitherto unaddressed grey areas.

To effectively modernize older IIAs, such a reform would need to follow the MLI example and address both substantive and procedural shortcomings in existing treaties. As discussed above, outdated and ambiguous substantive rules are a part of the legitimacy concerns associated with investment law insofar as vague protective standards fail to predictably balance the interests of investors with those of the host states. Recent IIAs have closed contractual gaps left open in earlier agreements not only by providing a more detailed ISDS procedure, but also by clarifying substantive obligations and adding new policy exceptions.[287] If these recent investment agreements are taken as

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286. *Id.* at 354.

287. *See, e.g.,* Aaken, *supra* note 62; Spears, *supra* note 5; Henckels, *supra* note 65; Andrew Newcombe, *General Exceptions in International Investment*

reflections of current best practices, then it makes little sense to limit the updating of older agreements to procedure only.

Despite this, the current multilateral reform efforts at UNCITRAL ostensibly focus exclusively on reforming ISDS (i.e., investment law's procedural shortcomings).[288] Yet, part of the concerns the UNCITRAL Working Group III has identified relate to incorrectness and inconsistency, which are substantive defects of awards, not procedural ones. Some states, such as Egypt, have acknowledged that inconsistency and incorrectness of arbitral decisions are substantive concerns during recent UNCITRAL deliberations:

> The problem of inconsistency and unpredictability will remain as long as there is this large part of overlapping treaties of international and investment treaties especially the old generations of bilateral investment treaties which involve inaccurate drafting, uncontrolled drafting and indefinite drafting of the rules of the protection of investment. . . . If the remit of the work of the current working group does not allow it to address the problematic of the rules of substantive protection of investment, I propose as a minimum recommending [a study of substantive reform option].[289]

Other states have suggested that procedural fixes can help address substantive investment concerns. The Romanian delegate at UNCITRAL remarked that:

> [I]n terms of consistency and predictability, the issue here is that too many investment treaties that are in force today are first generation BITs. That means that the language that is comprised in those BITs is vague. [. . .] It is very hard, complex process, very time-consuming process to change those BITs and amend them. [. . .] So the obvious solution would be to amend the ISDS mechanism to issue a set of procedural rules for a permanent adjudication body that will be able to

Agreements, 12 (2008), https://www.biicl.org/files/3866_andrew_newcombe.pdf (draft discussion paper prepared for BIICL Eigth Annual WTO Conference).

288. UNCITRAL, *Annotated Provisional Agenda*, Working Group III (Investor-State Dispute Settlement Reform), Thirty-fourth session, U.N. Doc. A/CN.9/WG.III/WP.141, at ¶10 (Sept. 15, 2017).

289. Statement of Egypt during UNCITRAL Working Party III Thirty-fifth session, 23–27 April, New York, *reprinted in* Anthea Roberts & Zeineb Bouraoui, *UNCITRAL and ISDS Reforms: Concerns about Consistency, Predictability and Correctness,* EJILTALK! (June 5, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-consistency-predictability-and-correctness/.

> interpret even first generation BITs in a manner that is consistent with both the interest of the investor but also with the interest of the states, the host states that receive those investments. [290]

Such procedural reform to address substantive concerns may appear to be an expedient solution, but, in fact, it sets up adjudicators for failure. Imagine a multilateral investment court of tenured judges that were to rigorously apply a consistent approach to treaty interpretation to resolve all investment disputes brought under existing treaties. Either that court would arrive at differing interpretations as existing treaties differ in wording, or the court would try to harmonize differences in wording through interpretive gap-filling to achieve consistent outcomes. Both results are undesirable. A court that pays too much attention to differences in wording neglects the fact that treaty practice has evolved. A BIT signed in the 1960s may not mention the term "right to regulate" in its preamble or provide an explanatory annex on indirect expropriation, but that does not mean that states intended for older treaties to provide less flexibility or more investment protection. Rather, as discussed above, at least some of these omissions are better understood as unanticipated contractual gaps that have been closed in more recent agreements.[291] A literal interpretation of outdated language is thus not desirable.

So, what if the court opts for a more evolutionary interpretation and fills contractual gaps? Adjudicatory gap-filling is a classic strategy when dealing with incomplete contracts,[292] and some investment arbitrators have indeed understood the vague language in early BITs to "give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty's object and purpose in particular disputes."[293] The

290. Statement of Romania during UNCITRAL Working Party III Thirty-fifth session, 23–27 April, New York, *reprinted in* Anthea Roberts & Zeineb Bouraoui, *UNCITRAL and ISDS Reforms: Concerns about Consistency, Predictability and Correctness,* EJILTALK! (June 5, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-consistency-predictability-and-correctness/.

291. ALSCHNER, *supra* note 194.

292. *See, e.g.,* SCHROPP, *supra* note 196.

293. Charles H. Brower II, *Investor-State Disputes under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 56 (2001).

backlash against ISDS,[294] as well as the current blockage of WTO Appellate Body Member appointments by the U.S., which accuses the body of judicial law-making,[295] however, are cautionary tales against overreliance on judicial gap-filling. Providing discretion to adjudicators to decide which treaty terms matter and which do not is a recipe for frustration and may well be an impossible task.[296] Therefore, substantive consistency and correctness cannot be fixed through procedural solutions alone. Instead, substantive problems require substantive solutions.

The MLI experience offers vital guidance in this regard. The MLI updates outdated agreements by drawing on the language of state-of-the-art treaty practice to fill contractual gaps in both substance and procedure: a practice that could be replicated in the IIA context.

For instance, the tax MLI modernizes the preambles of DTTs; similarly, an investment MLI could add references to host state's regulatory prerogatives in the preambles of IIAs where they are not yet present.[297] The tax MLI furthermore clarifies what is and what is not a PE for the purpose of taxation; likewise, an MLI in investment could delineate what IIAs cover and do not cover under the term "investment." The refined substantive tax allocation rules of the MLI (e.g., in relation to hybrid mismatch arrangements) could be templates for refining substantive investment protection rules, and the newly updated MLI denial of benefits clause could inspire updating denial of benefits clauses in an MLI in investment. Similar to the MLI in tax, the MLI in investment could also make clear that it does not affect treaties that already follow best practice standards.

The MLI would also provide an opportunity to clarify grey areas between substance and procedure that fall within the exist-

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294. Waibel et al., *supra* note 5.

295. On the WTO appointment crisis and the U.S. arguments, see Tetyana Payosova, Gary Clyde Hufbauer, & Jeffrey J. Schott, *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, PIIE POLICY BRIEFS, (Mar. 2018), https://piie.com/system/files/documents/pb18-5.pdf.

296. The Statement of Romania cited in *supra* note 290 illustrates this difficulty by asking adjudicators to read outdated treaties "in a manner that is consistent with both the interest of the investor but also with the interest of the states, the host states that receive those investments." These three sets of interests, however, often diverge.

297. Spears, *supra* note 5 (noting that recent agreements include language safeguarding policy space in their preambles).

ing UNCITRAL reform mandate and that have not been addressed in existing treaties. In its Thirty-seventh session in April 2019, the Working Group III asked the UNCITRAL Secretariat, for example, to undertake a study on indirect investment claims by shareholders for subsequent consideration by the states.[298] In indirect claims, a company's shareholders request compensation on behalf of the company for damages to the company's assets. Claims for such indirect or reflective losses are controversial because municipal systems do not typically allow investors to step into the shoes of the company to claim its losses and because they can result in multiple proceedings whereby the company and its majority and minority shareholders all launch parallel proceedings against the same measure, but under multiple IIAs.[299] Although claims for indirect losses have a procedural dimension (i.e., multiple parallel proceedings), they also relate to the scope and substance of investment protection (i.e., how far shareholder rights extend in investment law). As such, they belong to a grey area between substance and procedure, which is left largely unaddressed in existing agreements. An MLI on investment, on the other hand, could regulate reflective losses in all covered IIAs in one stroke.

The valuation of damages is a second grey area issue that is scarcely regulated in existing IIAs and has generated the most infamous example of arbitral inconsistency to date. Two investment cases, *Lauder v. Czech Republic* and *CME v. Czech Republic*, arose out of identical facts (governmental interference with a broadcasting licence) relating to the same investment (the company CME, in which Lauder was a shareholder), but resulted in fundamentally different outcomes—Lauder's

298. UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its Thirty-seventh session ¶ 84 U.N. Doc. A/CN.9/970 (2019), https://uncitral.un.org/sites/uncitral.un.org/files/acn9_970_as_sub_1.pdf.

299. UNCITRAL, Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration, Note by the Secretariat ¶¶ 41–43 U.N. Doc. A/CN.9/915, (Mar. 24, 2017) https://undocs.org/A/CN.9/915. *See also*, OECD, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, (OECD Working Papers on International Investment, 2014/02); David Gaukrodger, *Investment Treaties and Shareholder Claims: Analysis of Treaty Practice*, (OECD Working Papers on International Investment, 2014/03).

case was dismissed, whereas his company, CME, won 270 million US dollars in damages.[300] Although the claims were brought under two different BITs, the difference in outcomes resulted not from the substantive treaty law, but from how the two tribunals dealt with concurrent causation in the determination of damages—an issue on which the BITs were silent. Whereas the *Lauder* tribunal dismissed the claim arguing that concurrent, intervening factors caused the damage alleged to result from the treaty violation,[301] the *CME* tribunal found that concurrent causes (except contributory fault) do not attenuate the damage caused by the treaty violation.[302] To prevent such inconsistencies, any reform needs to clarify how tribunals are to valuate damages, including how they should deal with legal causation. Again, the MLI could provide a framework for addressing these issues left unregulated in existing treaties.

The MLI thus offers an attractive template to lift all IIAs up to the same level and to clarify procedural and substantive clauses as well as normative grey areas, which are at the heart of the current legitimacy crisis. An investment MLI would thereby correct the awkward current co-existence of outdated treaties and updated ones. It would also complete incomplete treaties in light of state-of-the-art practice to ensure a consistent and correct application of investment law.

C. Design: Balancing Harmonization and Diversity

The MLI also offers a design blueprint for reforming investment law. The MLI model is unlike any multilateral investment treaty hitherto debated. It preserves the essentially bilateral governance structure of the regime and leaves parallel bilateral treaties fully intact. At the same time, an MLI in investment would also impose a multilateral superstructure to

300. Ronald S. Lauder v. Czech Republic, UNCITRAL, Award (Final), Sept. 3, 2001. CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Partial Award, Sept. 13, 2001. See also, UNCITRAL, Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, Note by the Secretariat ¶ 12 U.N. Doc. A/CN.9/WG.III/WP.150 (Aug. 28, 2018), https://undocs.org/en/A/CN.9/WG.III/WP.150.

301. Lauder v Czech Republic, ¶ 234.

302. CME v. Czech Republic, ¶ 583. *See also*, Wolfgang Alschner, *Aligning Loss and Liability – Towards an Integrated Assessment of Damages in Investment Arbitration*, *in* THE USE OF ECONOMICS IN TRADE DISPUTES: LESSONS LEARNED AND CHALLENGES AHEAD (Carpenter, et al. 2017).

address policy problems that would be inefficient to resolve bilaterally (i.e., updating older treaties), or that entail externalities that are impossible to tackle without multilateral elements (i.e., the consistency and correctness of awards). In addition, an investment treaty modeled on the MLI design would offer flexibility at every step to contract around or out of some of its rules while imposing binding minimum standards elsewhere.

This ability to deliver global standards where needed while preserving national preferences where possible is an attractive model for investment law because its multilateral reform will need to strike a similar balance to be successful. During the UNCITRAL deliberations, several states stressed that differences between IIAs cannot be reduced to contractual gaps and drafting oversights. Israel, for instance, noted that "variation [amongst treaties] represents the different approaches countries have towards protection and promotion of investment."[303] Similarly, the United States stated that "[s]tates have taken a great deal of care in crafting these obligations with great specific intent, and that minute differences in the way they have drafted correspond to very important differences in both legal and policy objectives."[304] The reform of substantive investment law thus needs to be able to accommodate different approaches to investment policymaking to gain widespread support.

Such divergent views are not limited to the substance of investment protection, but also extend to procedural ISDS reform. States are divided among incremental reformers who prefer adjustments to the existing arbitration mechanism (like Japan or the United States), systemic reformers demanding more radical change (like the EU pushing for the creation of a multilateral court system), and a third group of states that want to shift paradigms altogether (like Brazil) and prefer to rely on

303. Statement of Israel during UNCITRAL Working Party III Thirty-fifth session, 23–27 April, New York, *reprinted in* Anthea Roberts & Zeineb Bouraoui, *UNCITRAL and ISDS Reforms: Concerns about Consistency, Predictability and Correctness,* EJILTALK! (June 5, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-consistency-predictability-and-correctness/.

304. Statement of the United States during UNCITRAL Working Party III Thirty-fifth session, 23–27 April, New York, *reprinted in* Anthea Roberts & Zeineb Bouraoui, *UNCITRAL and ISDS Reforms: Concerns about Consistency, Predictability and Correctness,* EJILTALK! (June 5, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-consistency-predictability-and-correctness/.

domestic courts, dispute prevention mechanisms, and inter-state arbitration rather than ISDS.[305]

In striking a balance between necessary harmonization and the need for continued flexibility and differentiation in substance and procedure, states can draw inspiration from the MLI design. Some elements of substantive investment law are actually very amenable to MLI-like international minimum standards. Several core investment treaty norms, such as protection from manifest discrimination and arbitrariness or compensation for expropriation, are arguably also part of customary international law and thus de facto already provide a kind of global minimum standard.[306] An investment MLI would offer an opportunity to clarify and codify the contours of this customary international law minimum standard, as well as spell out the content of customary international flexibilities (e.g., on police powers). Together, this package of norms could provide a substantive baseline that states could not contract out of. Such uniform standards would help, in turn, to promote the consistent and correct application of investment law where minimum standards are concerned.

Other investment treaty standards, including the role of investors' legitimate expectations, liberalization commitments, or performance requirements are more controversial and could be left outside the scope of the MLI to be dealt with in bilateral treaties or included in the MLI through optional clauses that signatories can opt into.

Similarly, on the procedural side, states could make certain aspects obligatory for all MLI signatories. Candidates for such procedural minimum standards include dispute prevention tools and inter-state mechanisms for the authoritative interpretation of investment norms. With respect to more contested issues, such as ISDS, where views diverge widely, states could follow the MLI model and make adjudication optional. Recall

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305. Roberts, *supra* note 228.

306. There is, of course, considerable controversy over the content (and even existence) of customary international law on investment. The 1967 OECD Draft Convention was, in part, inspired by custom, *see* Boas, *supra* note 121; Kenneth J. Vandevelde, *Brief History of International Investment Agreements, A*, 12 UC DAVIS J. INT'L POL'Y 157, 159 (2005). But the relationship of BITs and customs remains controversial, see Patrick Dumberry, *Are BITs Representing the New Customary International Law in International Investment Law*, 28 PENN STATE INT'L L. REV. 675, 680 (2009).

that Part VI of the tax MLI foresees arbitration as an opt-in rather than opt-out mechanism. Similarly, states could include a reformed ISDS mechanism that enjoys widespread support into an investment MLI but leaves it to states whether they want to join. This would then allow countries willing to commit to an international investment court or another multilateral body in that MLI to do so, while allowing those states less keen on the idea to stay out.

Of course, the exact contours of such an MLI on investment would have to be fleshed out. Indeed, agreeing on when to defer to states' divergent preferences and what to harmonize may prove to be the most controversial aspect of such a negotiation. But, at least the MLI would offer a design that eschews extremes and allows creative solutions that open up a middle ground between national preferences and multilateral harmonization.

In conclusion, the MLI mechanics, scope, and design offer an attractive template for multilaterally reforming investment law. An MLI in investment would preserve the current bilateral governance structure of the regime while fixing the problems that a uniquely bilateral system is ill-equipped to handle. The last section of this article will build on that insight and assess how feasible such an MLI in investment would be. In that context, the focus of this article will shift from similarities to differences between the tax and investment regime to show that the conditions that gave rise to the MLI are not (yet) present in the investment space.

VII. CONVERGENCE IN TAX, DIVERGENCE IN INVESTMENT

Even though the tax and investment regimes mirror each other in many ways, they also differ in important respects. These differences matter when considering the feasibility of reproducing the tax MLI experience in the investment law context. The MLI is the result of a broad political, normative, and epistemic convergence in the tax world. In contrast, the investment regime is currently marked by growing divergence. As such, before states can replicate the MLI in investment, they first need to prepare the ground through more consensus building. Current multilateral investment law reform efforts under the auspices of UNCITRAL may provide fertile ground for that.

A. Political Convergence in Tax, but not Investment

First, the taxation regime has benefitted from an important political convergence, as the interests of (most) rich, developed countries have become aligned with those of developing states in combatting tax avoidance. At the same time, in the field of investment, the positions within and between developing states, emerging powers, and developed countries are increasingly misaligned.

The MLI is a product of the 2007 and 2008 financial and economic crisis. That historical moment brought the tax dossier to the G20 and created a broad consensus to reform the global financial system.[307] As part of that agenda, tackling harmful tax practices was a low-hanging fruit insofar as rich developed countries, fast-growing emerging economies, and poor developing states could all support the proposition that tax arbitrage and competition were problematic when they eroded national tax bases. The defenders of the status quo, in contrast, were a small group of low-tax jurisdictions that had benefitted from tax arbitrage, which allowed them to attract foreign companies through low or no taxation and reap ensuing employment opportunities and other spill-overs. In terms of inter-state politics, the issue was thus relatively clear-cut: a small group of beneficiaries with little bargaining clout was pitted against a global coalition of large developed, emerging, and developing states. There was thus sufficient political consensus and momentum to address BEPS through coordinated international action in a very short time span.[308]

The current political situation in the field of investment looks very different. States take widely diverging views on what is wrong with the current investment law system and how it should be reformed.[309] As Anthea Roberts highlights, some states are content with the current system and the incremental improvements made to recent agreements, while others push for a systemic or even paradigmatic reform.[310] Importantly, these divergent positions split the G20. Each of the BRICS countries takes a different view on the appropriate path for in-

307. Brauner, *supra* note 131, at 1025.
308. *Id.* at 1019.
309. Roberts, *supra* note 228.
310. *Id.*

vestment law's future.[311] In the developed world, the EU and Canada's preference for a standing court clash with Japan's preference for preserving investor-state arbitration, albeit in reformed guise, while the United States has become skeptical of ISDS altogether.[312] Moreover, investment law has become a politically salient issue, making it more difficult for states to compromise.[313] In short, the broad political consensus that has propelled the MLI is absent in investment law.

B. Normative Convergence in Tax, but not Investment

A second important difference concerns the normative evolution of both regimes. Whereas bilateral taxation treaties have grown more similar over time, in part thanks to the leadership of the OECD acting as a common reference point, investment treaties have actually grown more diverse, even as international organizations seek to assert influence over the field's development.

Empirical research on international tax treaties points to a great normative convergence.[314] First, newly concluded DTTs are much more similar to each other than they were in the past.[315] While there continue to be some outliers, like the United States, it is not unusual for DTTs involving different parties to display a textual overlap of eighty percent or more.[316] Second, a main driver for this greater homogeneity is that states conform their texts more closely to the OECD Model Convention. As discussed above, the OECD Model Convention was first published in 1963, but has since been amended regularly

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311. BRICS stands for the emerging economies Brazil, Russia, India, China and South Africa. Roberts, *supra* note 14.

312. Roberts, *supra* note 228.

313. Investment arbitration provisions triggered mass protests in the context of free trade negotiations between Canada and EU, the CETA, for instance. Furthermore, Belgium's regional parliament in Wallonia temporarily blocked the signature of CETA citing concerns over investment rules. *See, e.g., Belgium seeks EU court opinion on EU–Canada free trade deal*, EURACTIVE (Sept. 6, 2017), https://www.euractiv.com/section/ceta/news/belgium-seeks-eu-court-opinion-on-eu-canada-free-trade-deal/.

314. Arel-Bundock & Lechner, *supra* note 12. *See also* AVI-YONAH, *supra* note 21, at 2–3; Christians, *supra* note 20, at 1614–15.

315. Avi-Yonah & Xu, *supra* note 47, at 157–58.

316. *Id.* at 157.

through the OECD Fiscal Committee.[317] In addition to the text, the OECD publishes an extremely detailed commentary to explain the Convention's provisions, which is widely used by states and courts as an aid in the interpretation of tax treaties.[318] Whereas states initially departed more liberally from the OECD Model, they now mirror it more closely as the OECD serves as focal point for the normative evolution of tax treaties and contributes to the normative convergence of tax treaties.[319] This convergence, in turn, facilitated the work of the MLI since differences between DTTs were not as pronounced as one would suspect in a network of bilateral treaties without formal centralization. The MLI could harness this relative homogeneity and leverage the work that had gone into updating the OECD Model and its commentary to codify targeted adjustments in the MLI.

Empirical research on international investment treaties points in the opposite direction.[320] National models that mirror each other in principle but diverge in language, at times significantly, shape the design of investment treaties.[321] National approaches to IIA design have grown further apart over the last decade as states are experimenting with new clauses or are creatively combining existing language to break with the path-dependency and incremental adjustment that long dominated the field.[322] Canadian, Mexican, Turkish, and Japanese BITs today look very different from each other, and even within the EU, member states' approaches to treaty design are growing more diverse.[323] Even the consensus around what were long described as core investment protection norms, such as fair and equitable treatment and most favored nation treatment, are eroding as states choose to omit them from their agreements.[324]

317. Cockfield, *supra* note 198, at 140.

318. KOBETSKY, *supra* note 118, at 153–78; Christians, *supra* note 20, at 1616–17; Cockfield, *supra* note 198, at 142.

319. Cockfield, *supra* note 198 (calling the OECD an informal World Tax Organization); Christians, *supra* note 13.

320. Alschner, *supra* note 15.

321. Alschner & Skougarevskiy, *supra* note 135; BROWN AND KRISHAN, *supra* note 187.

322. Alschner & Skougarevskiy, *supra* note 135.

323. *Id.*

324. *See, e.g.,* the recent Indian Model BIT. Model Text for the Indian Bilateral Investment Treaty (2016), http://www.dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf.

In part, this divergence in investment law is a result of the absence of normative focal points. Whereas the OECD published its first investment model convention roughly at the same time as its tax model, the template never gained the same traction and was never updated. International organizations, including the OECD, but also the World Bank and UNCTAD, as well as non-governmental entities, sought to shape investment treaty design through research papers, model conventions, guidelines, and principles. Yet, while informing individual agreements, none of these international organizations established a standard that exerted a gravitational pull similar to the OECD Model in tax law.[325] Whereas convergence in tax facilitated the MLI, divergence in investment is making an equivalent project more difficult.

C. Epistemic Convergence in Tax, but not Investment

A third important difference concerns those who write investment and tax rules. The tax regime was established by and around a tightly-knit expert community that first formed under the auspices of the League of Nations during the inter-war period, then found a new home in the Fiscal Committee at the OECD after the Second World War, and continues to dominate international tax governance to this date.[326] Investment law experts, in contrast, remain fragmented across national and professional boundaries. The result has been epistemic convergence in tax, but not in investment law.

The international tax regime is inextricably linked to a transnational network of tax experts. Many of the principles and rules of international tax law were crafted in the early twentieth century by groups of international tax experts (e.g., "The Four Economists," and "The Technical Experts Committee") working under the League of Nations.[327] Some of these experts served both in the League of Nations and later in the OECD, ensuring intellectual continuity in times of rapid insti-

325. Wolfgang Alschner, et al, *Shaping Investment Rules: The Imprint of International Institutions on Bilateral Investment Treaties,* (Paper presented at APSA Annual Meeting, 2017).

326. Christians, *supra* note 13; Genschel & Rixen, *supra* note 4.

327. PICCIOTTO, *supra* note 43, at 19–22; Christians, *supra* note 13, at 10–14.

tutional change.[328] By framing the avoidance of double taxation as a technical task rather than a political problem, the design of tax treaties was left almost exclusively to this expert community.[329] International tax law thus became a domain for transnational specialists.[330] This not only removed double taxation issues from high politics, but also insulated the tax community from other groups. Martin Hearson's archival research on British DTTs, for instance, documents how little influence diplomats and the Foreign Office had over DTTs.[331] Instead, the UK's international tax policy was dominated by a small group of tax specialists, often with close relations to the business community.[332] These tax experts, given their prized knowledge, also represented their countries at the OECD, where the OECD Fiscal Committee provided a venue for tax experts to meet and shape international tax policy by updating the OECD Model Convention and its commentary.[333] It was this transnational community of tax experts that facilitated the convergence around the OECD Model and offered expertise, which the G20 could tap into, when it came to designing and implementing measures to counter BEPS.[334] This also helps to

328. For instance, Mitchell B. Carroll started working on double taxation in the inter-war period and accompanied the codification efforts of the 1930s and 1940s. Mitchell B. Carroll, *International Tax Law: Benefits for American Investors and Enterprises Abroad: Part I*, INT'L LAW. 692 (1968). In fact, even after the League of Nations collapsed, the work on double taxation that had been undertaken under its auspices continued relatively undisturbed, resulting in successive draft conventions in 1943 (Mexico) and 1946 (London) before the OECD took over the coordination of international efforts to avoid double taxation in the late 1950s and early 60s.

329. Christians, *supra* note 13, at 9 ("the League's main function was to correct an existing international political malfunction, by creating a decision-making structure that focused on coordination as primarily a matter of collaborative technical problem solving rather than primarily a matter of diplomatic relationships."); Genschel & Rixen, *supra* note 4, at 163.

330. Christians, *supra* note 13.

331. Martin Hearson, *Transnational Expertise and the Expansion of the International Tax Regime: Imposing 'Acceptable' Standards*, 15 REV. INT'L POLIT. ECON. 647, 656, 660 (2018).

332. *Id.*

333. Christians, *supra* note 13, at 21–22; Genschel & Rixen, *supra* note 4, at 161–65.

334. Christians, *supra* note 20 (also pointing out that the BEPS project provided an opportunity for the OECD to entrench its role as the international focal point for tax policy); *similarly* Fung, *supra* note 180.

explain why the highly technical BEPS reforms could be crafted in such a short time span.

No similar transnational community of experts underpins the investment regime. First, investment law has been defined more by national than transnational considerations. The early BIT programs of Germany, Switzerland, and Belgium in the 1960s were developed in parallel, rather than in concert, with the OECD work, which resulted in some initial experimentation.[335] It was only in the 1970s that BIT newcomers like Great Britain or Sweden took greater inspiration from the OECD's work.[336] But, much in contrast to the OECD Tax Model, the OECD's Draft Convention on investment and its commentary were not updated over time. States instead developed independent national models that they updated incrementally.[337]

Second, investment treaties remained the domain of diplomats, not of technocrats. Poulsen and Aisbett's empirical work suggests that BITs were often concluded to coincide with diplomatic visits or the end terms of ambassadors.[338] In contrast to the technical language of DTTs, BITs contained intuitive principles (that made some signatories believe that they were signing statements of good will rather than binding commitments).[339] Moreover, the link between investment treaties and the business community appears to have been more tenuous as political risk managers and agencies often remained unaware or disinterested in the instrument that supposedly served their needs.[340]

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335. Wolfgang Alschner & Dmitriy Skougarevskiy, *Consistency and Legal Innovation in the BIT Universe*, (Stanf. Public L. working paper, 2015) *available at* http://papers.ssrn.com/abstract=2595288.

336. ALSCHNER, *supra* note 197.

337. Mark A. Clodfelter, *The Adaptation of States to the Changing World of Investment Protection through Model BITs*, 24 ICSID REV. 165, 166–68 (2009); Kenneth J. Vandevelde, *Model Bilateral Investment Treaties: The Way Forward*, 18 SW. J. INT'L L. 307, 312–14 (2011).

338. Lauge N. Skovgaard Poulsen & Emma Aisbett, *Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime*, 7 J. INT'L DISP. SETTL. 72, 87–90 (2016).

339. Poulsen, *supra* note 146, at xv, 155.

340. Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment–Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2010) (providing empirical evidence that businesses and political risk insurers do not systematically take BITs into account when making decisions and assessing risks on foreign investment).

Finally, even though a transnational community of investment negotiators did not previously exist, the proliferation of investment cases has given rise to a community of investment arbitration practitioners.[341] Part of the current investment law legitimacy crisis is directed at the self-interest of that arbitral community,[342] and, as a result, there are tensions between practitioners with vested interests and negotiators that seek to reform the current system. The arbitral community itself is split between those supporting (e.g., Gabrielle Kaufmann-Kohler)[343] and those criticizing (e.g., Charles Brower)[344] current reform efforts. Hence, in contrast to tax, states do not have a cohesive expert community to rely upon to help tackle the current legitimacy challenge. Instead, those with expertise in investment treaties and arbitration are divided along national and professional lines.

In summary, the conditions that paved the way for the MLI in tax are absent in investment law. That does not by itself exclude a future investment MLI, but it suggests that further political, normative, and epistemic consensus building is necessary to lay the groundwork for such an endeavor. The current UNCITRAL Working Group III deliberations can be an ideal venue for such consensus building. They bring together representatives from a geographically diverse set of countries, are open to stakeholder input from academia, civil society, and the arbitral community, and could thus facilitate epistemic convergence.

Crucially, to enable wider consensus-building, these UNCITRAL deliberations should not be limited to narrow, procedural fixes to ISDS. Some states have openly endorsed the view that UNCITRAL talks should be broadened. In its submission to the Working Group III, South Africa, for example, stressed that many of the regime's legitimacy problems can only be addressed through substantive reforms, and that proce-

341. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1998); Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387, 388 (2014).

342. Langford, Behn, & Lie, *supra* note 87.

343. KAUFMANN-KOHLER & POTESTÀ, *supra* note 284.

344. Charles N. Brower, *Doomed to Failure: Why the EU Investment Court System is Destined to Fail Both Foreign Investors and Host Statese*, 3 EUR. INVEST. L. ARB. REV. ONLINE 317 (2018).

dural and substantive concerns cannot be divorced from each other.[345]

Some may be concerned that widening the scope of the UNCITRAL talks may render an already difficult task (ISDS reform) even more difficult and could jeopardize a reform altogether. But this does not have to be the case. In its 2019 spring meeting, Working Group III decided to split its work into two ISDS reform tracks: more ambitious structural reforms and more limited other reforms. A third track could be added to tackle substantive concerns and normative grey areas. Alternatively, substantive discussions could be taken out of the UNCITRAL process altogether and run in parallel. For example, building on the model of its Inclusive Framework for tax, the OECD could host a similarly multilateral framework to complement the UNCITRAL deliberations and address substantive investment law concerns, as well as the above-mentioned grey areas. What matters in the end is not where talks take place, but that they take place in order to create the political, normative, and epistemic convergence that could enable an MLI in investment that holistically addresses the field's legitimacy concerns in both substance and procedure.

CONCLUSION

The investment and tax regimes display striking similarities. They both facilitate the free flow of international capital, they are both based on thousands of bilateral treaties, and they both share common historical foundations and evolved in similar ways. Yet, whereas the tax regime recently achieved a groundbreaking reform that mitigates a decades-old legitimacy crisis over non-taxation through the MLI, which modernizes covered DTTs in both substance and procedure, the investment regime is just beginning to discuss multilateral reforms to address its own legitimacy problems.

As this article has shown, the MLI provides an attractive model for such investment law reform. In terms of mechanics, it promises to leave the existing bilateral governance structure

345. UNCITRAL, Possible Reform of Investor–State Dispute Settlement (ISDS), Submission from the Gov't of South Africa ¶¶ 19–2- U.N. Doc. A/CN.9/WG.III/WP.176, (July 17, 2019), https://uncitral.un.org/sites/uncitral.un.org/files/176-e_submission_south_africa.pdf.

intact, while complementing it with tailored multilateral elements. In terms of scope, an MLI in investment could modernize the stock of existing and often outdated IIAs in both substance and procedure. Finally, in terms of design, the MLI shows the way for creating multilateral minimum standards where necessary, while providing sufficient flexibility to accommodate diverging policy preferences elsewhere.

Yet, as the last section has shown, an epistemic, normative, and political convergence in taxation prepared the ground for the MLI. The investment regime, in contrast, is experiencing a period of divergence, which makes an MLI equivalent for investment currently unlikely. The first step to enable a future MLI in investment must therefore consist of providing an enabling environment where political, normative, and epistemic forces can converge. The current UNCITRAL Working Group III deliberations could turn out to be just that.