

UNIVERSITY OF THE WESTERN CAPE
FACULTY OF LAW

**CAN A MULTILATERAL AGREEMENT ON INVESTMENT
REDUCE DOUBLE TAX TREATY ABUSE IN DEVELOPING
COUNTRIES?**

BY

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A mini-thesis submitted in partial fulfilment of the requirements
for the MPhil in International Trade, Business and Investment



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DECLARATION

I, Dumisani Joseph Jantjies, declare that 'Can a Multilateral Agreement on Investment reduce double tax treaty abuse in developing countries?' is my own work, that it has not been submitted for any degree or examination in any other university. All the sources I have used or quoted have been indicated and acknowledged by complete references. It is hereby presented in partial fulfilment of the requirements for the award of the Master of Philosophy Degree in International Trade, Business and Investment Law.

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Prof. Riekie Wandrag

4 December 2017



DEDICATION

I dedicate this mini-thesis to my family, my wife Mmaki, kids, Nkosinathi, Sibongile and Cebisa. You guys had to put up with me being away writing this mini-thesis, and you were always there for me.

To my siblings, parents and in-laws, thank you for the love that you have always shown me. I know I haven't been there as you would have like me to, I do hope to make up for lost time.

Thank you to God and to my Ancestors for the continued guidance in my life, in particular for leading me towards my purpose in life.



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LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
BTLP	Barcelona Traction, Light, and Power Company
CIL	Customary International Law
DTT	Double taxation treaties
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
IIA	International Investment Agreement
ICJ	International Court of Justice
ICC	International Chamber of Commerce
IMF	International Monetary Fund
ITO	International Trade Organisation
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor–State Dispute Settlement
MAI	Multilateral Agreement on Investment
MFN	Most Favoured Nation
MNE	Multi-National Enterprise
NT	National Treatment
OECD	Organisation for Economic Cooperation and Development
OECD-MTC	OECD Model Tax Convention
TIEA	Taxation Information exchange agreements
TRIMS	Trade Related Investment Measures
UNCTAD	United Nations Conference on Trade and Development
UN–MTC	United Nations Model Tax Convention
USA	United States of America
WEF	World Economic Forum
WTO	World Trade Organisation

KEYWORDS

Bilateral Investment Treaty

Double Taxation Treaty

Taxation Base Erosion

International Investment Agreement

International investment

Foreign Direct Investment

Developing countries

Developed countries

Multilateral Agreement on Investment

Model Tax Convention

OECD Model Tax Convention

United Nations Model Tax Convention



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CHAPTER ONE: INTRODUCTION

1.1. RESEARCH PROBLEM

Over the years, the world economy has experienced growth in foreign direct investments (FDI), with the role of developing countries becoming more evident as both recipients and investors alike.¹ The proliferation of international investment has also led to more bilateral investment treaties (BITs) with their complex and often duplicated rules.²

The increase in BITs of this complex nature has thus resuscitated a less publicly debated course, although recently discussed within the United Nations Conference for Trade and Development (UNCTAD), is there need for multilateral agreement on investment (MAI),³ hosted within the multilateral institution(s) ?

Since the late 1990s, the discussion as to whether international investments require the MAI has been characterised by diverging interests of developed and developing countries, with neither willing to concede.⁴ Even in the immediate post-War II period, this standoff between developed and developing countries has dominated a discourse on whether there is a need for an international agreement on international investment. Yet developing countries, or African countries classified as least developing, continue to be left out of MAI discussions. For example, the Organisation for Economic Cooperation and Development (OECD) 1990's proposed plurilateral agreement excluded African countries.

Regardless of the direction that the MAI discussions take, the role of developing countries, including African countries, has become more important and more prominent than ever before. In fact, if the MAI ever became a reality, then it would seek to resolve some of complexities brought about by the current international investment legal regime – mainly in the form of bilateral investment

¹UNCTAD Towards a new generation of international investment policies: UNCTAD's fresh approach to multilateral investment policy-making (2016) 84-85.

²Sullivan N and Salacuse J 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46, (1), 71.

³UNCTAD, World report on Investment, (1996).

⁴Sauvé J 'Multilateral rules on investment: is forward movement possible?' (2006) 9 *Journal of International Economic Law* 336.

treaties – such as dealing with concerns around development objectives, the abuse of double taxation treaties and many other issues.⁵

According to Åslund, a formal multilateral discussion with a proposal about a possibility of a multilateral agreement on international investment was initiated by UNCTAD at the United Nations (UN) around the 1970s without success.⁶ However, another formal process involving a proposal of a plurilateral agreement was established in the late 1990s by OECD countries.⁷ Nonetheless, France pulled out of the then OECD proposed plurilateral agreement.

A plurilateral agreement allows fewer countries to conclude a multilateral treaty that may be incorporated into the international economic law and binding on all World Trade Organisation (WTO) member states.⁸ In pursuing a plurilateral agreement, the OECD hoped the process to be quicker than involving the entire WTO membership.⁹

It was later suggested that the OECD MAI proposal to be part of the Uruguay round WTO agenda.¹⁰ Yet the proposal failed to gain momentum at the behest of critics from the poorest of the developing countries and some European Union (EU) countries.¹¹ The OECD approach to MAI intended to cover various aspects and themes of treatment of investors and investment, investment protection, dispute settlement, exceptions and safeguards, financial services and taxations as areas in the agreement.¹² However, the proposal failed to satisfy some of the OECD member states, more so the EU members on grounds of cultural differences.¹³ For example, France formally rejected the proposal citing failure by the proposal to consider the country's sovereignty needs on culture.¹⁴

⁵Double taxation treaty abuse: Developed countries investors are accused of manipulating double taxation treaty, in many instances leading to tax base erosion for developing countries who have often been international investment hosts.

⁶Åslund A 'The World Needs a Multilateral Investment Agreement' (2013) 04 Policy Brief, PIIE.

⁷OECD negotiating group on the Multilateral Agreement on Investment, The Multilateral Agreement on Investment Draft Consolidated Text (1998).

⁸WTO 'Understanding The WTO: The Agreements' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm (accessed 30 November 2017).

⁹Åslund A 'The World Needs a Multilateral Investment Agreement' (2013) 04-05.

¹⁰Drabek J 'A Multilateral Agreement on Investment: Convincing the Sceptics' (1998) Staff Working Paper ERAD-98-05 World Trade Organization Economic Research and Analysis Division.

¹¹Åslund A 'The World Needs a Multilateral Investment Agreement' (2013) 04-05.

¹²OECD Negotiating Group on the Multilateral Agreement on Investment (MAI) The Multilateral Agreement on Investment (1998).

¹³France was quoted as having a problem with the certain form of the proposed MAI.

¹⁴Kavaljit S 'Multilateral Investment Agreement in the WTO' (2003) *Asia-Pacific Research Network* 14.

Some of the aspects meant to be addressed in the MAI, are currently addressed through various BITs between developed and developing countries.¹⁵ However, taxation matters between the international investment hosts and international investors (or states) are in many, if not all instances, addressed through double taxation treaties (DTT), which also form part of international investment governance mechanisms.

The DTTs are part of the process of facilitating international investment between international investors and host countries by ensuring that investors' profits and related assets are not taxed twice by both their resident and investment host or source countries.¹⁶ The DTTs are also an incentive to both the international investors and international investment host countries to encourage more investment within the common and consistent taxation rules. The DTTs further protect the taxation base of the international investment host country by ensuring that taxation is fair for both contracting parties.¹⁷ Although the notion of DTTs protecting tax base has been contested before, the OECD report on action plan to address base erosion and profit shifting (BEPS) has acknowledged that double taxation treaties lead to base erosion in many developing countries.¹⁸

The 2008 global financial crisis led to many governments looking for revenue leakages as the global economy regressed.¹⁹ The abuse of international taxation rules and aggressive taxation planning by multinational corporations (MNEs) and other taxpayers were identified as amongst the activities, resulting in many governments losing taxation revenues.²⁰ These abuses have intensified a debate on an international level about measures developed to deal with the abuses.

These international discourses have resulted in a group of twenty powerful economies (G20) tasking the OECD to derive a mechanism to curb abuse of

¹⁵UNCTAD World Investment Report 1996 Investment, Trade and International Policy Arrangements (1996) 154-9.

¹⁶Double taxation treaties provide for international taxation rules with an aim to avoid levying income or other forms of taxation on investors' capital between investment host country and investor residence country.

¹⁷Oguttu A, 'Tax Base Erosion and Profit Shifting in Africa- Part 1: Africa's Response to the OECD BEPS Action Plan' (2016) 54 *ICTD Working Paper* 18.

¹⁸ OECD, Action Plan on Base Erosion and Profit Shifting, (2013).

¹⁹Cooper GS 'Preventing Tax Treaty Abuse', (2015) United Nations Department of Economic and Social Affairs.

²⁰ Cooper GS 'Preventing Tax Treaty Abuse', (2015) United Nations Department of Economic and Social Affairs.

double taxation treaties amongst other issues.²¹ Due to their dependency on extractive and mining industries in particular, developing countries, including African countries, have continued to be the main victims of the abuse of international taxation rules at the behest of MNEs as taxpayers.²² However, other economic sectors in both developed and developing countries are themselves not immune to the abuse of international taxation rules and aggressive taxation planning.²³

The argument is that due to an urge to attract more international investments, many of the African and other least developed countries tend to settle for unfavourable DTTs, for example, using the OECD model tax convention which is based on the residence principle.²⁴ In other instances, countries tend to fall prey to abuse of international taxation rules by the MNE due to the lack of necessary human resources to deal with complex taxation issues. Other developing countries fell victims of international taxation law abuse due to weaker Institutions to deal with such abuse and to secure international investment.²⁵ Contrary to intended objectives of the DTT,²⁶ Baker has argued that the DTT does not affect the flow of international investment from developed to developing countries.²⁷

South Africa, Kenya and Uganda are amongst African countries continuing to attract international investment. In addition, these countries have continued to use BITs and DTTs to attract and facilitate international investment inflows. However, these countries have also experienced abuse of international tax and investment rules as set out in DTTs and BITs, at the behest of the MNEs.

²¹OECD Action Plan on Base Erosion and Profit Shifting (2013) 09-11.

²²UNECA, Investment policy and Bilateral Investment Treaties in Africa: Implications for regional Integration, (2016) 19.

²³Ault J and Arnold J 'Protecting the tax base of developing countries: an overview' (2015) United Nations Handbook Protecting the Tax Base of Developing Countries 01.

²⁴OECD model tax convention frameworks favours developed (OECD) countries needs mainly, like the income is taxed at 'residence' as opposed to 'source'.

²⁵Cooper G S 'Preventing Tax Treaty Abuse' (2014) United Nations Department of Economic and Social Affairs.

²⁶The DTT's main objective is to attract international investments by eliminate the minimisation of tax to be paid on capital or investment or return between two or more jurisdictions.

²⁷Baker P 'An analysis of double taxation treaties and their effect on foreign' (2012) (unpublished paper, University of Cambridge, 2012) available at

http://www2.warwick.ac.uk/fac/soc/economics/events/seminars-schedule/conferences/peuk12/paul_1_baker_dtts_on_fdi_23_may_2012.pdf (accessed 29th December 2016).

It is unclear as to how much the failure to enforce compliance of taxation rules by international investors and giving away unfavourable concessions is attributable to incentives attracting more international investments or to the lack of human capital and strong institutions. The OECD and G20 Base Erosion and Profit Shifting (BEPS) project report on Action 6: Treaty Abuse is criticised for its failure to contextualise the issues of developing countries, instead favouring developed countries.²⁸

At times, MNEs have been accused of being embroiled in treaty shopping, leading to many of the developing countries - often international investment hosts - setting up unfavourable double taxation rules and regimes.²⁹ Hence, in their desperation to attract international investment, they are left to set up the DTT rules that lead to taxation base erosion.³⁰

The lack of multilateral agreements and a binding governance framework on international investment has exposed developing countries to abuse by MNEs, with rules on international taxation in particular. The current international investment regime, BITs, are useful for many countries. However, these rules are also seen mainly to protect international investors' interests over those of the international investment host countries, including poor double taxation rules.³¹

1.1.1. Governance of Investment Internationally and within Africa

International investments and related transactions are currently governed largely by BITs, free trade agreements (FTAs) and other cooperation agreements. However, the United Nations Conference on Trade and Development (UNCTAD) has recently³² reviewed its initial view³³ from twenty years ago, where the institution noted that international investment laws (BITs, FTAs and others) were sufficient but now advocates that a multilateral agreement on investment is necessary. Currently, a framework on governance of international investment is

²⁸Oguttu A 'Tax base erosion and profit shifting - part 2: a critique of some priority OECD action points from an African perspective - preventing excessive interest deductions and tax treaty abuse' (2016) 49 (1) Comparative and International Law Journal of Southern Africa, 154-156.

²⁹Treaty shopping, where the entities search for a country with low and favourable double taxation treaty, and such country is used as residence for the MNE.

³⁰Tax base erosion is the loss of government potential revenue as a result of taxpayers failing to declare all the profits and assets for tax liability. It could also be a result of taxpayers using tax legislation loopholes to avoid higher tax liability.

³¹Ault J and Arnold J, (2015).

³²UNCTAD, Policy Framework on International Investment (2015).

³³UNCTAD, (1996).

being developed and proposed by UNCTAD.³⁴ Although the UNCTAD development is a positive initiative that is long overdue, the policy framework should also aim to address specific issues relating to DTTs while the framework remains non-binding.

One of the reasons cited by UNCTAD and other spectators³⁵ support for MAI is that '*the balance of force*' between developed and developing countries has improved since the MAI discussions previously failed in the late 1990s. The UNCTAD initial doubts around the MAI were based on its reviews of the BITs, RTAs and other mechanism in place at the time.³⁶ African countries have also seen an increase in FDI for the past two decades. This provides them with a strong case for protection from a multilateral investment system rather than the current arrangement. Kenya, South Africa and Uganda have seen an increase in investment, while all three countries use BITs and DTTs as mechanism to facilitate investments.

1.1.2. International investment and Tax Treaty Abuse

DTTs are international agreements used by more than one country or jurisdiction in economic cooperation to minimise impact and regulate against any unintended taxation consequences, like the double taxing of profits for the contracting states' taxpayers. Two common DTTs models that are frequently used in developing taxation treaties:³⁷ the OECD Model Tax Convention (OECD-MTC) and the United Nations Model Tax Convention (UN-MTC)³⁸ also see.³⁹ International investors from OECD countries insist on the use of OECD-MTC regardless of whether the contracting state is a developing or developed country.

In its conception, the OECD-MTC was developed to be used uniquely by the OECD member states.⁴⁰ Yet international investors, often MNEs, those in favour of

³⁴UNCTAD, (2015).

³⁵Berger A 'Do we really need a Multilateral Investment Agreement?' (2013) German Development Institute.

³⁶UNCTAD, (1996).

³⁷Arnold A 'An introduction to tax treaties' (2014) available at http://www.un.org/esa/ffd/wp-content/uploads/2015/10/TT_Introduction_Eng.pdf (accessed 06 January 2017).

³⁸ UN-MTC uses source-base of taxing profits from international investments and favours capital importing countries.

³⁹United Nations Model Double Taxation Convention between Developed and Developing Countries, 2011.

⁴⁰Daurer V and Krever, R 'Choosing between the UN and OECD tax Policy models: An African Case study' (2014) 07.

OECD-MTC when contracting with developing countries, are accused of abusing the international tax rules in various ways.⁴¹ Moreover, African countries with mining and extractive industries continue to accuse MNEs, and those residents of developed countries in particular, of abusing DTTs and processes.⁴² These treaty abuses lead to taxation base erosion while many developing countries lack human resources and strong institutions to defend themselves against such abuses.⁴³

Despite the lack of capacity, some developing countries, like South Africa, uses their own domestic process to combat the abuse of DTTs and to avoid deterring international investment. However, significant progress in getting MNEs to comply with DTTs, or at least to limit abuse, requires more effort from all stakeholders at multilateral level. The analysis of this mini-thesis research advocates instead that a binding multilateral legislative provision be considered on behalf of developing countries, - African countries in particular - in the governance of international investments. The legal provision suggested would thus provide a better guidance for double taxation agreements at the multilateral level.

1.2. SIGNIFICANCE OF THE PROBLEM

A delayed global economic recovery since the 2008 global financial crisis, and the recent wave of a perceived protectionism⁴⁴ of the global economy has resuscitated an “old or muted discussion” as to whether international investments require a global governance structure, in particular whether double taxation treaties are favourable for both international investors and host countries.⁴⁵ also see.⁴⁶ Developing countries, including African countries (e.g. Kenya, South Africa and Uganda), continue to cry foul on the failure by the current international investment agreement (BITs) regime to protect their right to attain development objectives and limit taxation base erosion by weaker or manipulation of DTTs. As a result, some countries have opted to withdraw from international investment

⁴¹Oguttu A, (2016).

⁴²UNECA, Investment policy and Bilateral Investment Treaties in Africa: Implications for regional Integration, (2016) 19.

⁴³Peter C, Developing Countries' Reactions to the G20/OECD Action Plan on Base Erosion and Profit Shifting, (2015), 379.

agreements (BITs), Ecuador is one of the recent cases,⁴⁷ and enact domestic investment legislation.

South Africa is also one such country, where the new domestic legislation on investment governance was recently enacted.⁴⁸ also see.⁴⁹ South Africa's reason to enact domestic investment legislation has less to do with abuse of DTTs, but has to do with the country's development objectives and other challenges brought about by international investments. Yet it is worth noting that the South African legislators recently identified abuse of DTTs by MNEs as an area to be strengthened to deal with taxation base erosion brought about by MNE's doing business in South Africa.

Multilateral governance institutions like UNCTAD, World Economic Forum (WEF) and the International Chamber of Commerce (ICC) have recently called for other countries to reconsider to develop a MAI. For example, see⁵⁰ also see.⁵¹ However, the outstanding issues that led to failure of previous attempts for MAI would need to be addressed alongside some specific concerns by African countries. These include issues around the consideration of development objectives and concerns around fiscal losses as a result of abuse of DTTs being that these treaties are meant to facilitate international investments, one of the key concerns by African Union(AU)⁵²

1.3 RESEARCH QUESTION AND OBJECTIVES

This mini-thesis identifies areas of international investment and taxation rules set out in the IIAs and DTTs models that may be strengthened to address concerns of developing countries towards international investments; in particular, the African countries, Kenya, South Africa and Uganda. I have noted a continuing international discourse regarding the need for MAI. Hence, this mini-thesis intends to contribute to these debates towards a better governance on international investments.

⁵⁰UNCTAD *World Investment Report 2015: Reforming International Investment Governance-Reforming the International Investment Regime: An Action Menu* (2015).

⁵¹WEF *Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment* (2013).

⁵²UNECA, *Investment Policy and Bilateral Investment Treaties in Africa: Implications for regional Integration*, (2016).

The mini-thesis argues that African countries (for example, Kenya, South African and Uganda) may also require multilateral agreements on the investment regime (or rules on IIA) to cover anti-abuse of international taxation rules by international investors.

This study makes further reference to the weaknesses of the current International Investment law (BITs) legislative framework as far as international investment flows into African countries is concerned. In fact, many African countries – including the African Union - are questioning the effectiveness of the current international investment regulatory framework in helping to address the continent's development objectives. It is further argued that addressing weaknesses in the BITs should lead to a reformed multilateral investment rules accord, while African countries should contribute meaningfully when their concerns are taken into account in the process of obtaining MAI.

This mini-thesis provides specific recommendations to strengthen the current international investment and taxation rules and make proposals for how a multilateral agreement on investment should be determined. The main research question in this study is:

Can a Multilateral Agreement on Investment reduce Double Taxation Treaty abuse in developing countries?

In addressing the main research question, the following sub-questions are analysed in the mini-thesis:

- Do the IIAs and DTTs serving African countries (for example Kenya, South African and Uganda) support investment host country development objectives?
- Is there adequate co-ordination between DTTs and IIAs with African countries (for example Kenya, South African and Uganda) and how could a MAI strengthen harmonisation?
- How could a MAI (or a framework) strengthen DTTs to benefit the international investment host; in particular, developing countries in Africa?

1.4. RESEARCH METHODOLOGY

This mini-thesis contributes towards the continuing international discourse about the governance structures of international investment and taxation rules. In particular, international investment legal framework may require multilateral agreement or legal framework to be considered fair, but also takes into account inputs from both developed and developing countries. The contribution of this mini-thesis is to identify weaknesses within the international investment law requiring resolution to enable better participation by African countries. In this mini-thesis, the historical development of the international investment legal framework is analysed to determine its relevancy in the current international investment climate. In particular, the suitability of the current international investment legal framework taking into account the original socio, political and economic climate of their development has changed.

The mini-thesis analyses the effect the historical development of international investment regime on developing countries, in particular African countries. This analysis is used as an argument to ask as to relevancy of the current model on international investment rules, for example, is there a need to include consideration of the development objectives of investment host state as compulsory requirement.

Three African countries, Kenya, South Africa and Uganda, are used as reference cases to explore research questions. These countries were selected based on the availability of their DTT and BIT literature, and that they have more developed frameworks on DTTs and BITs compared to other countries in the Continent. All these countries are somehow in a process to reform their investment or taxation treaties,⁵³ also see,⁵⁴ and.⁵⁵ Therefore, analysis their BITs and DTTs as reference to this mini-thesis contribute to broader discourse about the need to reform international investment and taxation legal frameworks. I also have access to these countries' investment and taxation treaties information and their recent experiences with DTTs and BITs. This mini-thesis further uses these reference

⁵³ActionAid 'Double Taxation Treaties in Uganda Impact and Policy Implications' (2014).

⁵⁴Hearson M 'Tax Treaties in sub-Saharan Africa: a critical review' (2015).

⁵⁵ Olingo A, 'Kenya revises double taxation agreement to attract investors' (2016) available at <http://www.theeastafrican.co.ke/business/Kenya-revises-double-taxation-agreement-to-attract-investors/2560-3307782-aq7415/index.html> (accessed 03 June 2017).

countries studies to identify the strengths and weaknesses of the rules of international investments; those related to DTTs in particular. Various multilateral institutions, including the WTO, UNCTAD, OECD and others, have written proposals, guidelines or policy papers regarding the possibility of a multilateral agreement on investment or non-binding guiding frameworks at a multilateral level. Some of these proposed legal prescripts and frameworks form the primary sources of this mini-thesis, including double taxation treaties and BITs from three African countries identified in the paper.

1.4.1. Significance of the study

According to Berger,⁵⁶ for more than twenty years international stakeholders have pondered the governance of international investment. They have reflected in particular on whether to set up a MAI, who would be custodian of such a framework and how such an agreement would be implemented and monitored. Following the international discussion, wider research has explored the potential MAI and current legal instruments governing international investments, while some of the legal prescripts have focused on the potential implications for developing countries. Such literature is used in this mini-thesis as a secondary analysis to support my arguments.

The abuse of double taxation treaties by international investors has also been a part of the discussion and a lot of attempts have been made to try to redress challenges faced by developing countries in this regard. In recent years, the OECD and G20 BEPS project initiated in 2014 has published various reports and studies that seek to strengthen the international legislative regime dealing with taxation treaty abuse -and other issues - which seems to pose inherent problems to international investment. Hence, OECD and G20 BEPS project work has also formed part of the secondary analysis in this mini-thesis.

As members of the WTO, three African countries - Kenya, South Africa and Uganda - are classified as either developing or least developing countries. Thus, if MAI is to be considered by the WTO as has been the case before, then the participation of African countries in the process would be important.

⁵⁶Berger A 'Do we really need a Multilateral Investment Agreement?' (2013) German Development Institute.

In the main, this mini-thesis analyse various legal frameworks within the domain of international investment and double taxation treaties since the formal proposal for MAI by OECD in the late 1990s until recently. In so doing, to contribute to a continue discourse as to whether the is need for MAI.

1.5. CHAPTER OUTLINE

To answer the afore-mentioned research questions, this mini-thesis will consist of five chapters. The proposed outline is as follows:

- **Chapter one: Introduction**

In this chapter, I provide the reader with a background to the study, including the research objectives and questions, while the research design and methodology of the study are also outlined. The chapter also provides a rationale for the study.

- **Chapter two: Global governance framework of International Investment**

A case for a multilateral agreement on investment continues to be made, despite scepticism on the part of some of the stakeholders. Such an argument can be presented by reviewing the current international investment legal framework. This chapter provides a critical analysis on the international investment agreements regime. The analysis is based on review outcomes by regional and multilateral institutions and the experiences of individual development countries. A snapshot of the existing literature further introduces issues around the international investment governance regime.

- **Chapter three: International Investment Agreements in Africa**

Like other developing countries, African countries have seen an increase in FDI, although the full potential is still to be realised. There are growing concerns that international investments also lead to a negative net effect between investment inflows and profit remittance outflow for most of African countries. In this chapter, I provide an analysis of the international investment agreements and reflect on areas for improvement limiting taxation base erosion for developing countries; Using three African countries, Kenya, South African and Uganda as cases of reference.

- **Chapter four: Double Taxation Treaties and IIAs**

In this chapter, the study provides an analysis of various models of DTTs and how they are adopted by various African countries. The analysis provides further consideration of treaties susceptible to abuse by MNEs. The Chapter also provides an analysis of how to deal with the double taxation treaty abuse resulting from international investment.

- **Chapter five: What might work for African and other developing countries**

This chapter provides recommendations on plausible rules to deal with the concerns of developing countries and African countries in particular. The consideration of plausible reforms in international investment agreements is within the context that the current regime disadvantages developing countries as capital importing states.



CHAPTER TWO: GLOBAL GOVERNANCE FRAMEWORK OF INTERNATIONAL INVESTMENT

2.1. INTRODUCTION

This chapter provides a critical analysis of the current International Investment Agreements (IIAs) regime and includes an examination of developments at multilateral level on the possibility of a multilateral agreement on investment. The development of international economic laws has led to more bilateral investment treaties (BITs),⁵⁷ including BITs between developed countries, between developing countries, between regions and between developed and developing countries. In this chapter, an analysis of the usefulness⁵⁸ of the current BITs structure for both developed and developing countries is also provided.

In recent years, many developing and developed countries have continued to attract more FDI.⁵⁹ However, as is argued in this mini-thesis, this proliferation of international investments forms part of the reason why a review of the multilateral investment regime is required, and why a MAI may be necessary.⁶⁰ The review would also ensure that the investment governance framework takes into account developing countries concerns.

In a way, the current global governance⁶¹ framework may perpetuate the protection of international investment at the expense of the development objectives of host countries. The main question is whether the governance framework of international investment needs to be reformed to take into account the interest of both the investor and host countries equitably. Hence, this chapter attempts to reflect further on challenges within the current BITs.

Hearson argues that the structures of double taxation treaties resemble or symbolise the era or climate⁶² of their conclusion.⁶³ For example, during the post-colonial era, the former colonised countries gave up their fiscal space or tax base

⁵⁷BIT and IIA are used interchangeably in this mini-thesis.

⁵⁸Usefulness as to whether the BIT structure leads to more FDI and whether developing countries development objectives are taken into consideration.

⁵⁹Åslund, A 'The World Needs a Multilateral Investment Agreement' (2013) [01](#).

⁶⁰OECD 1998 support of MIA, UNCTA and others.

⁶¹The phrase 'global governance or governance' appearing in this chapter and elsewhere in this mini-thesis refers to the legal framework prescribing rules between contracting parties to an international investment agreement.

⁶²Climate refers to international political, legal and economic environment.

⁶³Hearson M 'Tax treaties in sub-Saharan Africa: a critical review' (2015) Tax Justice Network African.

to their former colonisers in their DTTs.⁶⁴ This mini-thesis author posits that the international investment agreements (BITs) are similar to DTTs in that they also reflect the era during which they were concluded. The UNCTAD analysis of the 'reforming the International Investment Regime: An Action Menu' also reflects upon the influences on international investment agreements by various political, economic and legal eras, including the 1950-1964 era of infancy, the 1965-1989 era of dichotomy, the 1990-2007 era of proliferation and the 2008- era of re-orientation.⁶⁵ If the theory about BITs or DTTs reflecting their era or climate is true, then the question is whether the current international economic, political and legal climate necessitate a reformed and inclusive legal or governance framework for the BITs or even a MAI.

2.1.1. Investment in context

In the context of this mini-thesis, international investment is defined broadly. In essence, investment is a procurement of interests in assets with the aim of deriving economic benefits or holding capital appreciation from ownership or control of interests in the assets as defined in international accounting reporting framework. The understanding and description of investment also includes procurement or concession of intellectual property rights and other intangible assets which may comprise of the rights to extraction of natural resources.⁶⁶ Investment may be done by either buying physical assets or starting a business or purchasing securities in existing corporations.⁶⁷ The procurement of investment may be done by either individuals, corporations, governments or non-profit organisations.

The investment may be pursued by domestic investors leading, generally, to national (or investment host) regulations used to govern such investments or by investment may be purchased by international investors leading to international investment where international investment rules apply.⁶⁸

⁶⁴Hearson M 'Tax treaties in sub-Sahara Africa: a critical review' (2015) Tax Justice Network African.

⁶⁵UNCTAD, 'Reforming the International Investment Regime: An Action Menu' (2015) in World Investment Report 2015: Reforming International Investment Governance, 122.

⁶⁶Houde M 'Novel Features in Recent OECD Bilateral Investment Treaties' (2006) OECD International Investment Perspectives, 148.

⁶⁷International Financial Reporting Standard 3, Business Combination.

⁶⁸International Investment rules: could include BITs, Free trade agreements, international cooperation or any other regulatory or practice framework within the multilateral trade and investment system.

However, the international investment governance framework often prevails in the case of conflict with domestic rules. For example, many countries insist on BITs making provisions to use an International Centre for Settlement of Investment Disputes (ICSID) or contracting parties becoming members of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and other multilateral process, in the case of investment disputes as far as they exclude domestic rules or processes.

2.1.2. International investment

International investment refers to short or long-term purchase of assets-transfer of capital and direct investment in a host country by a foreign investor. This type of investment is also classified as FDIs. As mentioned earlier, international investments are usually governed by international agreement rules or agreements on the part of both the investor and investment hosting countries. In particular, the investment treaty law, with various and specific legal instruments being used, is related to BITs, Free Trade Agreements (FTAs) and other cooperative agreements.

2.2. INTERNATIONAL INVESTMENT GOVERNANCE STRUCTURE

In trying to understand the structure of international investment governance, it is necessary to determine whether the international legal structure has its roots and origins in customary international law. Kishoiyan's⁶⁹ analysis of BITs argues that international investment governance frameworks fail to resemble international customary law insofar as BITs are concerned about the contracting parties' interests. The Kishoiyan analysis further cited two International Court of Justice (ICJ) cases. Firstly, the Barcelona Traction Case⁷⁰ where the court observed that due to continuous growth in inter-state economic activities, it is fair to expect an international law on such activities. In essence, Kishoiyan argues that the proliferation of BITs has delayed the creation of a customary international law on Investment. Secondly, he discussed the Right of Passage Case⁷¹ where the court held that provisions of BITs upheld by contracting parties forms local customary law and may as well be applied to other states. However, the principles of BITs are common, although some BITs may as well

⁶⁹Kishoiyan B 'The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law' (1993) 14 (2) North Western Journal of International Law & Business, 372-73.

⁷⁰Barcelona Traction Case, 1970 I.C.J. Rep. 3.

⁷¹Right of Passage Case (India v. Port), 1960 I.C.J Rep. 4, 39.

be unique in serving the interest of contracting parties which differs from other BITs, as Kishoiyan notes.⁷² A multilateral agreement on investment may therefore be recognised as customary law, as opposed to the BITs.

Unlike other international economic activities, such as international trade, which is governed through a multilateral agreements of the World Trade Organisation (WTO), international investments are mainly governed by BITs between investor states and the investment host country or governed as part of free trade agreements (FTAs) and other cooperation agreements.⁷³ The use of BITs was, at its conception, meant as a measure to protect FDI during the post-colonisation era insofar as the former colonisers would use BITs with its past colonies.⁷⁴

The need to protect FDI may be traced back as early as the 18th century where the United States of America (USA) signed bilateral friendship treaties with particular countries in protection of their of interest.⁷⁵ The USA experience was similar to that of West European countries insofar as many of them concluded BITs with developing countries principally to protect the investments of the residents of European states.⁷⁶

According to UNCTAD,⁷⁷ but also based on growth in BITs,⁷⁸ international investments continue to be governed largely by BITs in the twenty-first century. In view of the proliferation of the BITs over the years, I argue that, among other aspects, there is a need for a more unilateral or multilateral agreement to eliminate duplication and complexities brought up by BITs as their numbers increased and some overlap. Despite some of the recent BITs being driven by developing countries, many developing countries are frequently faced with having to convince developed countries to conclude favourable BITs, for

⁷²Right of Passage Case (India v. Port.), 1960 I.C.J Rep. 4.

⁷³Sauvant K 'The regulatory framework for investment: where are we headed?' (2011) 15 Research in Global Strategic Management, 411.

⁷⁴Sullivan N and Salacuse J 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 (1), 69.

⁷⁵Åslund A 'The World Needs a Multilateral Investment Agreement' (2013) 03.

⁷⁶Vandeveldt, K 'A Brief History of International Investment Agreements' (2005) 12 *Journal of International Law and Policy* University of California at Davis.

⁷⁷UNCTAD *Reforming the International Investment Regime: An Action Menu* (2015) 122.

⁷⁸ UNCTAD *World Investment Report 2017 Chapter 1: Global Investment Prospect and Trends* (2017).

example according to UNECA many African countries' BITs are unfavourable to their development objectives.⁷⁹

A typical BIT covers various themes but common categories include the: scope of the treaty, conditions for the entry of the foreign investment, treatment of foreign investments, transfer of funds, operational conditions of the investment, protection against expropriation and dispossession, compensation for losses and investment dispute settlement.⁸⁰ also see.⁸¹ Despite the existence of all these themes, there is a sense in the literature that the three main common themes in BITs and FTAs are treatment of international investors or their investments (also national treatment (NT)) and most-favoured nation treatment (MFN) investment protection and dispute settlement.⁸²

Hence, these three themes are continuously debated from the point of view of both the investor - often developed country - and investment host - often developing country - point of view. For example, however difficult it may be, international investment hosts strive for BITs which do not discriminate against domestic investors and vice versa; those in particular that take into account the developmental objectives of investment hosts.

Basically, developing countries continue to be dissatisfied that international investment governance regime fails to reflect a reformed or evolved international economic and political community,⁸³ where international investments are necessary for both the investment of exporting and importing countries alike.⁸⁴⁸⁵ On a multilateral front, there is yet to be a global binding governance structure or framework or agreement for international investments, although the Agreement on Trade-related Investment Measures (TRIMS) has limited governance provisions for trade-related international investment. The lack of a

⁷⁹UNECA *Investment Policy and Bilateral Investment Treaties in Africa: Implications for regional Integration*, (2016).

⁸⁰UNCTAD, (2015).

⁸¹Sullivan N and Salacuse J 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46, (1), 79.

⁸²Åslund A (2013).

⁸³Reformed Economic and Political Economic - Unlike in the twentieth century, developing countries are looking to be allowed to participate in international investment regulatory framework on equal footing.

⁸⁴AU, Report of the meeting of trade senior officials. Eight ordinary session of the conference of the AU ministers of the trade (2013).

⁸⁵Berger A 'Do we really need a Multilateral Investment Agreement?' (2013) German Development Institute.

multilateral investment accord is attributable, in part, to various failed attempts at both WTO and OECD levels to set up a Multilateral Agreement on Investment (MAI). These attempts date back to the Bretton Woods conference in 1944, if not earlier, with the attempted establishment of International Trade Organisation (ITO) by the Havana Charter.⁸⁶ Due to failure by the USA Congress to ratify the Charter, it has never come into force.

The discourse on whether to establish a MAI followed another formal discussion in the late 1990s, where OECD member states negotiated a formal plurilateral with the intention that such an agreement would be adopted at a multilateral institution like the WTO. However, due to lack of consensus amongst the member states about the contents of the proposed MAI, the OECD proposed MAI failed to materialise. Vanderveelde⁸⁷ posits that the failure to uphold the then agreement is due to competing expectations and interests from OECD member states. In addition to Vanderveelde's argument, it is further posited that, the failure to uphold a proposed plurilateral agreement was due to the fact that most of the OECD member states lacked incentives to see through the agreement. This was due to the fact that most of the OECD member states economic interests in international investments were already protected within BITs investment hosts.

In 2015, UNCTAD published their developed 'investment policy framework for sustainable development'.⁸⁸ The framework was intended to be a guide for international investment agreements as they continue to grow. However, although the framework provides much needed guidance to improve the current BITs regime, its existence and success may be undermined by the fact that this policy framework is a non-binding policy document. However, in light of concerns failure to take into account developing countries' developmental objectives in many of their current BITs, the UNCTAD policy framework makes provision that 'new generation' international investments agreements should take into account the developmental prerogatives of developing countries.

When applied to those parties concluding new or reviewing investment treaties, the policy framework could prove to create an environment of shift in BITs as they

⁸⁶Havana Charter.

⁸⁷Vanderveelde, K 'A Brief History of International Investment Agreements' (2005) 12, 185-6.

⁸⁸UNCTAD, (2015).

are known. Again, this framework development by UNCTAD raises a question of how far BITs should have been expected to provide for investments aligned to the development objectives of investment hosts. In line with previous expectations by international investment host countries, BITs were supposed to provide for development objectives.⁸⁹ Hence it would be unfair if such expectations were at least not part of their BITs. On the other hand, perhaps BITs were meant all along to protect the interest of the international investment capital exporting countries, as they have been accused of doing with limited consideration of international investment importing countries.

2.3. MAINTAINING THE STATUS QUO- IIAS

It is clear from the analysis of the BITs literature that expectations vary towards setting up BITs from the points of view both of international investment exporting and the importing countries.⁹⁰ Moreover, there is a lack of conclusive evidence that BITs do lead to greater international investment Table 3.1 in chapter three provides some evidence about the lack of conclusive evidence regarding impact of BITs on international investment growth. International investment exporting states somehow expect that the BITs or FTAs provide protection for their investment from any potential expropriation by the international investment importing state, more so where the investor and host had had a colonial history prior to concluding the BITs.⁹¹ and also see.⁹²

The expectations of international investor states have been affirmed in the ICJ GL No 50/[1970]ICJRep 3, where the court held that the Belgium state had no legal right to claim losses for its citizen bond shares in the Barcelona Traction, Light and Power Company (BTLP)⁹³ in Spain. Moreover, only Canada, which is BTLP's state of incorporation, may claim for such losses against Spain. However, Canada has chosen not to pursue claims against losses suffered by its shareholders, including the Belgium residents. In essence, the ICJ has affirmed that, in terms of international law, investment host states are bound to provide legal protection to

⁸⁹UNCTAD, (2015).

⁹⁰Malik M 'South-South Bilateral Investment Treaties: The same old story?' (2010) IV Annual Forum for Developing Country Investment Negotiators Background Papers,

⁹¹Vandevelde K, (2005).

⁹²Malik M 'South-South Bilateral Investment Treaties: The same old story?' (2010) IV Annual Forum for Developing Country Investment Negotiators Background Papers, 1.

⁹³BTLP: Barcelona Traction, Light, and Power Company, Ltd.

international investors and their investments. Despite Belgium lacking legal standing to seek protection for its shareholders in *Canadian Company*, Spain should provide such protection to international investors.

The need for protection of international investment is founded in the post-colonial era,⁹⁴ also see,⁹⁵ or the “era of infancy and dichotomy” to use the phrase coined by UNCTAD,⁹⁶ insofar as the greater proliferation of BITs took effect after World War II.⁹⁷ By advocating for the protection of their investments, international investment exporting countries expected retaliation from the former colonies for repatriation of their investment as a form of claim against colonial exploitation. On the other hand, the expectations of developing countries had been such that concluding BITs would lead to more international investments in their countries.⁹⁸ However, BITs have often sought to provide for favourable terms for international investor exporting states.

Although there is inconclusive evidence of the effect of BITs on actual international investment behaviour,⁹⁹ many developing countries, including African states, have competed to have as many BITs as possible. This trend has passed despite concerns that the designs of some BITs may present disadvantages for many developing countries, including taking away the sovereign right to regulate investments, unfair dispute settlement measures, failure to promote and facilitate investment, irresponsible investments and inconsistent application of international laws.¹⁰⁰

The concern about the effect of BITs on developing countries' economies is in line with the African Union's 2013 Conference, which was also concerned that the continent continues to conclude more BITs than before.¹⁰¹ There is limited evidence of replication of the BITs proliferation in the actual investments and

⁹⁴Vandeveldt, KJ. (2005), 161.

⁹⁵Åslund A (2013), 03.

⁹⁶UNCTAD, (2015),121.

⁹⁷Salacuse J 'Historical Background of Trifitication' (2015) in, the Law of Investment Treaties Oxford International Law Library, 97.

⁹⁸Mosoti V 'Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?' 2005, *Northwestern Journal of International Law and Business*, 26, (1),103-104.

⁹⁹Carim X 'International Investment Agreements and Africa's Structural Transformation: A perspective from South Africa' (2015) 4 *Investment Policy Brief*, 3.

¹⁰⁰UNCTAD (2015).

¹⁰¹AU, Report of the meeting of trade senior officials. Eight ordinary session of the conference of the AU ministers of the trade (2013).

developments.¹⁰² According to Salacuse and Sullivan,¹⁰³ BITs have three main objectives: investment and market liberalisation, investment promotion and investment protection. Dispute resolution then overarches all these objectives.

These themes are also similar to those noted by Mosoti's three of four areas of BITs:¹⁰⁴ the scope of application of the treaty, market access, establishment and investment protection and dispute settlements. It is my argument that, as noted by Salacuse and Sullivan, the three BITs objectives fall short of recognising the host states of international investment, often developing countries, having expectations of more focus on their development objectives as noted in the UNCTAD 2015 report.¹⁰⁵

2.4. BITS OBJECTIVES

2.4.1. Investment and market liberalisation

Bilateral investment treaties, particularly between developed OECD states and developing countries are most frequently inclined to contain provisions guaranteeing investors and their capital access to the market of the investment host state with limited, if at all, government restrictions.¹⁰⁶ Developing countries are thus expected to adhere to the concept of 'market liberalisation', which is continuously debated in the field of economic development.

At the heart of the debate is the question of whether the liberation of markets is beneficial to the developing countries' economies. Does liberating the market ensure that the development objectives of the international investment host states are attained? One school of thought is that liberating markets lead to more and better competition because international investors bring newer technology and better ways of producing, thus leading to better goods and service for consumers.¹⁰⁷

¹⁰²AU, (2013).

¹⁰³Sullivan N and Salacuse J, (2005), 79.

¹⁰⁴Mosoti V, (2005), 133.

¹⁰⁵UNCTAD 2015, international investment host state expectations, taking away the sovereign right to regulate, unfair dispute settlement measures, failure to promote and facilitate investment, irresponsible investments and inconsistent application of international laws.

¹⁰⁶UNECA, Investment Policy and Bilateral Investment Treaties in Africa: Implications for regional Integration, (2016).

¹⁰⁷Chang HJ and Grabel E, 'Reclaiming Development: An Alternative Economic Policy Manual' (2004).

The other school of thought is that liberating the market lead to MNEs dominating domestic industries and, in many instances, leading to the destruction of domestic and, at times, infant industries. Of course, there are multilateral instruments¹⁰⁸ available to redress such ills. However, many developing countries lack money and other resources to use such measures to gain compensation.

In drafting BITs, the sections of the treaty that provide measures to ensure access to the host state market place an emphasis on the fairly accessible NT and MFN principles. Most of the BITs between developing countries and developed states (in particular OECD members) provide for NT and MFN.¹⁰⁹ Notably, Article 2 of the TRIMS also makes provision for these principles, although according to Article 4, developing countries are exempt from adhering to NT and MFN principles for a certain period.

It may prove challenging to allow for Article 4 of TRIMS insofar as BITs are often negotiated instruments and once signed, have a long-term lifespan. Some developing countries may as well lack the necessary human capital and strong institutions for these negotiations. They are also desperate to compete with fellow developing countries to attract FDI. All these issues make it virtually implausible if not impossible for developing countries to negotiate on a level playing field with international investment exporting states.

In a sense, international investors and their investments are to be treated in a similar way to domestic investors and, as required by the multilateral system, any preferential treatment conferred to any nations should be automatically conferred to all other international investors. Hence, the existing model for international investors investment provides for MFN and NT. Looking at it within NT and MFN, there is clearly a consensus at multilateral level for international investment and market liberalisation.

However, developing countries are often given enough time to first consider whether international agreement at multilateral level are beneficial to their own

¹⁰⁸The Agreement on Subsidies and Countervailing Measures, and Dumping and Antidumping Measures.

¹⁰⁹National Treatment: Imported and locally-produced goods should be treated equally — at least after the foreign goods have entered the market.

Most-Favored- Nations: Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favor (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members.

development. In a way, it is within the prerogative of the developing countries during the negotiation of the BITs to ensure that their development objectives and other public interest issues are taken into account. According to Houde,¹¹⁰ the issue of liberalisation in BITs by OECD member countries has become more prominent. It is thus my argument that developing countries development objectives will continue to become important when considering the liberalisation of markets and investment.

2.4.2. Investment promotion for the host

Against the backdrop of otherwise inconclusive evidence on whether signing BITs leads to international investments, the expectation remains that 'contracting parties' to an investment treaty will seek to promote investment. In the case of an agreement between developed and developing countries, it is often the latter holding the higher expectations that, by conceding to the demands of developed countries, they will be promoted as the preferred investment destinations by the developed countries.¹¹¹ Unfortunately, many developing countries are seen to go to even further lengths to attract international investment, including conceding or giving taxation relief, which leads to lower state tax revenue.¹¹² The implication is that the development of infrastructure and the creation of jobs brought about international investment is more important than realising higher tax revenue from international investment profits.

In its presentation of a 2015 investment report at an International Conference providing guidance for reform of international investment governance, UNCTAD noted that one of the lessons for reforming international investment rules is that the expectations for the BITs of being an investment promotion tool is misplaced.¹¹³ However, the Conference conceded that BITs could be used to serve multiple purposes within the investment host countries. For instance, they could provide certainty about the legislative environments for domestic investment or act to create domestic investment legislation if it does not already exist. The Conference further argued that instead of expecting BITs to promote

¹¹⁰Houde M 'Novel Features in Recent OECD Bilateral Investment Treaties' (2006) OECD International Investment Perspectives, 176.

¹¹¹UNECA, Investment Policy and Bilateral Investment Treaties in Africa: Implications for regional Integration, (2016).

¹¹²Chapter four of this mini thesis provides detailed analysis on the double taxation treaties and effect on concession by developing countries and their revenues.

¹¹³UNCTAD, World Investment Report 2015: Reforming International Investment Governance, (2015) 126.

investment for the developing countries, it is plausible for the international investment host states to promote development objectives within international investment.

In contrast to UNCTAD's guidance, Houde notes in an analysis of the BITs concluded by OECD member states with developing countries towards the end of the twentieth century that promotion of investment between the contracting states has become more prominent.¹¹⁴ Thus, international investment opportunities are commonly identified and shared with the member contracting states. However, the issue of investment promotion still fails to be an explicit and measurable requirement of BITs themes. Hence Appendix A,¹¹⁵ at the end of this mini-thesis gives the key themes covered in many of the OECD countries BITs.

Protection of investment is mentioned as an objective of these agreements, as in many of the BITs it is part of the preamble. It is worth noting that many developing countries make additional provisions (for example, DTTs favourable to international investor) to promote international investment despite such measures being detrimental to the host country economy and fiscal position. In a way, protection of international investment is emphasised in BITs, regardless of having other provisions favourable to international investments.

To take one case, due to the presence of international mining and extractive MNEs in Zambia, the country has both a BIT and double taxation treaty with Switzerland. The Zambia-Switzerland DTT prohibits the Zambian Taxation Authority from levying any withholding tax,¹¹⁶ on royalty, management fees and interest payment to Switzerland residents, also see.¹¹⁷ It has been argued that having this provision on the taxation treaty would limit Zambia's ability to levy taxes on Swiss MNEs. Sadly, Zambia has struggled for the past few years or so to meet its sovereign debt obligations due to insufficient government revenues.¹¹⁸

¹¹⁴Houde M (2006), 177.

¹¹⁵Appendix A: Substantive Issues covered in the OECD BIT Models.

¹¹⁶Withholding Taxation- Is source base tax retention, and in the international agreements it is levied on interest, dividends, management fees and others income. Withholding tax is also used as an anti-avoidance or anti-abuse or both measure by tax authorities.

¹¹⁷Hearson M 'Tax Treaties in Sub-Saharan Africa: A Critical Review' (2016) Tax Justice Network, 12.

¹¹⁸Phiri D, Zambia headed for sovereign debt crisis, *Zambian Watchdog*, accessed online at <https://www.zambianwatchdog.com/zambia-headed-for-sovereign-debt-crisis-fundanga/comment-page-1/>.

The point is not to suggest that the lack of government revenue in Zambia is entirely attributable to the DTT with Switzerland. However, the DTT with Switzerland disallows the taxation of withholding taxes, more so in the mining and extractive sector. which does affect the country's ability to raise much needed revenue. Considering the reliance on the mining and extractive industry by the Zambian economy, such taxes could provide relief for Zambia's government in meeting the country's spending commitments.

According to UNCTAD's report 'reforming the International Investment Regime: An Action Menu',¹¹⁹ the work of BITs is contrary to the expectations of many developing countries. BITs are seen to fail to promote international investments and should instead be used to promote other interests of the investment hosts, such as aligning with FDIs for development objectives. The negotiation process of the BITs is therefore a critical stage for many developing countries. Hence, once the agreement comes into force, it is almost impossible to pursue development interests.

2.4.3. International Investment Protection

The protection or fair treatment of international investment is one of the original goals of the IIA during the post-colonial era or 'era of infancy'.¹²⁰ According to UNCTAD, as different countries reach their freedom from colonies, their BITs increased that protected international investment. The protection of international investment might prevent or redress harm by expropriating international investment. In the Barcelona Traction case, the ICJ held that the protection of international investment by investment hosts is expected because. As a result, Spain should provide protection to international investment similar to the assurance given to domestic natural and legal persons. In this case, however, the Belgium government was found to lack *jus standi*.¹²¹ In a way, the court found that the Belgium lack legal standing to seek protection for shareholders in the Canadian company based in Spain. This is despite finding that Spain should provide protection of international investment to avoid creating insecurities in the international economic arena.

¹¹⁹UNCTAD, (2015), 126.

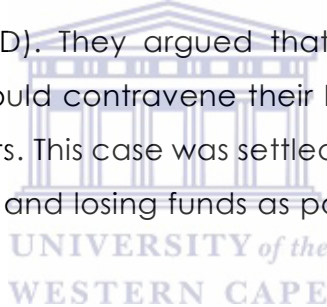
¹²⁰UNCTAD, (2015).

¹²¹Jus standi- legal interest.

To a greater extent, in redressing potential harm or the expropriation of international investment, BITs are aligned to dispute resolution as another form of guarantee given to international investors if dealt with at a multilateral institutional level.¹²² In this way, international investors may feel that disputes resolution process are unbiased.

The *Foresti Case*¹²³ provides evidence that the protection of international investment through the use of multilateral judicial systems is powerful indeed. In this case, South African government had introduced legislation¹²⁴ which would have seen the interests of international and domestic investors in the mining and extractive industry being forced to give away up to twenty-six per cent of their shareholding to local communities.

However, the international investor states of Luxembourg and Italy brought a suit against the South African government at the International Centre for Settlement of Investment Disputes (ICSID). They argued that the legislation proposed to enhance local objectives would contravene their BITs with South Africa and the protection of their investments. This case was settled without a ruling by the ICSID, with South Africa conceding and losing funds as part of the settlement in favour of the international investor.



Nonetheless, this case has led to a review of the current investment governance framework by the South African government with the result of withdrawing or not failing to renew most of the BITs with the EU¹²⁵ and introduction of domestic investment law. The development of a domestic investment legal framework in South Africa is still in the process. However, the legislation favors a domestic dispute settlement mechanism over those at multilateral level. The South African government argues that current international disputes fail to recognize the sovereign right to legislate issues related to its development objectives.

The protection of international investment is probably a well-developed aspect of the governance of international investment. Multilateral institutions, like the

¹²²Dispute resolution, this is could either be state-to-state or investor-to-state dispute resolution.

¹²³*Foresti case*: In the matter of an arbitration under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes: Case No ARB(AF)/07/1.

¹²⁴Legislation introduced: Mining and Petroleum Resources Development Act (MPRDA) which is part of Black Economic Empowerment (BEE).

¹²⁵Mellersh N, No longer a fair game? access online at <https://www.africanlawbusiness.com/news/5864-no-longer-a-fair-game>.

ICSID or ICS¹²⁶ are meant to resolve disputes related to international investments between international investors and investment hosts, as well as amongst contracting states. Based on the extent to which the protection of investment is addressed, at both multilateral level and that of the BITs, it is argued that this has also led to the proliferation of international investment agreements since the post-colonial era.

It would appear that multilateral institutions dealing with international investors' disputes about investments have been successful at protecting international investments. This success could be used as an example of the narrative arguing for multilateral agreement on international investment housed at one of the multilateral institutions.

According to UNCTAD, the introduction of ICSID has led to an enhanced protection of international investment since the mid-1960s towards the 1980s. This occurred in the same period where an initial attempt to form a multilateral agreement on investment also failed.¹²⁷ One can therefore posit that had attempts to strengthen protection of international investment at multilateral level failed, then this failure would have provided enough incentive to force a better discussion towards a MAI with interest in both capital exporting and importing countries. In a way, international investment exporting countries lack an incentive to bargain with investment hosts. Therefore, dispute resolution mechanisms could have been necessary measures employed by developing countries to advocate for MAI.

2.5. CONCLUSION

It is clear that over the years BITs have increased between developed and developing countries and this proliferation may have led to duplication of some BITs or created a complex of international rules of international investments. This may be the explanation of why there has been an incentive to enhance discourses querying whether multilateral agreements on investment are necessary. The analysis provided in this chapter has revealed the importance of the international investment regulatory framework.

¹²⁶ICSID or ICS- International Centre for Settlement of Investment Disputes or International-Court-System.

¹²⁷UNCTAD, (2015), 122.

However, it is also clear that BITs continue to disadvantage capital-deprived countries which mostly happen to be developing countries. Bilateral investment treaties have continued to provide international investors with guarantees of protection for their investments, while making further provision for the use of a multilateral system in place for any disputes. However, these guarantees and a multilateral dispute resolution system may be at the expense of the development objectives of many international investment host countries.

The analysis of the international investment regulatory framework shows that in their conception during the post-war period, the legal framework was very much influenced by the need to protect international investments from potential harm by host states. However, the need to protect international investment may perhaps still be necessary today. Nonetheless, there are other interests that ought to be considered for a fairer international investment law, such as the development objectives of developing countries. Perhaps an international investment legal framework should expand development objectives by deliberately ensuring that, as UNCTAD suggests, sustainable development could also be pursued through a multilateral accord. The lack of conclusive evidence as to whether more BITs lead to more FDIs certainly strengthens the case for consideration of MAI. Moreover, UNCTAD has also noted the need to reform the current international investment regulatory framework.

Chapter three continues the analysis of the international investment governance framework with a focus on the African continent. The development of BITs on the continent will be analysed and further areas identified that support the development of MAI. As an additional instrument to promoting international investments in the continent as part of BITs, the advantages of double taxation treaties will also be highlighted before we provide a substantive analysis of DTTs in chapter four.

CHAPTER THREE: INTERNATIONAL INVESTMENT AGREEMENTS IN AFRICA

3.1. INTRODUCTION

Like other developing countries, African countries have seen an increase in FDI¹²⁸ although its full potential is still to be realised.¹²⁹ Foreign direct investment records in 2014 show a growth of more than four per cent from just below three per cent over the ten-year period for the African region.¹³⁰ However, there are concerns that despite the growth in international investment inflows in Africa, there is a more negative net-effect between investment inflows and profit remittance outflow for many African countries.¹³¹ In essence, money removed as return-on-investment by international investors significantly exceeds the money introduced as investment.

In this chapter, an analysis of the BITs within the African continent is provided, with particular emphasis on areas for improvement to limit fiscal losses for developing countries. As part of our analysis of the BITs in the African continent, regional economic agreements, rules and their investment models will also be analysed.

The growth of international investment agreements throughout the continent is, in part, encouraged by a continued increase in both the consumer market and levels of return on investment enjoyed by international investors.¹³² However, it is unclear how much growth in BITs in the continent provides more opportunities for more FDIs, although many international investors continue to use available BITs to protect their interest in investments to the continent.¹³³ There is currently a lack of consensus from various economic analysis literature - econometric studies in particular - as to whether the available evidence supports a significant association between signing BITs and FDI.¹³⁴

¹²⁸UNCTAD, (2015).

¹²⁹UNECA, (2016).

¹³⁰UNECA, Investment Policy and Bilateral Investment Treaties in Africa: Implications for regional Integration, (2016).

¹³¹UNCTAD, Economic Development in African, Rethinking the Role of the Foreign Direct Investment, (2005), 34.

¹³²UNECA (2016).

¹³³UNECA (2016).

¹³⁴Table 3.1. Summary of studies looking at the effect of IIA on FDI. In one column can be found studies that suggest significant association of correlation between increasing of BITs and FDI, and the other column shows studies suggesting a lack of correlation between increase in BITs and FDI. The last column shows specific studies showing African development of Bits and FDI. From these studies, it is clear that there is not conclusive evidence, even more so that most of these studies use similar datasets when looking at the study dates.

The lack of a conclusive consensus on the relationship between increased BITs and growth in FDIs is also replicated in African countries. However, many African countries are more concerned about a lack of consideration of their sovereignty in policy development and need to combat taxation base erosion in setting BITs with international investors. Hence, a multilateral agreement at a multilateral institution (s) may be well positioned to provide a much sought after fairer investment agreement regulatory framework.

Table 3.1. Summary of studies looking at effect of IIA on FDI

General Studies on IIA effect on FDI		African exclusive studies on IIA effect on FDI
no-Proof that IIA lead to FDI	Proof that IIA lead to FDI	no-Proof that IIA lead to FDI vs Proof that IIA lead to FDI
UNCTAD -2008: No statistically significant relations BIT and FDI	Egger and Pfaffermayer- 2004: BITs have a positive effect on FDI (developing countries)	Banga- 2003: Lack statistical significant relations between BITs and FDI without other incentives
Hallward- Driemaier- 2003: BITs do not generally increase FDI (developing countries)	Salacuse and Sullivan - 2005: Strong positive effect of US BITs on FDI (developing countries)	Grosse and Trevino- 2005: BITs have a positive effect on FDI (developing countries)
Tobin and Rose-Ackerman- 2005: No statistical relations between BITs and FDI (developing countries)	Busse et al. -2008: BITs increase FDI flows to developing countries	Gallagher and Birch-2006: No statistical significant relations without other incentives
Aisbett -2009: no evidence that BITs increase FDI flows	Kerner -2009: significant positive relationship between BITs and FDI flows to developing countries	Egger and Merlo-2007: did not find any evidence suggesting that BITs have a significant influence on FDI
Yackee -2008: no meaningful evidence that strong BITs lead to higher FDI.	Berger et al. -2010: existence of a BIT increases bilateral FDI to developing countries	UNCTAD- 2009: no evidence that BITs increase FDI flows
Yackee- 2010: did not find any evidence suggesting that BITs have a significant influence on FDI		UNECA-2016 Empirical evidence unable to demonstrate association between BIT and FDI

Sources: author, using UNECA and UNCTAD datasets, 2017

3.2. IIA IN AFRICA

In its 2013 report of the meeting of senior trade officials held in Addis Ababa, the AU¹³⁵ raised concerns about a failure to attract more FDI even though more BITs were being concluded. The AU concerns were also directed at the international investment governance regime for failing to support the continent's development objectives.¹³⁶ As a result, the AU requested a critical analysis of the international investment regulatory framework to ensure these BITs contribute

¹³⁵AU, Report of the Meeting of Trade Senior Officials. Eighth Ordinary Session of the Conference of AU Ministers of Trade, (2013) Addis Ababa, 21–23 October.

¹³⁶AU (2013).

towards the continent's vision of industrialisation programmes.¹³⁷ At the heart of the AU's concerns is the extent to which current drafts of BITs are mainly based on OECD model investment¹³⁸ between non-African countries and within intra-African investment treaties.¹³⁹ Yet this model investment has failed to address the continent's developmental objectives.

Non-African countries entering into BITs with African countries are beyond OECD member countries, being that countries like China, India and other countries have continued to enter to these agreements. Of course, these countries are considered developing countries according to the World Bank, but they continue to increase their BITs in the African continent beyond some of their OECD counterparts. The growth of BITs between African countries and non-OECD or developing countries further fits with Berger's argument that a need to develop multilateral agreement on investment could gain momentum considering the economic strength of some developing countries like China and India.¹⁴⁰

The growth of BITs with non-OECD member countries is expected to surpass that of OECD countries. However, the BITs model investment used with African countries has its origin with the OECD model, even if both China and India also have their own BITs model investment treaties while many African countries use them.

3.2.1. Agreement on Trade-Related Investment Measures - Africa

The TRIMs guidelines to the investment measures are related to trade in goods. TRIM applies to the forty-two African countries which are members of the WTO, in particular Article 2 on the application of NT and quantitative restrictions and Article 8 on the consultation and dispute settlement. However, Article 4 provides for developing countries to deviate from the provisions of Article 2. Hence, all African member states are developing countries and may opt for to use Article 4. Therefore, in concluding BITs, African countries may choose to deviate from NT provision on trade-related investments to cater for their development objectives.

¹³⁷AU, (2013).

¹³⁸OECD model investment, (2013).

¹³⁹AU (2013).

¹⁴⁰Berger A 'Do we really need a Multilateral Investment Agreement?' (2013) German Development Institute.

However, according to UNECA,¹⁴¹ in their attempt to attract or compete for FDIs, African countries continue to follow international norms of protecting international investment, while also providing preferential treatment at the detriment of their own development. It is clear that following international norms on BITs provides consistency and certainties to international investors. However, African countries could also benefit from making their investment treaties counterparties aware of their concerns about developmental objectives at a multilateral level.

The reform policy framework proposed by UNCTAD also encourages developing countries to take advantage of multilateral provisions, and do so by aligning their BITs or models to their development initiatives.¹⁴² However, the UNCTAD framework is neither enforceable nor prescribed. Thus it would be fair to expect that the new generation of BITs regime between developed and developing countries would take into account development issues; unless, of course, a multilateral investment accord was to be established at a multilateral level enforcing adherence to development principles.

3.2.2. OECD-Framework and Africa BITs

In 1976, the OECD developed a declaration of its member countries, predominantly developed countries, to improve the investment climate, encourage the positive contribution MNEs can make to economic and social progress.¹⁴³ This declaration forms the legal basis although non-binding of the OECD international investment treaty models. The declaration was reviewed in 2011 to reinforce the OECD and the MNEs commitments to provide guidelines for MNE, NT, conflicting requirements and international investment incentives and disincentives.

The declaration is an open agreement¹⁴⁴ to non-OECD countries and some African countries, Morocco, Tunisia and Egypt, who are signatories to the declaration. Having this declaration shows a commitment by OECD countries to a fairer investment environment for both international investors and hosts. However, given the lack of consideration for developing countries objectives, the

¹⁴¹UNECA, (2016), 08.

¹⁴²UNCTAD, (2015), 126.

¹⁴³1976 OECD declaration on international investment.

¹⁴⁴Open agreement, a non-binding agreement by OECD member states.

OECD may need to go beyond having a declaration or making the declaration to be legally binding and provide specific measures for redress in cases of non-compliance by its member states and their MNEs.

Under the OECD declaration guidance to MNEs, there are specific taxation contribution responsibilities prescribed for the MNEs, including that the “MNE should comply with both the letter and spirit of the tax law and regulation in countries in which they operate”, which includes providing information as required by the tax authorities. The emphasis on compliance to taxation rules is an important guideline for OECD MNEs, as many have been accused of abusing taxation practices globally.¹⁴⁵

However, since the declaration is non-binding, making its compliance the prerogative of the member states defeats the purpose. In this case, the unbinding nature of the regulatory mechanism may incentivise MNEs from OECD to opt for compliance at a time suitable to them; more so, as far as repatriation of their capital is concerned.¹⁴⁶ In concluding their BITs with the OECD member countries, African countries may use these declarations as a guideline. However, the fact that the declaration is non-binding mainly encouraging good practice by MNEs.

In addition to this OECD declaration, the Multilateral Investment Guarantee Agency (MIGA) also provides support to as many as fifty-three African states,¹⁴⁷ while MIGA is meant to provide support and promote FDI in developing countries. Accordingly, like many developing countries African countries use various measures to attract international investments in their economies, including use of BITs and DTTs.

African countries have access to these OECD and MIGA provisions to strengthen the governance of international investments. However, in spite of these provisions, many African countries' investments treaties with OECD countries are still unfavourable to the investment hosts. These consistently unfavourable investment treaties may be explained by BITs negotiated between the two states with their own interests in mind. However, power dynamics or bargaining power

¹⁴⁵OECD Developing a Multilateral Instrument to Modify Bilateral Tax Treaties - Action 15 - 2015 Final Report (2015).

¹⁴⁶OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report Action 06 - 2015 Final Report (2015).

¹⁴⁷MIGA; Multilateral Investment Guarantee Agency.

in these negotiations and desperation to attract more international investments by African countries continues to produce BITs that do not appeal to the hosts' development needs.

The *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/0,¹⁴⁸ demonstrate the effect of unfavourable BITs for developing country's objective. In that, South Africa could not pursue its development objectives as result of BITs it had with developed countries.

3.3. REGIONAL INVESTMENT TREATIES- OR FTAS

Individually and collectively, African regional economic communities (RECs) are meant to provide governance structure for international investments within the regions and the continent. The RECs have also signed their regional treaties and cooperation that deals with the investment issues regionally. For example, the South African Development Community (SADC) Protocol on Finance and Investment, the Economic Community of West African States (ECOWAS), a supplementary Act adopting Community Rules on Investment and the Modalities for their Implementation, the Common Market for Eastern and Southern Africa (COMESA) – or the Common Investment Areas and the East Africa Community (EAC) – and the East African Community Model Investment Code.

Every region has a governance framework for international investment: investment agreements binding to member states, regional free trade agreements with investment chapters and investment agreement models. The EAC-Model Investment Code, was developed in 2006, with Part II¹⁴⁹ Section 5 of the code 'National Treatment and Non-discrimination' providing for NT and Non-Discrimination for international investments.

Section 14, 'Protection from Deprivation of Property', then provides protection from expropriation of assets, unless such expropriation is in the public interest. Section 15, 'Settlement of Disputes in Respect of Registered Investment' provides that dispute for investment be resolved using national laws and processes, with the exception of disputes related to investments that have certificates branding them significant investments according to the government process, where such

¹⁴⁸Case No ARB(AF)/07/1.

¹⁴⁹EAC Model Investment Code, 2006: Part 11 (Section 5): Right of Establishment, Establishment Procedures, Operation, Protection and Benefits of an Enterprise.

investments disputes shall be in accordance with the rules of the International Centre for the Settlement of Investment Disputes (ICSID).

According to the code, the dispute mechanism is also meant to promote international investment with the regions by an agency under section 15 and 18 of the model. The EAC-Model Investment Code is not legally binding, as it serves as a model for national legislation.¹⁵⁰

In the ECOWAS common investment market vision¹⁵¹, Articles 5, 6 and 8 provide for protection of international investments under the titles of national treatment, most-favoured-nation treatment and expropriation respectively. Article 33 provides for dispute resolution between the investor and host state using the national process and courts, failing which disputes should be resolved using a national process and courts, while the ECOWAS court of justice should be approached as the last arbiter.

As with model investment for other regions, the COMESA Investment Agreement for Common Investment Area¹⁵² provides for adherence in dealing with international investment disputes in Article 6,¹⁵³ then providing for national treatment, most-favoured-nation treatment and expropriation in Articles 17, 19 and 20 respectively. In addition to the protection provisions in the other mentioned regions, the SADC Protocol for Finance and Investment (FIP),¹⁵⁴ provides for the right for member states to regulate for public interest under Article 14. The amended the SADC FIP, 2016 is in-force, it further limits the compensation to international investors in case of expropriation of their investment, if such expropriation is in the public interest.

Looking at the regional model investment frameworks of Africa's main economic regions, one can posit that they are mainly modelled around the OECD model investment model framework with less consideration given to the enhancement of development objectives. Indeed, UNCTAD's¹⁵⁵ reform report notes that BITs negotiation should be in line with developing countries' development goals. It is

¹⁵⁰UNECA, Investment agreements landscape in Africa, (2015).

¹⁵¹ECOWAS Common Investment Market Vision, (2008).

¹⁵²COMESA Investment Agreement for the COMESA Common Investment Area.

¹⁵³Article 6, International Multilateral Agreements.

¹⁵⁴SADC protocol for finance and investment, as amended in (2016), though its status of entering into force is unclear.

¹⁵⁵UNCTAD, (2015).

more worrying that the regional model investment frameworks were all concluded within the 21st century. Nonetheless, they still reflect the 20th century investment model as far as developing countries development mandates are concerned.

The assumption would be that concerns related to the lack of inclusion of development objectives and dealing with issues of taxation base erosion and more favourable terms for African countries will be prioritised. However, the investment codes for the regional models are primarily to provide a governance framework for international investments with fellow regional member states (model investment provides for non-regional member state).

The international investors make use of treaty shopping¹⁵⁶ to benefit investors from developed or OECD countries with regional agreements. For example, due to its low tax regime and as a member of the two SADC and COMESA economic regions, Mauritius can attract MNEs to set up regional offices and invest in the African continent. The setting-up of bases in Mauritius by MNEs certainly benefits the BITs of the Mauritius regional and other preferential treatments awarded within these regions.

Despite having regional model investment agreements, concern remains within the African continent that a continental framework on investment would perhaps be desirable for simplicity, avoiding duplications and minimising fiscal losses.¹⁵⁷ The continental governance framework on investment may also ensure that African countries development objectives and other issues like lack of 'strong institutions' and capacity to negotiate international agreements are addressed.

Many African countries lack the sufficient and necessary human capital, skills and strong institutions to negotiate, uphold and implement international agreements. These weaknesses were also echoed by Busse et al.¹⁵⁸ that developing countries should rely on BITs as a form of institutional support in case where countries lacks necessary 'strong institutions'. However, reliance on BITs as a guiding framework where domestic laws are either weak or non-existent was initially refuted by Mary

¹⁵⁶Treaty shopping: an instrument of international tax planning by International Taxpayers seeking to set base at a jurisdiction with low tax rate.

¹⁵⁷UNECA, Investment agreements landscape in Africa, (2015).

¹⁵⁸Busse M, Königer J and Nunnenkamp, P 'FDI Promotion through Bilateral Investment Treaties: More Than a Bit?' (2010).

Hallward-Driemeier.¹⁵⁹ Developing countries should not use BITs to supplement the role played by internal institutions to avoid sole reliance on international legal frameworks. Mary Hallward-Driemeier argues that reliance on BITs as the main legislative framework often delays developing countries in establishing their own domestic institutions, while exposing those countries to abuse by international exporting countries.

The other main issue that is not addressed well within the international investment governance framework are taxation issues; in other words, how would a return on investment be taxed by the international investment hosts. Of course, the idea is not to isolate international investments from domestic legislation like taxation. Thus, unlike domestic investors international investors rightfully repatriate their profits and other assets. It is therefore argued that international investment requires a unique taxation structure as currently provided by the international taxation law.

In the African regional models and the protocols on taxation measures, not all the regional legislative investment frameworks make specific mention of compliance to taxation measures by international investments in particular. All the regional agreements make provision that compliance to domestic laws like taxation should be prioritised before international profits and assets are transferred out of the host countries. However, under Article 20 and 23 the COMESA makes specific provision for taxation measures to which international investment ought to adhere. In a way, this requires compliance to regional laws over those of municipal laws. Hence, the SADC FIP¹⁶⁰ makes the provision that DTT between member states and other countries aims to eliminate the probabilities of double taxation amongst members.

3.4. GOVERNANCE AND DOUBLE TAXATION TREATIES

As binding international agreements, double taxation treaties are used by international investors and host states to eliminate and remove potential double taxation¹⁶¹ insofar as income and other assets in international transactions are not

¹⁵⁹Hallward-Driemeier M 'Do Bilateral Investment Treaties Attract Foreign Direct Investment?'.
¹⁶⁰SADC-FIP, the original and amended version provides guidance on taxation issues for its members, with the amended version emphasising on double taxation treaties with the region.
¹⁶¹Brauner Y, Pistone P, BRICS and the Emergence of International Tax Coordination (2015) IBFD.

double taxed between the investment host state and investor country.¹⁶² Accordingly, the DTTs are intended to lead to trade-offs between loss in taxation revenue by international investment host state (often developing countries) with the potential to attract further FDI from the international investor (often developed countries) as a return for fiscal loss.¹⁶³ As with BITs, conclusive evidence is lacking as to whether these DTT arrangements lead to more FDI from developed to developing countries. However, various studies suggest there is compelling evidence that the current DTT regime leads to abuse of international tax laws, in particular leading to taxation base erosion for many countries.¹⁶⁴

The findings of a study by Neumayer¹⁶⁵ suggest that, using their OECD model tax convention experience, middle-income developing countries that have signed DTTs with the USA have increased investment more than low-income group countries. Arguably, the model of DTT used between the contracting parties affects the developing and developed states differently. For example, the UN model benefits developing countries more than the OECD model.

In essence, double taxation agreements are governed by two main common conventions: the OECD Model Tax Convention and UN Model Tax Convention. International investor states and investment hosts use these two common taxation treaty models globally to eliminate the possibility of double taxation. These models are discussed in detail in chapter four. To summarise, the models are mostly similar as the UN model was developed based on the OECD model being the oldest model. However, a key difference between the models is that in the OECD model, the taxpayer (international investor) income and other assets is taxed from their residence base¹⁶⁶ while in the UN model, the taxpayer (or

¹⁶²Barthel F, Busse M and Neumayer E 'The impact of double taxation treaties on foreign direct investment: evidence from large dyadic panel data', *Contemporary Economic Policy* (2009) 28 (3) 369.

¹⁶³Steenkamp L 'The Permanent Establishment Concept in double Tax Agreement Between Developed and Developing Countries...' (2014) *IJEER* 548.

¹⁶⁴OECD/ G20 BEPS project reports.

¹⁶⁵Neumayer, E 'Do double taxation treaties increase foreign direct investment to developing countries?' (2007), 43 (8) 1501.

¹⁶⁶Residence base: this simply refers to the taxpayer (investor) being taxed from their resident. In practice, this issue has proved difficult to determine as many conditions are used by both the investors and investment hosting states.

investor) is taxed from the source base¹⁶⁷. Basically, when countries enter into a DTT, they use one of the two as a model to draft and develop their DTT.

The OECD model is used by their member states¹⁶⁸ in their DTTs with developing countries. This model is preferred insofar as most of the international investors are residents of OECD countries. In that sense, the investor states' tax base would be virtually guaranteed to be high even though the business activities take place in other jurisdiction - the investment host state. This is probably the most simplified way of describing the situation, but it still gets to the point.

As mentioned earlier, chapter four provides a detailed analysis of these tax models. Considering the need for fiscal space, many developing countries would prefer to use the UN model as that guaranteeing a higher taxation base for their countries, since the investor is taxed on the source which is often, the developing countries' area. However, in fear of losing out on potential and further FDIs, where the intention should otherwise be to incentivise international investors to provide more FDIs, developing countries often settle for the OECD model tax convention to satisfy the preferences of international investors. However, there is a sense that some developing countries do prefer using the OECD model tax convention despite having a choice to use the alternative UN model.

The common use of the OECD model tax convention between developed and African countries is demonstrated in a record of the DTTs between African countries and OECD countries. The use of DTTs within African countries has not been as prevalent as its use beyond the continent between African and non-African countries. The DTT regime was introduced in international law around the same period as the BITs regime become popular; that is, in the 1960s during the post-colonial era¹⁶⁹ also known as era of infancy and dichotomy.¹⁷⁰

¹⁶⁷Source base: In contrast with the residence base, source base refs to taxing of the taxpayer (investor) from the source of generating income. Basically, income is taxed by the investment hosts, mostly developing countries.

¹⁶⁸OECD member states: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, German, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, South Korea, Latvia, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States of America.

¹⁶⁹Post-Colonial area: A period after the end of colonialization between less developed and developed countries. This era refers the effect on the former colonies.

¹⁷⁰UNCTAD, (2015).

However, there are fewer DTTs by African countries in comparison with the BITs in the continent. Although the League of Nations had already developed principles of international tax in their model convention in 1927.¹⁷¹ According to UNCTAD, by the year 2016 there were more than 2750 BITs and 2894 DTTs internationally.¹⁷² In these statistics, African agreements account for 854 BITs and 400 DTTs. From this analysis, it is clear that DTTs are less prevalent than BITs in Africa because, internationally, the number of BITs compares fairly well with DTTs agreements.

Despite the proliferation of intra-African BITs, there are fewer intra-African DTTs as many of these tax treaties are either concentrated within fewer African countries,¹⁷³ while more treaties are concluded with non-African and developed countries. This is ironic, insofar as most African countries are in need of fiscal space if they are to deal with continued demands for development. Hence, proper international taxation laws that protects an African countries' tax base would provide for much needed fiscal space.

Of course, there are complexities that justify low DTTs in the African continent; for example, the lack of strong institutions or taxation or legal authorities and human resources capacity to negotiate and enforce DTTs by many African states. Taxation is inherently a complex concept and BITs do not necessarily lead to more international investments. However, the lack of proliferation of DTTs similar to BITs in the continent may, in part, be beneficial to international investors, in that the assets and profits may be repatriated without hurdles like paying taxes. This has proven able to reduce the tax base of the investment hosting states and, on the other hand, inflate the tax bases of the investor's resident state tax base.¹⁷⁴

Certainly, failure to generate enough tax revenue by developing countries from international investment has not pleased African countries. Hence, the AU has recently raised concerns around the lack of favourable international economic law for its member states.¹⁷⁵ Many studies¹⁷⁶ are commissioned to redress the

¹⁷¹Avi-Yonay R 'A perspective on supra-nationality in tax law' in *BRICS and the Emergence of International Tax Coordination* (2015) IBFD 33.

¹⁷²UNECA, (2016),16.

¹⁷³DTTs intra-Africa- Mauritius, South Africa and Tunisia account for most of the DTTs in the African continent.

¹⁷⁴Neumayer E, Do double taxation treaties increase foreign direct investment to developing countries? 2007, 8.

¹⁷⁵AU Conference of Trade Ministers (2013).

¹⁷⁶AU studies commissioned to find a solution to the problem of the tax abuse.

problems by stretching both international investment law and taxation regimes in the continent.

The OECD and G20 Base Erosion and Profit Shifting (BEPS) project may also have heeded the concerns of the AU and other parties about abuse of international tax legislative regime by jointly commissioning a study coined the 'BEPS Project in 2014',¹⁷⁷ whose recommendation reports were published in 2015. In one of the reports that supports the development of multilateral instrument to modify taxation treaties,¹⁷⁸ it is noted that some provisions in the current taxation treaty regime perpetuate taxation base erosion, for example, use of resident-taxing approach over source-taxing approach with developing countries. In some instances, DTTs do not lead to non-taxation at all, leaving both investor resident and investment host states without any tax revenue.

Many countries, including developing countries, are expected to adopt the BEPS and G20 BEPS projects when negotiating the DTTs.¹⁷⁹ However, it is worth noting that the BEPS project was criticised for its failure to include developing countries in decision-making process, Africa, notably, is in the process of reviewing the tax treaty regime,¹⁸⁰ insofar as such processes should have been conducted at multilateral level entailing that the victims of the poorly negotiated DTTs are predominately developing countries - mining and extractive industries in particular.

3.4.1. Inter-Regional DTTs

As an attempt by the African continent to strengthen governance in its international taxation regime, many inter-regional double taxation agreements are currently in force.¹⁸¹ Out of 400 DTTs in the African continent, 85 DTTs are inter-regional taxation treaties in the continent.¹⁸² These intra-regional treaties are meant to harmonise taxation with intra-regional investments between member states. The intra-regional treaties might seem few compared to international statistics, but it is noted that some regions are inter-linked, for example, COMESA

¹⁷⁷BEPS project 2014.

¹⁷⁸OECD 'Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report' (2015) 15-17.

¹⁷⁹OECD *Action Plan on Base Erosion and Profit Shifting* (2013).

¹⁸⁰Oguttu, A (2016).

¹⁸¹UNECA, (2016),

¹⁸²UNECA, (2016), 16.

has both members of SADC and EAC like Kenya has both EAC and COMESA. Therefore, since some of the regions have other agreements and cooperation, like free-trade agreements or custom unions, one would expect few tax treaties will be in place.

However, the question is whether this is sufficient and serves the purpose of considering the proliferation and review of old BITs in the continent. COMESA-EAC-SADC have more DTTs at 32 than other intra-regional consensus, with Arab Maghreb Union (AMU) having fewer intra-regional treaties at 4.¹⁸³ This points to the concern that DTTs are concentrated in certain countries or regions in the African continent and that lack of capacity and institution by other African countries would benefit from multilateral agreements.

There are more than fifteen countries in each intra-regional DTT, making a stronger case for these treaties as gaining in strength over bilateral treaties. Of course, the intra-regional tax treaties are used by their member states and these agreements are between developing countries in Africa. Unlike the DTTs with OECD or developed countries, the intra-African regional taxation treaties are drafted based on the UN model taxation convention.

Table 3.2. Intra-regional DTTs in Africa

REGs	BITs between REC members	DTTs between REC members
CEN-SAD (28 countries)	61	14
COMESA (20 countries)	27	11
EAC (5 countries)	1	0
ECCAS (10 countries)	0	0
ECOWAS (15 countries)	13	0
IGAD (8 countries)	2	0
SADC (15 countries)	18	24
UMA (5 countries)	8	4
COMESA-EAC-SADC (26 countries)	45	32

Sources: UNCTAD, 2016

¹⁸³Table 3.2 Intra-regional DTTs in Africa, adapted from the 2016 UNCTAD report gives comparative statistics on intra-regional taxation treaties.

3.4.2. African countries with DTTs

Fewer African countries¹⁸⁴ make use of both BITs and DTTs to govern their international investments and to harmonise taxation issues between both the African and non-African countries. According to the UNCTAD database as cited by UNECA,¹⁸⁵ there are more African-Africa double taxation treaties than for Africa-to-non-African countries.¹⁸⁶ This disparity could either reflect the willingness to negotiate more with fellow African countries, although Mauritius is seen as a taxation haven for many MNEs and has more DTTs than those motivated by these MNEs, or that the African-African DTTs are mainly used as part of continental or regional requirements. There are more than two-hundred DTTs between thirty-five African countries, with Mauritius, South Africa and Tunisia collectively making up more than a third of all DTTs in the continent.¹⁸⁷

However, there is a sense that such agreements fail to lure in more international investments as at least one of the main objectives.¹⁸⁸ The question is whether conclusion of these agreements is in line with the developing countries developmental objectives insofar as potential and harmful implications are often underplayed, such as taxation base erosion. The other point is whether developing countries leaders are coerced into concluding these treaties without sufficient understanding of the fiscal and technical implications for their countries.¹⁸⁹

In essence, the process of negotiating and concluding the DTTs at the 'political level' is always required to be within the context of taking into account development objectives, as that would also ensure that the FDIs attracted also support African countries' development paths.¹⁹⁰ It is argued that some of the DTTs between Africa and developed countries lack economic substance

¹⁸⁴African countries with 6 or more DTTs: Algeria-10, Botswana-6, Ivory Coast-6, Egypt-7, Mauritius-26, Senegal-8, South Africa-28 and Tunisia-19.

¹⁸⁵The UNCTAD database was cited in the UNECA, report, (2016).

¹⁸⁶ Non-African countries in this case refers to OECD countries.

¹⁸⁷African countries with 6 or more DTTs: Algeria-10, Botswana-6, Ivory Coast-6, Egypt-7, Mauritius-26, Senegal-8, South Africa-28 and Tunisia-19.

¹⁸⁸UNECA, (2016), 16.

¹⁸⁹UNECA, (2016), 16.

¹⁹⁰Kasoko E 'Why and how Africa should extend its network of double taxation treaties with China' (2014) available at <https://africlaw.com/2014/03/17/why-and-how-africa-should-extend-its-network-of-double-taxation-treaties-with-china/> (accessed 17 April 2017).

because there is no international investment flowing between both parties to the treaties.¹⁹¹

3.5. CONCLUSION

African countries continue to receive international investment from both developed or OECD and other developing countries like China, including intra-African investments. The growth of international investment is expected to increase further as the continent continues along its development path. The AU has also noted that the continent's development is dependent on investment that aligns with development objectives. Hence, to ensure alignment of international investment with the continent's development objectives, the AU is looking to reform governance framework of international investment flowing into the continent.

In awakening these concerns, African economic regional bodies have reformed their model international investment treaties and have recently reviewed their regional investment agreements. Most of these governance frameworks are aligned to international norms and make use of multilateral institutions for further guidance; in particular, over dispute resolution, including those in OECD models. There is clearly support for African countries and regions to make use of their municipal courts in dispute resolution. However, provisions for multilateral system are available in most of the international investment models.

The analysis of these frameworks has shown that there is limited consideration of the specific provisions included to address African continent development issues. These provisions may also include combating taxation base erosion leading to loss of much needed government revenue.

Loss of tax revenues with the intent to attract more international investment is one of the key problems facing African international investment regulatory models. The use of double taxation treaties is a fairly new concept in many African countries due, in part, to lack of human capital and strong institutional capacity. However, even those African countries using DTTs to limit double taxation of international investors' profits continue to lose fiscal space. The African continent may hence benefit from a multilateral investment agreement that is overseen by

¹⁹¹Oguttu, A (2016),18.

a multilateral institution; more so if fiscal loss resulting from international investment is also combatted at multilateral level.

Chapter four provides an analysis of double taxation regimes and agreements to identify areas within the regime that leads to the taxation base erosion due to international investments and related activities. Loopholes identified in the double tax regimes will then be used to provide recommendations to strengthen both the case for a multilateral investment agreement and the need for the double taxation regime to be improved to account for developing countries' development objectives.

Here, three case studies are used as reference for in-depth analysis in some of the specific areas of international taxation rules to demonstrate the weakness and opportunities for strengthening international legal frameworks.



CHAPTER FOUR: DOUBLE TAXATION TREATIES AND IIAs

4.1. INTRODUCTION

In this chapter, an analysis of the various models of double taxation treaties (DTTs) and how they are adopted in different countries is provided, with particular focus on developing countries, specifically African one. The analysis here provides further consideration of DTTs susceptible to abuse by MNEs, at the behest of developing countries as international investment hosts. In strengthening an argument about the weakness in the current DTT regime, a historic overview about the development of International law of investment and taxation treaties is also given.

This chapter provides further analysis of the recent OECD and G20 BEPS project outcome that has led to a development of a multilateral instrument (MLI) to modify double taxation treaties.¹⁹² In conclusion, the chapter attempts to explore areas of weakness in both DTTs and BITs to argue for a stronger role to be played by multilateral governance institutions to provide a multilateral legal framework that strengthens international economic law in this regard.

As far as international investment is concerned, the assumption¹⁹³ and understanding of the purpose and role of the double taxation treaties (DTTs) and BITs, continues to receive criticisms from scholars¹⁹⁴ also see,¹⁹⁵ and further see,¹⁹⁶ developing countries and, in recent times, developed countries.¹⁹⁷ In particular, the backdrop of inconclusive evidence shows that the current models of BITs and DTTs have led to more FDIs for developing and African countries. Despite a lack of conclusive evidence, the international investment outcomes for AU member states continue to disappoint.¹⁹⁸

Furthermore, despite the lack of consensus in the literature whether having more DTTs lead to increased international investments, it would appear that the DTTs

¹⁹²OECD and G20 BEPS Project, the project.

¹⁹³DTT assumptions: Amongst others include that they facilitate free movement of capital, goods and services.

¹⁹⁴Dagan T, (2000).

¹⁹⁵Daurer V and Krever R, (2012).

¹⁹⁶Hearson, M, (2015).

¹⁹⁷OECD and G20 BEPS 2014 Project has seen OECD and G20 countries criticising the failure by the current taxation treaty regime to alleviate abuse of international tax rules leading to non-taxation.

¹⁹⁸UNECA, (2016), 10.

between the OECD countries and developing countries has led to higher taxation base erosion for the latter; or, at least, some DTTs between developed and developing countries have led to a lower tax base for developing countries (often international investment hosts).

On the other hand, the fiscal losses to the developed or mainly OECD countries seem to be more neutral compared to the developing-to-developed.¹⁹⁹ Although at times, according to the OECD and G20 BEPS project, the DTTs lead to non-double taxation²⁰⁰ and at times non-taxation due to MNEs manipulating the international tax rules to avoid tax liability even at their residence.²⁰¹ Hence, the BEPS project recommended a review is, by BEPS project, of the current double taxation treaties to deal with the abuse of international taxation rules. These manipulations are endured more by international investment hosts, often developing countries, than developed countries or OECD member countries.

In principle, a double taxation treaty offers cost-and-benefits for contracting parties.²⁰² Apart from those main intended objectives, amongst the benefits²⁰³ brought about by the DTT includes ensuring compatibility of taxation laws between 'contracting parties', improving taxation revenue collection and increasing supply of taxpayer information, reducing opportunities for non-compliance with taxation laws, increasing international investor certainties and improving relations between international investors and residence and host-counties.²⁰⁴ Some of the costs, including loss of fiscal space, has also reduce the tax base for the net-capital importers due to the concessions allowed within international taxation rules.

¹⁹⁹Dagan T 'The tax treaties myth' (2000), *International Law and Politics Journal*, 32 (939) 43-51.

²⁰⁰Non-Double Taxation relates to an outcome of abuse of international tax rules by MNEs, whereby both the residence and source countries are unable to impose taxation on the international investors' profits on income.

²⁰¹OECD 'Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report' (2015) 15-17.

²⁰²Contracting Parties, include both the residence state- country that is the resident of the international investor who is more often than not a developed economy and net capital investment exporter - and host state - a country of the international investment host who is often a developing country and often net capital investment importer.

²⁰³DTT main objectives are to eliminate or reduce double taxation and encourage cross-border investments.

²⁰⁴Dagan T, (2000),46.

4.2. MODEL OF TAXATION TREATIES- UN AND OECD MODEL TAX CONVENTIONS

The introduction of international income tax law dates back to before World War I, when many countries started levying taxes on income. The prevalence of jurisdictions imposing income tax increased as international investment transactions grew after the First World War.²⁰⁵ At the initial stage of developing international tax rules and use of customary international law, many countries opted for unilateral approaches of taxing foreign income and capital. In the unilateral approach, governments use domestic legislation and policies as tools to offer tax-credit for foreign taxes paid.²⁰⁶

Although there are still many countries using the unilateral approach in dealing with taxation accrued to cross-border transactions, including the USA,²⁰⁷ even more countries have opted to use international taxation rules (treaties predominately). The Vienna Convention on treaties does apply to taxation treaties,²⁰⁸ as Article 2 provides that a treaty is an international agreement between states that is governed by international rules. In her criticism of the taxation treaties weakness,²⁰⁹ Dagan has supported the use of the unilateral approach to serve the purpose²¹⁰ meant to be addressed by double taxation treaties. This argument responds to concerns that the current international taxation rules and investment treaties benefit more the net-capital exporting states than the net-capital importers.

There are various conventional taxation treaties in existence, including estate and inheritance taxation treaties,²¹¹ a multilateral convention on mutual assistance in tax administrative matters,²¹² taxation on Information exchange agreements (TIEAs) and other international agreements with tax treatment provisions. The double taxation treaties convention models of the OECD and UN are the two main taxation treaties adopted by many countries compared to other international

²⁰⁵Daurer V and Krever R 'Choosing between the UN and OECD Tax Policy models: An African Case Study' (2014) AJICL,04.

²⁰⁶Dagan T, (2000), 05.

²⁰⁷Marian O 'Unilateral Responses to Tax Treaty Abuse: A Functional Approach' (2016) University of Florida Law Faculty Publications, 1160-16.

²⁰⁸Convention on the Law of Treaties, Vienna, 23 May 1969.

²⁰⁹Dagan T, (2000), 05.

²¹⁰Double taxation treaties intend to provide certainty to the MNEs in terms of international taxation rules used to impose taxes on profits and other income.

²¹¹ United States-Switzerland Estate and Inheritance Tax Treaty ,1959, 9/17/51.

²¹²ARNOLD, B, (2015).

treaties dealing with tax matters. In essence, these are more influential as many countries' taxation treaties are based on one of the two.

These two model taxation conventions were developed in different years to guide international tax law. The OECD model taxation convention was developed in the earlier 1960s, while the UN model taxation convention is based on the OECD model and was created around late 1980s, coming into effect around the late 1990s. The development of these models was preceded by events and the interests of both OECD countries and developing countries within the UN respectively.

The OECD model taxation convention has succeeded other similar treaties, which were considered either unfit for purpose or failed to address the interest of capital exporters over those of capital importers or vice versa. The earlier taxation model, the Mexico model, which was developed during the Leagues of Nations era in 1943, allowed or conferred source-countries or international investment hosts²¹³ taxing-rights over international investment transactions²¹⁴ contrary to the current OECD model taxation convention.²¹⁵ Due to dissatisfaction on the part of developed or OECD countries about the Mexico model, in particular that taxing rights were given to capital importers over the exporters, another model was created later in 1946 to be known as the London Model which became common used for more than twenty years.

The London Model's implementation success was attributable to the model satisfying the concerns of the developed countries raised during Mexico model, by granting taxing rights to the resident countries,²¹⁶ which were predominately capital-exporting countries.²¹⁷ Post-World War II, around the late 1950s and earlier 1960s saw the development of the OECD model taxation convention, mainly based on the London Model and partly adopted some aspects of the Mexico Model.

²¹³Source or Investment hosts: In the context of this paper referring to the developing countries; in particular, African countries, as they are mainly net-capital importing states.

²¹⁴Taxing-rights: In the current OECD mode tax convention, the taxing rights are granted to the resident countries, often capital-exporting countries.

²¹⁵Daurer V and Krever R, (2014), 04.

²¹⁶Residence countries - These are countries that are mainly exporting capital, in the context of the paper, also to be developed countries or OECD countries.

²¹⁷Daurer V and Krever R, (2014) 05.

The OECD model tax convention is intended to support its member countries' objectives,²¹⁸ as this model limits the rights to tax international profits by source-countries or net capital-importing countries compared to Mexico Model.²¹⁹ However, it would seem the model was meant to be used amongst the OECD members anyway.

If the argument holds that the OECD models are meant for its members, then the fiscal losses of using residence-based approach would be relatively nil since OECD member countries would be source-countries with importing capital, or residence-countries when exporting capital to fellow OECD member countries insofar as OECD member states would be both importing-and-exporting capital.²²⁰ The OECD model taxation convention is still in place in the twenty-first century, although the recent OECD and G20 2014 BEPS project is intended to reform these rules to address the base erosion and profit shifting (fiscal losses) experienced by many countries both developed and developing.

The post-development of the OECD model taxation convention era in the 1960s saw a proliferation of DTTs amongst the OECD members, although non-OECD member states were also part of concluding taxation treaties with OECD countries based on their model tax convention. In the main, the objective of reforming the OECD model tax convention is perpetuated by continuing growth in international tax competition, leading to greater non-double taxation in many instances. The tax competition led to more and more countries lowering their corporate taxes. Hence, this led to MNEs moving their residences to low tax rate jurisdictions. The irony for tax competition is that the low tax regime does not translate into more decisions to increase investment either.²²¹

²¹⁸The OECD Model Tax Convention is based on residence tax base; since most of the OECD members are capital exporting countries, their MNE profits are taxed in their residents.

²¹⁹Daurer V and Krever R 'Choosing between the UN and OECD Tax Policy models: An African Case Study' (2014) AJICL, 04.

²²⁰Residence-based tax treaty amongst net-capital exporting countries often leads to nil as far as fiscal losses. This is due to the fact that both treaty contracting parties are incentivised to invest in each other. However, the negative effect exists in case where the other contracting party is a net-capital importing in that the exporter- the capital export would benefit from residence taxing rights.

²²¹A study of OECD tax regimes by the economist journal argues that lowering corporate tax rates doesn't translate to more investment either - The Economist, Getting the most out of business taxes-changing rates does not make a lot of difference, 2017, accessed online at: <http://www.economist.com/news/finance-and-economics/21723407-changing-rates-does-not-make-lot-difference-getting-most-out-business>.

The late 1960s not only saw growth in DTTs, but according to UNCTAD,²²² the failure of the customary international law (CIL) to contain international investment disputes and a lack of appetite to reach consensus about the MIA proposed in the Havana Charter,²²³ also led to the proliferation of international BITs.²²⁴ This take-off and growth in both BITs and DTTs era was also dubbed the post-colonial era, as this was the same period where the post-decolonisation of many developed countries entered into international investment agreements with their former colonies.

South Africa is also an example supporting the notion of the post-colonial period, insofar as more than eighty-five per cent of the country's taxation treaties were concluded post-apartheid, which was in 1994.²²⁵ Many reasons were cited for the BITs, but certainly one of the main motives for these treaties was, and it is still to a greater extent today, to protect the international investor or former colonisers interests. There were more BITs between developed (those from Europe) and developing countries; in particular those from Africa, Asia and Latin America, during the era of mid-1960s and late 1980s.²²⁶

It was in this era is that DTTs also grew substantially. It is argued that here international investors, in particular those from OECD countries, were willing to export their capital to developing countries. The question is whether this proliferation of the BITs suggests correlation or causality between flows of investment and certainty brought about by international rules provided by both DTTs and BITs. Or is this mainly indicative of invertible process of post-war era where international trade and industrialisation were expected to increase?

The OECD model tax convention continues to influence taxation treaties, including between developed and developing countries. The latter countries have also continued to raise concerns regarding their tax revenue losses associated with the use of the model. This concern may well be misplaced in that the OECD model was never meant for developing countries but mainly to function between OECD members states.²²⁷ At this point, the role of multilateral governing institutions or instruments would

²²²UNCTAD 'World Investment Report 2015: Reforming International Investment Governance' (2016) 122-124.

²²³Havana Charter, (1948).

²²⁴UNCTAD, (2016) 122-124.

²²⁵Hattingh J 'South Africa' in 'the BRICS and the emergence of international tax coordination' (2015)237.

²²⁶Havana Charter, (1948).

²²⁷Daurer V and Krever R, (2014) 05.

come into question. Hence, the Mexico Model, which was seen to be biased towards developing countries, remained within the then multilateral institution of governance, Leagues of Nations. Developing countries raised concerns (as they still do today) about their losses of tax revenue brought about by the taxation concessions in the OECD model.²²⁸

The UN established a team of tax experts (Ad Hoc Group of Experts) from both developed and developing countries to develop an alternative model tax convention after the late 1960s.²²⁹ The work of this ad hoc group led to the development of the UN model tax convention, which primarily attempts to balance the taxing rights of the taxation treaties on both developed and developing countries, although the UN model is seen to favour giving taxation rights to source compared to residence countries. Accordingly, the UN model tax convention has been in place since the late 1980s.

Between 1997 and 2013, there were more DTTs signed that included UN model provisions, more so by developing countries. According to Arnold, in the study commissioned by UN to assess the uptake of the UN model tax convention, there was more uptake of the share taxation rights on the provision of royalties than most of the other twenty-seven provisions.²³⁰ However, there were few countries that allow source countries' rights to tax royalties and this included the treaties between developing countries.

The provision on share taxation rights in Article 12 (1) and (2) of the UN Model Tax Convention reads:

- (1) Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*
- (2) However, such royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, the tax so charged shall not exceed... per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the royalties. The competent authorities... (Emphasis added)*

In this assessment, out of more than 1800 taxation treaties assessed, more than eighty-per cent of the taxation treaties gave low taxing rights for royalties to source or capital

²²⁸Daurer V and Krever R, (2014).

²²⁹Arnold, J (2014).

²³⁰Arnold J 'Tax Treaty Monitor, The UN Model in Practice' (2014) IBFD, 129.

importation countries.²³¹ It is ironic that many developing countries still opt to use the OECD model tax convention when entering into taxation treaty with OECD countries or relinquish their taxing rights despite using UN Model tax convention. This begs the question of whether developing countries use the OECD model tax convention as an incentive to attract more international investments despite inconclusive evidence to support the notion, as noted by UNECA.²³²

On the other hand, is it due to the lack of necessary skilled negotiators or strong institutions on the part of developing countries as noted by the UNCTAD,²³³ and Busse *et al*²³⁴ and by Daurer and Krever.²³⁵ As for these countries it is rather easy and accessible to opt for OECD approaches and rely on their capital exporting countries institutions. Perhaps, both points raised are applicable as reasons for the continued use of OECD model tax convention despite its disadvantage to non-OECD member states and for developing countries in particular. As much as the issue of which model tax convention is in use is complex, the role of multilateral governing institutions, like the WTO or UNCTAD, has never been so important and profound in setting up the international governance framework of international investment and taxation.

The international rules on taxation, like the BITs, are very much crafted or developed in terms of the perspectives of the capital exporter against the importer. This view is reflected in the development of the model tax convention itself, with the OECD aligned to its members by giving taxing rights to capital exporters and the UN supporting capital importers who are largely developing countries.²³⁶ The OECD and G20 countries have, since 2014, embarked on a process of redressing the weakness within the treaty regime that has led to a loss tax revenue due to the abuse of international taxation rules and aggressive tax planning.²³⁷

This OECD and G20 process is also considered to be a taxation treaty reform process.²³⁸ In particular, this process also deals with taxation treaty abuse that

²³¹Arnold, J (2014), 129.

²³²UNECA, (2016).

²³³UNCTAD, (2015).

²³⁴Busse, M, Königer J and Nunnenkamp, P, (2008).

²³⁵Daurer, V and Krever, R (2014), 06.

²³⁶Arnold J 'Tax Treaty Monitor, The UN Model in Practice' (2014) IBFD.

²³⁷Brunton L 'The OECD/G20 Base Erosion Profit Shifting Project- Informed perspective' available at <http://www.thesait.org.za/news/255947/The-OECDG20-base-erosion-and-profit-shifting-BEPS-project--an-informed-perspective.htm> (accessed 01 November 2017).

²³⁸Oguttu, (2016).

lead to non-taxation. However, this process is criticised for failing to include developing country representation, more so being that the net-capital importers in these countries have suffered more revenue losses as a result of double taxation treaties abuses compared to developed countries or net-capital exporters,²³⁹ also see.²⁴⁰ For this process to be seen as more representative, the role of the UN and other multilateral institutions may have to be strengthened.

Looking at the trends and origins of the international taxation rules, it is argued that the importance of international economic law is never in doubt, more so as far as international investment and taxing rights thereto are concerned. However, the continuous contest for taxing rights and, by extension, regressive redistribution of taxation revenue from developing to developed countries certainly cast doubt with regard to the effectiveness and relevancy of current international investment and taxation framework.

4.3. DOUBLE TAXATION TREATIES – AFRICA - KENYA, UGANDA AND SOUTH AFRICA

4.3.1. Issues for developing countries

The Kenyan and South African double taxation treaties with developed and OECD countries²⁴¹ dates back to their respective pre-(1960s) and post-colonial (1970s) areas. In contrast, Uganda's double taxation treaties network were mainly concluded towards the end of the twentieth century and the beginning of the twenty-first century.²⁴² In addition to having concluded taxation treaties after the development of the UN model, Uganda has in recent years embarked on a process of reviewing its double taxation treaty structures which stand in contrast to the Kenya and South African taxation treaties as predominately modelled around OECD taxation convention.²⁴³

Uganda has even gone to the length of delaying further ratification of new taxation treaties as part of reforming its taxation treaty regime. The delays are due to concerns from the Ugandan government that the state is unable to raise much needed tax revenues from some of the MNEs taxpayers, being that DTTs

²³⁹Hearson M 'Developing Countries' Role in International Tax Cooperation' (2017), 04-06.

²⁴⁰ Oguttu A 'Tax base erosion and profit shifting – part 2: a critique of some priority OECD action points from an African perspective – preventing excessive interest deductions and tax treaty abuse' (2016).

²⁴¹Double tax treaties within the African countries is relatively newer concept.

²⁴²Hearson M 'Tax Treaties in sub-Saharan Africa: a critical review' (2015), 09.

²⁴³ActionAid 'Double Taxation Treaties in Uganda Impact and Policy Implications' (2014).

were making it difficult to do so by either giving away the taxing rights to other jurisdiction or leading to non-double taxation of international profits.²⁴⁴

The process of reviewing the taxation treaty regime in Uganda is expected to guide and reform the country's future treaty negotiations with other jurisdictions. Uganda is one of the African countries that has been affected by abuse of DTTs by MNEs.²⁴⁵ The abuse of taxation treaties with Ugandan has taken place despite its treaty regime being amongst the newest in the continent.

A common double taxation treaty model often covers various themes. However, in addition to a preference of the 'residence'²⁴⁶ treaty model, OECD countries also ensure that three specific features are indicated in their taxation treaties: withholding taxes, permanent establishment and tax sparing. Withholding tax is a provision that gives clarity in terms of imposing taxes on passive income of the international investors. In essence, withholding tax is levied at source base for the international investors, this is despite the taxation treaty being based on resident base. The principle of withholding tax is meant to discourage tax avoidance by international taxpayers using passive income to reduce their tax liabilities.

Permanent establishment (PE), is a criterion used to determine whether the income derived from international investment, or part thereof, qualify to be classified or taxed at source base. The PE principle is important for developing countries where OECD model tax convention is used, or where the residence-based taxing rights approach is adopted in a treaty. The permanent establishment principle or criterion or both are often used to assess how to shift profits and assets from source countries.²⁴⁷ Tax sparing²⁴⁸ is an arrangement in the DTT or any other international agreement between two contracting states where any tax incentives or tax relief allowed to the international investors should be further passed on by the resident state when imposing residence tax on the said international investor's income.²⁴⁹

²⁴⁴Hearson M, (2015),09.

²⁴⁵Uganda DTT abuse include: Treaty shopping and round tripping. Treaty shopping.

²⁴⁶Residence base tax treaty: Residence DTT model tax refers to OECD model tax conventions, where income and other assets are taxed at resident of the international investor as opposed to the 'source' base or at investment host, also similar to UN model tax convention.

²⁴⁷Hearson M, (2015),21-22.

²⁴⁸Nilsen K *The Concept of Tax Sparing* (unpublished LLM thesis, University of Oslo (2013), 8-10.

²⁴⁹Hearson, M, (2015), 12.

a. Withholding tax

As mostly net-capital importers, or as source countries,²⁵⁰ many African countries have mastered provisions of withholding taxes on dividends, interest payments, management fees and royalties paid to international investors. The withholding tax is often used as an anti-abuse measure²⁵¹ and as a special tax rate often levied below the normal income tax rate and frequently differing from domestic taxes. Provisions for imposing withholding taxes on passive income paid to non-residents – dividends, interest, royalties and management fees - are made in double taxation treaties.

The Ugandan government has on average withheld taxes of about fifteen per cent while both their domestic corporate and individual income tax rates are more than twenty-five per cent.²⁵² Uganda's withholding tax in taxation treaties has declined over the years from forty-per cent in the 1970s to fifteen per cent now.²⁵³ The Ugandan rates of withholding tax is similar to that of South Africa being fifteen per cent while Ugandan domestic corporate and individual income tax rates are thirty and forty per cent respectively,²⁵⁴ while South Africa's individual and corporate tax rates are forty-five and twenty-eight per cent respectively.²⁵⁵ However, Kenya has lower withholding tax at less than ten-per cent while domestic tax rates for corporations and individual taxpayers are both at thirty per cent.²⁵⁶

The point being made here is that developing and net-capital importing countries are constantly reducing their withholding taxes rates, mainly to attract international investments. However, these reductions are due to continuous expectations from the international investors or pressure from international tax

²⁵⁰Source country, where cross-border transactions and assets takes place but are taxed from the international investor's resident as opposed to source.

²⁵¹Hearson, M, (2015), 17.

²⁵²KPMG tax rate online tool, available at <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online.html> (accessed 15 May 2017).

²⁵³Hearson, M, (2015).

²⁵⁴KPMG tax rate online tool, available at <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online.html> (accessed 15 May 2017).

²⁵⁵ Mandy K 'South Africa Corporate- Withholding Taxes' available at <http://taxsummaries.pwc.com/ID/South-Africa-Corporate-Withholding-taxes> (accessed 28 November 2017).

²⁵⁶KPMG tax rate online tool, available at <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online.html> (accessed 15 May 2017).

competition,²⁵⁷ with the expectation that lower tax rates would lead to more FDIs. Most of the African countries, let alone the three cases referenced in this mini-thesis, are also forced to reduce their withholding taxes in attempts to attract more international investments.

b. Permanent establishment (PE)

Many developing countries are source-tax states, but in their negotiations in DTTs settle for the OECD resident-tax model. The PE clause provides for the criteria used by source-tax countries for imposing taxes on some income and profits meant for international investors. Thus, for the source country to use PE rule to impose taxes on the international investor's income and profits, four criteria are to be satisfied for the construction or installation of the project. Ultimately, these criteria are intended to establish whether assembly project or supervisory activity could give rise to PE and whether provision of service through employees give rise to PE or whether provision of services through employees amounts to PE.²⁵⁸

According to Dauer and Krever,²⁵⁹ the OECD tax convention model makes a concession for PE. However, the concession still requires the source countries to assess whether a given business activity qualifies for PE. It is therefore argued that, as already mentioned earlier in this chapter and elsewhere in this mini-thesis, many developing countries lack the necessary human capital and strong institutions to conduct these complicated PE tax assessments.

Moreover, MNEs in many instances taxpayers manipulate the process, make it more difficult to discover and determine as to whether the business activity qualify as PE, while this point is also noted in the BEPS project.²⁶⁰ Of course, there is merit to using such a mechanism in determining PE, but developing countries will continue to endure fiscal losses if their right to tax income derived from their sources is unprotected at a multilateral level, more so in a MAI.

In employing the four criteria noted, Uganda has its taxation treaties set a criterion period of six months for the building and business activities subject to PE taxation. This period is aligned to the criteria set out in the UN model tax

²⁵⁷International Tax Competition: Where many jurisdictions, more so within developing countries, compete to become the lowest tax rate regime.

²⁵⁸Daurer, V and Krever, R (2014), 07.

²⁵⁹Daurer, V and Krever, R (2014), 07.

²⁶⁰OECD and G20, (2015).

convention. As a second criterion, the Uganda government has then to be able to ensure that it has the rights to impose tax on international investor activities, those specifically related to supervisory activities.

Like Uganda, South African taxation treaties also use the four criteria although the period for international investors to be regarded as having PE varies between six months and twelve months. OECD countries prefers lengthy periods to allow them more time for exemption. Kenya²⁶¹ also uses a six-months-or-more period to determine whether income is derived or accrued for domestic taxation.²⁶²

Despite having to use this six-months-or-more period to determine whether the income accrued for domestic taxation or as its source, the period is too long in other instances. In other words, some international investors can conduct business activities and generate income before a period of six months ends. As one of the Zambian taxation authority arguing against a six-month PE period puts it,

*“The Chinese can do things in three months”*²⁶³

Like the other measures meant to be anti-abuse measures for international tax laws, I may therefore argue that the PE provision currently used is insufficient to deter the abuse of international tax rules by MNEs taxpayers. In their hope that they would attract more international investment, African countries are the worst affected by the abuse.

c. Tax Sparing

Many of the DTTs with Africa countries provide for tax sparing; in particular, those based on the OECD model tax convention. According to Hearson,²⁶⁴ one of the objectives of the proliferation of DTTs between EU and African countries is to increase tax sparing for EU states. Of course, this is due to the pass-through effect that such concessions in taxation treaties confer to the international investor's residence country.

²⁶¹Muia F 'Permanent Establishments in Kenya' available at <http://www.globaltaxnetwork.co.uk/company/latest-news/permanent-establishments-in-kenya.html>. (accessed 29 May 2017).

²⁶²Hamzaoui R, Munyandi K, Boon S 'Withholding Tax Risks and PE Risks in Egypt, Kenya, Morocco and Turkey' available at <https://www.ibfd.org/Consultancy-Research/Withholding-Tax-Risks-and-PE-Risks-Egypt-Kenya-Morocco-and-Turkey#>. (accessed 30 May 2017).

²⁶³Hearson, M, (2015) 21.

²⁶⁴Hearson, M, (2015).

The effect of tax sparing for the net-capital importers (including African countries) is that more tax incentives are to be given to international investors. Such tax incentives lead to international investment host countries foregoing taxation revenue. However, if African countries were also capital exporters, like most OECD countries, then the effect of tax sparing would be set off against similar relief received from other capital importers.

In a separate context, tax incentives are used to attract more investment, including international investments.²⁶⁵ Tax sparing enables the international investors to enjoy tax incentive benefits in both their home or resident country.²⁶⁶ Uganda's taxation treaties thus provide for tax sparing. The Ugandan Ministry of Finance has argued that it is necessary for a tax incentive to be passed through to the international investor by their resident countries; failing which the resident country would benefit from the loss of Ugandan tax revenue.

However, it is worth noting that the OECD bloc has argued against the current form of tax sparing in recent publications.²⁶⁷ The concern is that tax sparing leads to a rapid loss of tax base by those awarding taxation incentives; and more importantly, losses to its member countries. In a way, tax sparing encourages a bad behaviour where international investors demand tax incentives from their investment hosts in the DTTs. In this regard, according to the United Kingdom's approach to taxation treaties, Hearson argues against tax sparing being used to benefit UK MNEs without the necessary and obvious benefit of securing additional international investment from countries that are awarded such incentives.²⁶⁸

Before 2005, almost all of South Africa's DTTs provide for tax sparing for international investors. Subsequent to 2005, South African tax authorities abandoned the tax sparing clause in its double taxation treaties, as it was considered to be unfavourable to South African taxation policies.²⁶⁹ It is argued that, like other developing countries, having tax sparing in South African DTTs is meant to encourage more international investment.

²⁶⁵Hearson, M, (2015).

²⁶⁶Nilsen KR *The Concept of Tax Sparing: A General Analysis, and an Analysis and Assessment of the Various Features of Tax Sparing Provisions* (unpublished LLM thesis, University of Oslo, 2013).

²⁶⁷Owens J 'Tax Sparing, A Reconsideration' available at <http://www.oecd.org/tax/treaties/2090389.pdf> (accessed 29 November 2017)

²⁶⁸Hearson, M, (2015).

²⁶⁹Hattingh J 'South Africa' in 'the BRICS and the emergence of international tax coordination' (2015) 259.

However, South Africa also plays the role of an international investor to some of the African countries.²⁷⁰ Therefore, South African MNEs might have also benefited from the tax sparing arrangements with countries like Mauritius, for example. However, it is still unclear as to whether the awarding of tax incentives or concessions like tax sparing will lead to more international investments for net-capital importer countries. Table 3.1 in the chapter three shows lack of conclusive evidence as to whether incentives in international agreement like BITs, lead to increased investment.

Despite lack of conclusion on causality between FDI inflows and taxation incentives, international investments to the South African economy continue to decline.²⁷¹ However, in their studies of the effect of tax sparing on the flow of international investment between OECD countries and developing countries, Azémar and Dharmapala conclude that a year where DTT with tax sparing comes into force generally sees an increase of FDI of at least thirty per cent compared to prior years.²⁷²

Kenya, like Zambia and Uganda, has in recent years reviewed its DTTs with various countries, for example Uganda in 2014 stopped signing new DTTs and started reviewing current tax treaties²⁷³. However, contrary to Zambia and Uganda's review of their taxation treaty regime to deal with abuse by MNEs leading to loss of tax revenues, the objective of Kenya's review is more to use the DTTs to attract FDIs. Amongst other areas of review, Kenya's DTT was to reduce tax rates for international investors and this is intended to increase international tax competition.²⁷⁴

The Kenyan DTTs recently reviewed include those of Mauritius, United Kingdom, Germany, Canada, Denmark, Norway and Sweden. These treaties now have a

²⁷⁰South Africa more than fifty- per cent of outward international investment in 2015 went to African and Asian countries, according to 2016 International investment report published by UNCTAD, 12-13.

²⁷¹UNCTAD, (2016),40.

²⁷²Azémar C and Dharmapala D 'Tax Sparing Agreements, Territorial Tax Reforms and Foreign Direct Investment' (2015) 01.

²⁷³ActionAid 'Double Taxation Treaties in Uganda Impact and Policy Implications' (2014).

²⁷⁴Olingo A, 'Kenya revises double taxation agreement to attract investors' (2016) available at <http://www.theeastafrican.co.ke/business/Kenya-revises-double-taxation-agreement-to-attract-investors/2560-3307782-aq7415/index.html> (accessed 03 June 2017).

tax sparing provision. In a sense, Kenya is hoping to attract more international investments by offering a tax sparing concession to its taxation treaties.

In line with previous discussions of the adverse effects of concessions given by developing countries in double taxation treaties, I further argued that many developing countries fall prey to the trick of giving concessions like tax incentives. In some instances, these concessions lead to loss of tax revenue with the expectation that such losses would be compensated by an increase in international investment stock. Perhaps failure to give these taxation incentives could lead to low international investment levels. However, I argue that a lack of multilateral agreement or framework on international investment and international taxation incentivises developing countries to give away unaffordable concessions.

4.4. OECD AND G20 BEPS PROJECT- 2014 “THE BEPS PROJECT”

In 2014, G20 and OECD finance ministers and national²⁷⁵ leaders met to agree on an approach to intensify efforts that redress issues related to base erosion and profit shifting (BEPS) and aggressive tax planning. Concern about the abuse of international taxation rules means that many countries are seeking to close tax revenue leakages because the global economy is yet to recover the growth levels experienced before the 2008 global financial crisis.

In particular, the OECD and G20 countries are devising a strategy to deal with the weakness of international taxation laws. As a result of scrutiny by the OECD and G20 on the double taxation treaties models, various weaknesses have been noted which are also in line with concerns in the taxation treaty literature. Owing to the era in which they were created, the current taxation treaty models – both OECD and UN model tax conventions - are susceptible to abuse by modern taxpayers. For example, double taxation treaties are meant to prevent the taxation of the same income twice, but now the experience is that taxpayers abuse the model leading to more non-taxation. Moreover, international tax rules

²⁷⁵OECD + G20 Stats: OECD: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, German, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, South Korea, Latvia, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States of America + G20 Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States of America and the European Union.

need to be modernised since most international tax laws were developed in the early years of the twentieth century.²⁷⁶

The OECD and G20 BEPS project is made up of forty-five members, which includes the European Union (EU) counting as one, and certain member states that are both individually members²⁷⁷ of OECD and G20 in addition to being EU members. Table 4.1 shows 'individual' country participation in the OECD and G20 BEPS project, worth noting that participation in decision-making mainly includes developed countries.²⁷⁸

More than seventy per cent of countries involved in the project regarded as developed countries.²⁷⁹ South Africa is the only developing country from the African continent that is part of the BEPS project. The participation in the BEPS project is monopolised by EU countries, as almost half of the members are EU, G20 and OECD members. It is quite ironic that most of the OECD and G20 countries have DTTs and BITs in force with many developing countries, including African countries. They have participated in resolving the BEPS problems, which had until recently affected developing countries more than others, yet they have excluded developing countries.

According to the literature, BEPS problems are predominantly created by the abuse of model tax conventions and the OECD model in particular, are affecting African countries more as mining and extractive reliant states.²⁸⁰ In particular, countries reliant on mining and extractive industries are inherently and adversely affected by DTT problems. Ironically, African countries are unfairly represented in the OECD and G20 BEPS project.

As a result of poor representation of those affected by abuse of taxation treaties, the BEPS project has attracted criticism from both academia and practitioners for failing to be more inclusive in resolving taxation treaties problems, such as loss

²⁷⁶OECD and G20 (2015).

²⁷⁷EU members also have individual membership of the OECD and G20.

²⁷⁸Developed countries are based on the UN 2014 report on country calcification.

²⁷⁹According to the World Bank's criterion, defines developed and developing countries.

²⁸⁰Thibedi I and Modiba S 'The impact of BEPS on the global mining industry' (2016) available at <https://www2.deloitte.com/za/en/footerlinks/pressreleasespage/the-impact-of-beps-on-the-global-mining-industry.html#> (accessed 05 June 2017).

of tax revenues²⁸¹ also see.²⁸² Failure to include developing countries at the origin of the BEPS project has justified the suspicions and aspersions being cast about the sustainability, relevance and practicability of the project outcome. More so, that the outcome of the BEPS project is intended to develop a multilateral instrument. However, non-OECD and non-G20 countries have been allowed to participate during the process of discussions regarding BEPS project, with the OECD and G20 providing agenda and final decisions.

The OECD and G20 BEPS project has established a body (the Ad Hoc Group) to explore the development of a multilateral instrument (MLI) specifically on taxation treaty measures. According to the BEPS project, 'the group' is a voluntary body where participation from OECD and G20 countries was is voluntary, while other countries can also be observers.²⁸³ However, as mentioned in the previous paragraph, non-OECD and non-G20 countries²⁸⁴ were not permitted to participate in the group activities and decisions making process, but may only be observers.

In view of the lack of inclusion of non-OECD and non-G20 countries in these processes, for the process outcomes (MLI) to become part of international law would justify the concerns for many developing countries their concerns and development objectives fail to be taken into account in the international rule-making process.

²⁸¹Oguttu, (2016).

²⁸²Rangaprasad P 'Should a problem for everyone be solved by the few?' (2015) available at <https://financialtransparency.org/should-a-problem-for-everyone-be-solved-by-the-few/> (accessed 02 June 2017).

²⁸³OECD and G20, (2015).

²⁸⁴Non-OECD and non-G20 countries are mainly developing or least developing countries. Many of which the OECD and G20 countries have DTTs in force.

Table 4.1. The BEPS Project Participation Matrix

OECD and G20 BEPS Project	OECD and EU Membership	OECD, EU and G20 Membership	OECD and G20 Membership	The Project and Developing Countries	The Project and African Countries
Austria	Austria				
Belgium	Belgium				
Brazil				Brazil	
<u>Canada</u>			Canada		
Chile				Chile	
China				China	
Czech Republic	Czech Republic				
Denmark	Denmark				
Estonia	Estonia				
European Union *		European Union *			
Finland	Finland				
<u>France</u>	France	France	France		
<u>German</u>	German	German	German		
Greece	Greece				
Hungary	Hungary				
Iceland					
India				India	
Indonesia				Indonesia	
Ireland	Ireland				
Israel				Israel	
<u>Italy</u>	Italy	Italy	Italy		
<u>Japan</u>			Japan		
Latvia	Latvia				
Luxembourg	Luxembourg				
<u>Mexico</u>			Mexico	Mexico	
Netherlands	Netherlands				
New Zealand					
Norway					
Poland	Poland				
Portugal	Portugal				
Russia				Russia	
Saudi Arabia				Saudi Arabia	
Slovak Republic					
Slovenia	Slovenia				
South Africa				South Africa	South Africa
<u>South Korea</u>			South Korea	South Korea	
Spain	Spain				
Sweden	Sweden				
Switzerland					
Turkey			Turkey	Turkey	
<u>UK</u>	UK		UK		
<u>USA</u>			USA		
43	21	4	10	12	1

Source: Developed by the author, from the UN dataset, 2017

As part of the intended outcomes, the BEPS²⁸⁵ project has developed fifteen action plans²⁸⁶ meant to strengthen the international taxation regime; in particular, dealing with aggressive tax planning and the abuse of current international taxation rules. Each of the individual project action-plans have led to fifteen different action reports released in 2015, which were then endorsed by Leaders and Finance Ministers of G20 and OECD countries.²⁸⁷ All the action reports are, to some extent, related to taxation treaties, while two are related more specifically to strengthening of the current taxation treaties: These are, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, and Multilateral Instrument to Modify Bilateral Taxation Treaties.

- **Preventing the Granting of Treaty Benefits in Inappropriate Circumstances- Action 06**

The OECD and G20 project has identified taxation treaty abuse as one of the principal root causes of weakness within the current International taxation regime. In essence, through the influence of their resident-MNEs many countries are accused of seeking treaty partners with lower taxation rates for international investors and their investments. This practice of looking for a treaty willing to concede to low taxation rate regimes is popularly known as 'treaty shopping'.

Treaty shopping pressurises countries that are desperate to attract and host international investment and MNEs to compromise their tax revenues; for example, by reducing their income tax rates.²⁸⁸

²⁸⁵BEPS: Base Erosion and Profit Shifting.

²⁸⁶OECD/ G20 Action plans: Action 1: Addressing the Tax Challenges of the Digital Economy, Action 2: Neutralising the Effects of Hybrid Mismatch Arrangements, Action 3: Designing Effective Controlled Foreign Company Rules, Action 4: Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 7: Preventing the Artificial Avoidance of Permanent Establishment Status, Actions 8-10: Aligning Transfer Pricing Outcomes with Value Creation, Action 11: Measuring and Monitoring BEPS, Action 12: Mandatory Disclosure Rules, Action 13: Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, Action 14: Making Dispute Resolution Mechanisms More Effective, Action 15: Developing a Multilateral Instrument to Modify Bilateral Tax Treaties.

²⁸⁷Gurria, A, Multilateral Convention to Implement Tax Treaty Related Measure to Prevent BEPS Information Brochure, 2017 also at <http://www.oecd.org/ctp/beps/g20-finance-ministers-endorse-reforms-to-the-international-tax-system-for-curbing-avoidance-by-multinational-enterprises.htm>.

²⁸⁸Hearson, M, (2015), 23-25.

It is arguable that treaty shopping is a phenomenon that has previously affected developing countries, or net-capital importers. However, many developed countries also complain about their reduced tax bases due to some of their residents moving to low tax regime jurisdictions; more so after the 2008 global financial crisis.²⁸⁹ Developing countries have thus been affected more extensively by this phenomenon, as the International Monetary Fund (IMF) has also noted, though with exceptions that the behaviour is prevalent particularly within sub-Saharan African countries.²⁹⁰

The OECD and G20 project has recommended three strategies to deal with taxation treaty abuse to be introduced in the OECD model tax convention. The taxation treaties should include commitments by contracting parties to avoid non-taxation and limit abuse; to provide for specific rules in the treaty, such as limitation-on-benefits of the treaty parties, to deter abuse of treaties; and to work under anti-abuse principles.

- **Multilateral Instrument (MLI) to Modify Bilateral Tax Treaties- Action 15**

In the Action 15 report, the OECD and G20 BEPS project has acknowledged an extensive series of problems emerging from the current double taxation regime created by international taxation laws.²⁹¹ Some of the taxation treaties models are outdated, with modern international business practices perpetuating the treaty abuses²⁹² and exposing the irrelevancy of the treaties. The upshot is the abuse of taxation treaties. Although the culprits are not named mentioned, the report suggested a creation of a multilateral instrument to modify current treaty models.²⁹³

The main issue that the BEPS project fails to address and is even more problematic for developing countries (including African countries) is the use of source-versus-residence taxation approaches; principally, the use of UN model tax convention as opposed to OECD model tax convention. Although the report recognises that

²⁸⁹Cooper, G, Preventing Tax Treaty Abuse, 2014, Papers on Selected Topics in Protecting the Tax Base of Developing Countries, United Nations Department of Economic and Social Affairs United Nations Secretariat, http://www.un.org/esa/ffd/tax/2014TBP2/Paper_PreventingTaxTreatyAbuse.pdf.

²⁹⁰Ali-Abbas S. M, Klemm A, Bedi S, and Park J 'A Partial Race to the Bottom: Corporate Tax Developments in Emerging and Developing Economies' (2012) IMF Working Paper WP/12/28, 22

²⁹¹ OECD, (2015), 18-20.

²⁹²Abuse of tax treaty includes creating double non-taxation.

²⁹³Treaty model being modified is the OECD model tax convention.

the OECD model tax convention needs to be reviewed,²⁹⁴ the report falls short of mentioning that the model leads to taxation base erosion for net-capital importers of whom the majority are developing countries. The conclusion of the Action 15 report recommends the development of the MLI and this multilateral instrument was supported by sixty-eight different jurisdiction signatories in July 2017.²⁹⁵

To motivate the development of the MLI, the report correctly noted that developing countries lack necessary specialists as far as negotiating the double taxation treaties is concerned.²⁹⁶ In fact, developing countries make use of the expertise of their anticipated counterparts to negotiate taxation treaties on their behalf. No doubt, a multilateral instrument would certainly aid many developing countries if key issues like loss of tax revenue and others were to be addressed in this MLI.

4.5. CONCLUSION

The double taxation treaty regime has evolved over the years. However, such developments are, in part, aligned to improvements within international investment law, which indeed makes sense. Over the years of continual growth in both international investment and development of taxation rules, the contestation of a preferable approach lines has always been drawn between satisfying the needs of the net-capital exporting and those of the net-capital importing countries – in reality, a conflict between the interests of developing and developed states.

The analysis provided in this chapter shows that developing or net-capital importing countries often concede to unfavourable taxation treaties, such as the use of OECD model provisions that prevents the imposition of taxes on the source-base to attract more international investment. These concessions are made despite such treaties. This leads to the erosion of revenue tax bases and because some developing countries lack sufficient human capital capacity and strong institutions to track international investors' business activities that are worth

²⁹⁴OECD, (2015), 18.

²⁹⁵EY Signing by 68 jurisdictions of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS highlights impacts for business to consider, (2017) EY Global Tax Alert Library.

²⁹⁶OECD, (2015).

taxing.²⁹⁷ also see.²⁹⁸ Furthermore, developing countries continue to follow unfavourable taxation models with the intention to attract more international investment, despite inconclusive evidence supporting their hope of attracting more international investments.

Pursuing unfavourable taxation treaty models has less to do with the intention to attract international investments, but ensuring better infrastructure development or job creation or providing certainty in taxation rules. Thus, developing countries and African countries in particular may have either to foster a multilateral accord on international investments which also strengthens taxation rules or revert to strengthen their unilateral or regional legislative framework to support their development objectives. Supporting an inclusive multilateral accord or use of unilateral or regional framework is more important because the current international legislative framework is less supportive of their development objectives than relying on own domestic legislation.²⁹⁹

The proposed OECD multilateral convention to implement tax treaty related measures (MLI) makes provision to address the abuse of double taxation treaties but few developing countries are currently signing up for it. The MLI is seen by many as a better approach towards reforming international tax rules, such as introducing anti-treaty abuse measures. However, certain critics argue that OECD countries' tax-related problems might not be similar to those in developing countries, so questioning the OECD's legitimacy to house MLI. The instrument also fails to address base erosion as one of the main problems affecting developing countries, seeing that many developing countries use a sources-taxation approach.

In chapter five, we will conclude this mini-thesis by providing recommendations for mechanisms to be considered in a multilateral investment agreement to address international taxation rule abuses and deal with development concerns raised by developing countries. The recommendations responding to this mini-thesis' research questions are also set out in chapter one

²⁹⁷Daurer V and Krever,R (2014), 06.

²⁹⁸Peter C, Developing Countries' Reactions to the G20/ OECD Action Plan on Base Erosion and Profit Shifting, (2015) Bulletin for International Taxation, 379.

²⁹⁹UNCTAD Towards a new generation of international investment policies: UNCTAD's fresh approach to multilateral investment policy-making' (2016), 23 (1).

CHAPTER FIVE: WHAT MIGHT WORK FOR AFRICAN AND OTHER DEVELOPING COUNTRIES

5.1. INTRODUCTION

This mini-thesis has been partly motivated by an investigation of the ongoing international discussion of the effects of a delayed global economic recovery since the 2008 global financial crisis. There has clearly been a negative effect on many countries' economic growth and, in particular, a decline or lack of growth in many governments' tax revenues. Further impetus for this study was provided by the recent wave of perceived protectionism³⁰⁰ passing through the global economy, one resuscitating an "old discussion" as to whether international investments require a multilateral governance structure.

This discourse also serves to introduce a question as to whether current international taxation law relating to taxing-rights is favourable for both international investors and host countries.³⁰¹ also see.³⁰² This mini-thesis has thus analysed the various attempts to pursue a multilateral investment regulatory framework and highlighted areas that need strengthening in the current international regulatory framework related to international investment.

This chapter provides recommendations for realistic changes to the international investment and taxation regulatory framework to deal with concerns of developing countries about development objectives - African countries in particular. The main objective of this mini-thesis is to review the current international investment regime and determine whether a multilateral investment agreement is desirable, one with special clauses providing for the international taxation regulatory framework and so balancing the needs of both developing and developed countries.

My analysis of the literature on bilateral investment treaties and other investment regulatory frameworks, including double taxation treaties, has revealed common challenges such as a lack of inclusion or consideration of development objectives of developing countries and international taxation rules that leads to fiscal losses

³⁰⁰Many developed countries are perceived to be advancing protectionism, like the UK with Brexit and the USA for voting in Donald Trump as President who is perceived to pursue a protectionist policy, while the French 2017 election candidate Le Pen promised Frexit.

³⁰¹ UNCTAD, (1996).

³⁰² Oguttu A, (2016).

or redistribution of the tax base to developed states, or residents state of international investors.

These challenges are experienced predominantly by international net-capital importing countries rather than developed or international net-capital exporters. However, there are also clear indications that some of the challenges, are inherent to the structures of the international economic system such as the lack of strong institutions to negotiate or implement favourable international investment and taxation laws within many developing countries.

More importantly, there is also a continuing narrative that the global political-economic-social setting does affect the calibre of the international investment and the regulatory taxation framework.³⁰³ To take some examples, prior to World War II the League of Nations was able to produce a model tax convention, the Mexico model,³⁰⁴ which seemed to have been influenced more by developing countries since developed countries were preoccupied with the build-up to war.

After the war, developed countries started to influence the review of such model and advocate for the London Model, which was further developed to become the model OECD model tax convention. The emergence of the London model took place within the same era where the initiation of development of the international investment regulatory framework took-off.³⁰⁵ However, as international trade and investments grew in the era coined post-colonial, more and more international bilateral investment and taxation agreements also grew, strengthening international law towards the mid-1980s.

There has always been the intent to establish these rules at the multilateral level. Multilateral approach was attempted as far back as the 1948 proposal of the Havana Charter and were later cited by a ruling at the International Court of Justice in the Barcelona Traction Case,³⁰⁶ where the need for multilateral rules on protection of international investors was recommended. The OECD made another plurilateral attempt at an MAI via around the late 1990s, which also failed to garner enough support. The 2008 global financial crisis has also led to many countries losing

³⁰³UNCTAD, (2015).

³⁰⁴Daurer V and Krever,R (2014).

³⁰⁵UNCTAD, (2015).

³⁰⁶Barcelona Traction Case, 1970 I.C.J. Rep. 3.

tax revenues to deal with the effects of the crisis due to lower economic growth. The experience of global financial crisis might lead to an international discourse as to whether the current international economic regulatory framework and taxation rules in particular are fit for purposes. This discourse has led to another attempt to strengthen the international economic regulatory framework, now called the OECD and G20 2014 BEPS project.

The analysis of literature and international economic regulatory framework has revealed that the participation of developing countries has been limited, in most instances, to a few countries like South Africa, China, India and Brazil. For example, the development of the UN model tax convention, which is meant to include the views of developing countries for fewer African countries in the sub-committees that developed the model.³⁰⁷ The recent process by the OECD and G20 BEPS project is criticised for failing to include developing countries,³⁰⁸ despite current international taxation framework's adverse consequences for tax revenues of these countries. There is also a lack of human capital and strong institutions which certainly limits some of the developing countries' capacity to participate in international processes of developing and updating existing international regulatory frameworks.

The mini-thesis has explored various international legal frameworks that may be applied to strengthen the current international investment legal system. In particular, an assessment is required of whether a multilateral agreement on investment is desirable to protect the interests of developing countries, including ensuring that the development objectives of developing countries is taken into account when setting rules and there are limits in terms of tax base redistribution as far as developing countries are concerned. The mini-thesis has thus sought to answer the following research questions:

- Do the IIAs and DTTs serving African countries (for example, Kenya, South African and Uganda) support investment host country development objectives?
- Is there adequate co-ordination between DTTs and IIA with African countries (for example, Kenya, South African and Uganda) and how could a MAI strengthen harmonisation?

³⁰⁷Hearson, M, (2015), 31.

³⁰⁸Oguttu, (2016).

- How could a MAI (or a framework) strengthen DTTs to benefit the international investment host; in particular, developing countries in Africa?

5.2. CONSIDERATIONS IN DEVELOPING RECOMMENDATIONS

The objectives of the international investment and taxation rules have been set out and 'agreed' to. However, in practice there are inconsistencies in implementing such laws insofar as some MNEs manipulate the rules and developing countries often lack human and institutional capacity to uphold implementation. It would appear that rather than having a fairer system, international investors or capital exporters, predominately OECD members, desire consistent international investment rules and regulatory framework that protect their investments and returns at all costs. However, international investment hosts are more concerned about attracting as much international investments as possible while, to a greater extent, it would seem that having fairer rules has been a secondary factor, but not anymore.

There is inconclusive evidence that, if adhered to, the current international investment legal framework has led to more FDIs, Table 3.1 in chapter three shows inconclusive evidence. This is probably one of the reasons why developing countries, including African Union member states, seek to review the rules governing investments coming to the continent. This is to ensure that the AU member states' development agendas are taken into account during the rule-making process.

In reviewing the international investment and taxation rules, the AU may consider the main analysis finding of this mini-thesis to be that current BITs and DTTs protect international investors' interest more than those of host countries. Whether this is deliberate or not, the current international investment and taxation treaties are created to encourage more FDI. Unfortunately, this means offering more concessions and incentives to international investors.

Ironically, the international agreements (BITs and DTT) are mainly concluded between the contracting states who would then act to implement them. The process of negotiating these agreements thus allows contracting parties to raise issues of importance; that is, developing countries would have to ensure that their development objectives are taken into account.

5.3. RECOMMENDATIONS

The analysis provided by this mini-thesis has identified various weaknesses and some strengths within the current international investment and taxation treaties, outcomes that are mainly supported by the literature. It is therefore recommended that the following intervention will strengthen the current international governance structure in support of a multilateral agreement on investment with specific and fair taxation rules.

a. Multilateral Institutions to pursue international agreement on investment

Multilateral institutions such as the WTO, WB, IMF and UNCTAD are to reconsider the previous positions that they have held regarding a MAI. They ought to play a more strategic and leadership role in fostering the development of an accord regarding standardising and harmonising international investment and taxation rules. Of course, in many instances, the multilateral institutions play a coordinating role.

However, if these institutions are to be effective and remain relevant in the twenty-first century they should be required to address challenges that are inherently affecting developing countries under the current international regulatory framework. These include lack of human capital and strong institutions to negotiate and implement an international regulatory framework without compromise. If a multilateral agreement on investment is to be beneficial to developing countries and African countries in particular, it should contain a clause that emphasises the deliberate balance between the interest of the international investors and the development objectives of the international investment host and other domestic objectives. Multilateral institutions should be empowered to create dispute mechanism that protect both the development objectives of investment hosts and the interests of the international investors.

b. Unilateral policy over bilateral treaties

Many developing countries,³⁰⁹ and some developed countries are withdrawing from their long standing bilateral investment treaties,³¹⁰ instead opting for

³⁰⁹AU has also considering how to withdraw from current BITs with developed countries, due to their failure to support the continent development objectives.

³¹⁰Uribe D 'Ecuador withdraws from its remaining investment treaties' (2017) available at <http://us5.campaign-archive1.com/?u=fa9cf38799136b5660f367ba6&id=2e104d965b> (Accessed 25 May 2017).

domestic legislation over investment. Recently Ecuador and South Africa found themselves amongst the countries to withdraw from their BITs and developing domestic legislation in this regard. This approach of withdrawing from international frameworks may fail to reform the attitude of developed countries in the short term, whose unfair behaviour are often cited as reasons for the terminations of BITs.

Certainly, in the long run many developed countries may find it difficult to invest in developing countries without complying with domestic investment laws. More so, these domestic legislations are meant to address their developmental objectives, which some BITs fail to protect. It is therefore worrying that more and more developing countries should withdraw from the current BITs as a means of influencing a multilateral investment agreement.

This approach may not, in the first place, create fair outcomes for international investors, but it could certainly lead to more international investors being forced to adhere to or at least be aware of developing countries' interest, more so that there is not a consistent rationale to international investment decisions. BITs have to a greater extent provided certainty and consistency to many international investments; in particular, those related to dispute settlements. However, a unilateral legislative framework for developing countries, or least at regional level, could strengthen their bargaining power for international investments.

c. Regional bodies to be used- African countries perspectives

Developing countries and African countries in particular may consider strengthening human capital and strong institutions at regional level. Such regional capacity should be used to negotiate international agreements with other countries, instead of individual AU member states. The process could be more beneficial in the case of countries with limited human capital and strong institutions.

The AU regions have negotiated some of its regional treaties together with investment chapters. However, member countries often go ahead and negotiate BITs individually. The use of regions as a common voice for all member states may in appearance and in practice provide a strong negotiation mandate for the regions and the continent at large.

d. Domestic investment legal framework and support for taxation competition

If a multilateral institution fails to develop or coordinate the development of a binding multilateral investment agreement with fair taxation rules, then developing countries would better be served by domestic investment legislation as well as reconsidering their involvement with current international cooperation on taxation.

Fairer taxation rules could include, consideration that redistributing tax base of international investment hosts should be limited to the initial investment made, or there should be a timing-limit for the redistributing tax base, or the relation of taxation rules to attract investments should be supported by evidence. More so that international cooperation on taxation serves the interest of the net-capital exporting countries rather than that of developing countries by eliminating tax competition.³¹¹ Also fairer taxation rule to consider, the United Nations has a taxation division, of course the purpose is unique though it includes exploring measures to redress abuse of international taxation rules abuse. Since the taxation rules are often more unique to country specifics than investment rules, developing countries without human capital or strong institutions should be allowed to consider having access to UN specialist without or limited costs when negotiating taxation agreements.

In a way, the withdrawal of developing countries' participation in international taxation cooperation may exaggerate taxation competition. According to Dagan,³¹² taxation competition has a potential to attract more international investment to a lower tax rate regime. Having a low tax rate regime could mainly benefit the host country, if low tax revenue is a secondary objective rather than jobs creation or the development of infrastructure. Therefore, tax competition is considered harmful by developed countries because MNEs moving their offices to low tax jurisdictions leads to non-taxation and the low tax regimes are mostly non-OECD countries.

5.4. CONCLUSION

In conclusion, I do recommend that further research investigates how to strengthen the current international economic cooperation led by multilateral institution(s) to

³¹¹Dagan, T (2015), 21-22.

³¹²Dagan, T (2015), 21-22.

ensure a fairer international legal framework in this regard. It is in the interest of both developed and developing countries that such a process is undertaken to avoid many countries returning a regressive dependency on their domestic legal framework as far as international economic activities are concerned.



APPENDIX LIST

Appendix A: Substantive Issues covered in the OECD BIT Models



	Definitions/scope/coverage				Umbrella clause	Admission			Post admission			Investment protection			
	Asset based		Investment			NT	MFN	Performance requirements	NT	MFN	Performance requirements	Standard of treatment	Transfers	Expropriation	
	Open list	Closed list	Direct	Indirect										Direct	Indirect
German Model	+				+				+	+		+	+	+	+
French Model	+		+	+					+	+		+	+	+	+
Belgium-Luxembourg Model	+		+	+	+				+	+		+	+	+	+
Canadian Model		+	+	+		+	+	+	+	+	+	+	+	+	+
US Model	+		+	+		+	+	+	+	+	+	+	+	+	+
Germany-China BIT	+		+	+	+				+	+		+	+	+	+
Germany-India BIT	+				+				+	+		+	+	+	+
Japan-Korea BIT	+		+	+		+	+	+	+	+	+	+	+	+	+
Mexico-Korea BIT	+					+	+	+	+	+		+	+	+	+

	Key personnel	Transparency	Exceptions					Financial services	Taxation	Environment	Labour	Investment facilitation	CR
			EIA ¹	General exceptions	Security interests	Prudential measures	Country exceptions						
German Model	+		+										
French Model	+		+										
Belgium-Luxembourg Model	+		+		+								
Canadian Model	+	+		+	+	+	+	+	+	+			
US Model	+	+			+	+	+	+	+	+			
Germany-China BIT	+		+										
Germany- India BIT	+		+	+	+								
Japan-Korea BIT	+	+	+	+	+					+			
Mexico-Korea BIT			+							+			

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