LINKAGES BETWEEN DOUBLE TAXATION TREATIES AND BILATERAL INVESTMENT TREATIES

United Nations
Economic Commission for Africa

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Foreword

Africa is at an important crossroads of investment regulation. The global investment landscape is changing at a fast pace, with first movers setting the tone and influencing the content of international rules affecting investment. To date, the continent has been rather reactive in this field, with little participation in forums in which investment and related taxation matters are discussed.

The international investment agreements dialogue taking place globally has evolved considerably in recent years. Efforts to reform the existing Agreements system, in particular the investor-State dispute settlement, have shifted from the stage of initiating to consolidating reforms, targeting instruments such as bilateral investment treaties that are not consonant with today's development policy needs and that have not been conducive to attracting investment. Although an increasing number of African countries have become active in undertaking such reforms, others have yet to embrace this challenge.

There is also a growing realization that investment has become a leading source of external development finance for many developing countries, including those in Africa. As resource mobilization becomes more critical for African countries amid the ambitious goals set out in the 2030 Agenda for Sustainable Development and Agenda 2063: The Africa We Want, and given the commitment established in the Addis Ababa Action Agenda of the Third International Conference on Financing for Development to explore and harness alternative and complementary sources of development finance, beyond official development assistance, the continent needs to have a better understanding of what type of international investment agreements can support investment attraction and retention for sustainable development.

This has become clear to the member States of the Economic Commission for Africa, as exemplified by their resolve to revise existing international investment agreements that have not delivered in terms of attracting greater investment, but also in the context of the continental dialogue on investment that they have been driving. Indeed, since 2013, member States have been promoting a dialogue on investment issues in the context of the Conference of African Ministers of Trade.

In the spirit of advancing this continuing dialogue, the Economic Commission for Africa was recently mandated by the African Union ministers of trade to conduct a study on the linkages between double taxation treaties and bilateral investment treaties. This study, a direct response to this call, provides analytical elements of how the relationship between these two regulatory instruments can affect investment and what impact this may have on the continent's ability to harness and retain investment and, at the same time, avoid illicit financial flows that derive from the investment activities of multinationals through double taxation treaties.

It is my sincere hope that the dissemination of this study will contribute to a better understanding of what African countries need to do to review and develop their bilateral investment treaties and double taxation treaties to support the mobilization of investment that is transformative and developmental for the African people.

Vera Songwe

Under-Secretary-General and Executive Secretary of the Economic Commission for Africa

Executive summary

Foreign direct investment (FDI) holds promise for accelerating structural transformation and poverty reduction in Africa. Such investment is essential in increasing the stock of domestic productive assets, generating positive spillovers and forward and backward linkages within the economy and facilitating import of new technologies and know-how.

Although investment in Africa has significantly increased during the past decades, the continent still struggles to reach a 5 per cent share of world FDI flows. Among other factors, the attractiveness of African economies as a destination for foreign investment continues to be dampened by a perception of elevated risk.

Investment regulation is a fundamental factor in attracting investment flows and may determine whether they translate into tangible and sustainable development outcomes. Unlike international trade rules, which are consolidated through a multilateral trading system governed by the World Trade Organization, the international investment regime is decentralized and characterized by a network of bilateral and multilateral investment agreements.

In common with other parts of the world, most African countries have resorted to bilateral investment treaties and double taxation treaties as a means of stimulating inward investment. They have tended to accept templates of these treaties and have been sponsored by their counterparts rather than advance their own formulas informed by their specific development ambitions. Nevertheless, in recent years, there has been a gradual expansion of home-grown approaches to regulating investment at the bilateral, regional and continental levels, marking a specific break with a number of the traditional approaches. Regional investment models and protocols, a recently adopted pan-African investment code and, in some countries, the phasing-out of old generation bilateral investment treaties and the adoption of new generation bilateral investment treaties as well as renegotiation of tax treaties, bear out the increased assertiveness of African decision-makers. These recent events fit into the wider reform trends in international investment and tax regime around the world.

Desirous of a common understanding and greater alignment of bilateral investment treaties and double taxation treaties, in 2016, the African ministers of trade asked the Economic Commission for Africa to undertake a scoping study of the linkages between these two instruments. This preliminary assessment is intended to contribute to the ongoing debate on global investment and tax reform by identifying some common themes, challenges and opportunities facing Africa in this context, with a view to leveraging foreign investment for structural transformation and sustainable development.

Objectives and features of bilateral investment and double taxation treaties

Bilateral investment treaties are conceived primarily to protect foreign investors against domestic political risks that would adversely affect their investment in the host country. All bilateral investment treaties set out what entities and which of their assets are covered. At the most fundamental level, these treaties protect against uncompensated takings both in their direct form, notably through nationalization, and the indirect, policy-driven variant. Moreover, they contain additional safeguards, for example the national treatment standard, which protects foreign investors against discriminatory treatment, compared with domestic entities and the most-favoured nation standard, ensuring that the treatment that investors receive is not inferior to that enjoyed by other foreign companies in the economy.

The fair and equitable treatment standard is meant to protect investors from arbitrary or abusive treatment on the part of the host State. Bilateral investment treaties also tend to guarantee the free transfer of funds in and out of the economy. Many investment treaties also prohibit the imposition of mandatory performance requirements under which the foreign company must comply with specific additional demands from the host Government. Lastly, and crucially, bilateral investment treaties allow investors to defend their treaty rights by directly challenging the host States through the investor-State dispute settlement.

Double taxation treaties are designed primarily to prevent instances of double taxation, which is thought to distort investment inflows, but may also play some ancillary roles, such as helping to combat tax evasion. Under these treaties, the host economy can levy taxes on corporate income only when the company's presence meets the permanent establishment criteria set out in the treaty, which can be for instance an office or factory. Taxes governed by these treaties include retention taxes on passive income, including interest and dividends, and capital gains taxes.

The standards of treatment granted by double taxation treaties are limited usually to national treatment. Only a very limited number of tax treaties contain the most-favoured nation provision. Most tax treaties also do not allow access to arbitration and contain instead the mutual agreement procedure under which investors can notify tax authorities in either country of their disagreement with the host country's authorities. Competent authorities from both countries may then seek a joint solution. Arbitration is not currently a commonly used option but is envisaged for future tax treaties.

Existing bilateral investment treaties and double taxation treaties tend to impose stronger commitments on host States than on investors' countries of origin or on investors themselves. Bilateral investment treaties often contain legally binding obligations only for the host States but not for home States or investors. In turn, double taxation treaties cap existing taxes at established or below-statutory levels and they do not create any new classes of taxes beyond those recognized in the domestic tax code. They also usually do not have significant financial implications for home States as the latter normally offer unilateral tax relief measures. Misuse and abuse by investors of the two instruments may further compound their potential negative effects on the host countries.

The empirical evidence on the impact of bilateral investment treaties and double taxation treaties on investment flows is mixed. More recent studies are more likely to indicate the positive effects of bilateral investment treaties on investment inflows, compared with the findings resulting from earlier studies. In addition, questions remain concerning the importance of the strength of dispute settlement for investors and the interactions between bilateral investment treaties and domestic institutions.

Bilateral investment treaties and double taxation treaties in Africa

Africa reports 515 bilateral investment treaties in force, of which 47 are between African countries. The continent also accounts for more than 450 active double taxation treaties, including 59 intra-African treaties. The most active countries in concluding these treaties on the continent tend to be concentrated in North Africa. The five African countries having the largest stock of bilateral investment treaties in force are Algeria, Egypt, Mauritius, Morocco and Tunisia. Egypt, Mauritius, Morocco, South Africa and Tunisia have been most active in concluding double taxation treaties on the continent.

While industrialized countries have typically been the main partners of African countries in concluding bilateral investment treaties and double taxation treaties, South-South treaties have become increasingly common. West European countries, however, still retain some of the densest networks of investment and tax treaties on the continent.

African countries have become more proactive in shaping the investment regulatory environment at the continental level. Examples of these efforts include the pan-African investment code adopted by ministers in October 2017 and the envisaged investment protocol of the African Continental Free Trade Area. The objective of the code is to articulate a common and coherent position on investment that might help to balance the objectives of promoting inward and intra-African investment flows and to retain sovereignty with regard to domestic policy.

Bilateral investment treaties and double taxation treaties may pose challenges to development-oriented policies

A government's ability to enact and implement policies is determined crucially by the policy options and financial resources at its disposal. The two dimensions may, however, be affected by poorly designed investment and tax treaties.

Older bilateral investment treaties in particular tend to contain only vague definitions of key standards of treatment, which may potentially limit a governments' policy space or create a sense of uncertainty around the implications of their key provisions and therefore hinder the policymaking process. The impact of uncertain outcomes may be compounded by a possible perception bias and systemic deficiencies in the investor-State dispute settlement system.

On balance, developing countries (typically respondents in arbitration) are more likely to win in cases of arbitration than are private companies (usually claimants). Nevertheless, a significant number of cases are settled, often implying an admission of a degree of wrongdoing on the part of the defending State. In addition, taking into consideration only arbitration cases judged on merits, as opposed to jurisdiction or procedure, investors are more likely to win. Respondent States from developing countries are also less successful in defending themselves, compared with their industrialized peers.

In addition to curtailing the tax rights of host countries, double taxation treaties may enable tax avoidance, as foreign companies may exploit loopholes and differences in national and international tax rules. For example, companies may structure their business so as to not attain the permanent establishment threshold or they may artificially shift profits through various jurisdictions to minimize their tax burden. Tax avoidance is particularly problematic for African countries, whose tax base is relatively narrow and relies heavily on corporate taxation. Tax avoidance is one of the channels of illicit financial flows from the continent, which have been estimated to average 73 billion annually and curtails efforts being made to mobilize resources domestically.

Importance of double taxation treaties in investment arbitration

The extent to which bilateral investment treaties apply to tax treaties and tax matters depends, in general, on their design. By default, these treaties encompass all policy areas relevant to investment, including taxation. The scope or definition of the standards of treatment guaranteed by an investment treaty is decisive when tribunals determine when an investor alleges a breach of the investment treaty by State action. In practice, these treaties often contain various carve-outs relating to taxation.

The preamble does not entail legally binding obligations but contributes to arbitrators' interpretation of the treaty. Emphasis on States' obligations and silence on their rights in the preamble may potentially play a role when assessing a treaty claim. Definitions of investors in bilateral investment treaties and permanent establishment criteria may be misaligned, providing some investors with the option of challenging host States without being taxable in the economy. National treatment, covered in both bilateral investment treaties and double taxation treaties, may obstruct legal or administrative measures that are intended to address tax avoidance. The most-favoured nation provision is invoked frequently by investors to import more convenient treatment standards or better access to arbitration, which can add to uncertainty on the part of the host State.

When assessing claims of breaches of fair and equitable treatment or expropriation, tribunals usually take into consideration a number of elements, including the "legitimate expectations" of investors. A measure in contravention of a valid tax treaty may run counter to investors' expectations. There are also concerns within the expert community as to how a potential investment dispute over, in the absence of a double taxation treaty, changes in retention tax might be approached by an arbitration panel.

When mandatory performance criteria under a bilateral investment are not available, host States can induce investors to comply with similar requirements through tax incentives. This practice may, however, also raise the issue of tax advantages sometimes playing a part in companies' tax avoidance toolkits. Lastly, specific measures may be disputed through the investor-State dispute settlement or a mutual agreement procedure, or both, and investors' preference for one or the other will raise uncertainty and associated dispute costs for the host State.

Inappropriate access to treaties can heighten negative externalities of treaties

Unless bilateral investment treaties and double taxation treaties contain specific safeguards, they may provide an incentive to third-country foreign investors to restructure their investment in order to obtain the best combination of investment protection and tax treatment under these agreements. This opportunistic behaviour, however, goes beyond what the contracting States initially consented to when signing these agreements and compounds the repercussions of some of the problematic features of these treaties. Treaty abuse can further undermine host States' ability to promote development policies and may be contrary to the spirit and purpose under which such treaties were adopted.

Three distinct but mutually compatible, if not complementary, types of treaty misuse have been identified. First, investors from third countries may want to structure their operations so as to enjoy better treaty protection rather than invest directly. Second, a specific investment treaty may be particularly attractive, given that it could double as a gateway to access better treatment present in parallel treaties through the most-favoured nation clause. Lastly, companies can channel their investment through a separate jurisdiction to enjoy favourable treatment offered by double taxation treaties. Tax treaties covering jurisdictions with permissible domestic laws may prove particularly conducive to opportunistic behaviour.

Conclusions and policy recommendations

The present study highlights the various linkages that exist between double taxation treaties and bilateral investment treaties and some of the associated challenges that they pose to African countries signing these agreements. There is a growing recognition of the need to ensure better alignment of the agreements with the developmental concerns and ambitions of States. There are a number of steps that African leaders can consider taking at the national, bilateral and multinational levels to deal with these challenges. As many of the investment treaties concluded in the 1990s-early 2000s have recently expired or are about to expire, now is an opportune moment for review and reform. African countries wishing to avail themselves of bilateral investment treaties or double taxation treaties are encouraged to draw inspiration from and contribute to the ongoing global dialogues on investment and tax matters.

In the immediate term, African countries should take stock of their current bilateral investment treaties and double taxation treaties and assess to what extent they are compatible with their development needs of attracting productive investment, being in a position to mobilize domestic resources through taxes and curbing illicit financial flows. African policymakers should also articulate and implement national approaches to develop investment and tax policy informed by their countries' development plans. These approaches will determine whether they want their countries to make use of these instruments and if so, to what extent. Domestic process and stakeholder engagement need to be fostered and become an integral part of the policy process to ensure quality and sustainable outcomes. Strengthening domestic institutions would also go a long way towards tackling some of the issues that bilateral investment treaties and double taxation treaties are intended to achieve. In this respect, domestic institutions and capacity-building need to be prioritized, irrespective of the national stance on bilateral investment treaties and double taxation treaties.

Regional and continental integration projects can be harnessed to introduce more balanced investment and tax policies. It is essential that these initiatives be coordinated and not add a further layer of complexity to existing treaties and arrangements. The investment protocol that will form part of the Phase II negotiations of the African Continental Free Trade Area provides a unique opportunity to cohere and clarify the investment landscape on the continent. It will be binding on all members and could provide one set of rules that would replace existing intra-African investment treaties. These rules should also calibrate its scope of applicability to double taxation treaties and taxation more generally. Going forward, the African Continental Free Trade Area could also serve for policy discussions on approaches to taxation, including the issue of illicit financial flows. African countries can also use regional and especially continental mechanisms to formulate and project their vision of investment and tax policies onto the global investment and tax regimes.

There are a number of sources of inspiration available to policymakers wishing to promote reformulated bilateral investment treaties and double taxation treaties. In addition to existing regional and continental models and protocols, including the pan-African investment code, they may wish to consult newly emerging national models in Africa and beyond. In relation to double taxation treaties, policymakers may draw on but are also encouraged to go beyond the Organization for Economic Cooperation and Development (OECD) and United Nations model tax treaties (see Organization for Economic Cooperation and Development, 2014 and United Nations, Department of Economic and Social Affairs, 2011), the Group of 20/OECD base erosion and profit shifting project unveiled in 2015, the 2016 *United Nations Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries and consult the 2018 Base Erosion and Profit-Shifting in Africa: Reforms to Facilitate Improved Taxation of Multinational Corporations and Economic Report on Africa 2019: Fiscal Policy for Financing Sustainable Development in Africa* by the Economic Commission for Africa for general policy orientations on tax avoidance. Illustrations of available options are also presented at the end of this report.

1. Introduction

Foreign investment is a potent catalyst of the structural transformation needed to set African economies on a long-term sustainable development path to fulfil the 2030 Agenda for Sustainable Development and Agenda 2063: The Africa We Want of the African Union. Investment inflows build and expand domestic productive assets and have the potential to generate positive spillovers in the economy in the form of backward and forward linkages, productivity increases through technology and skills transfers, human capital, value added production, insertion into global value chains and higher growth and fiscal revenue (Ozturk, 2007). Foreign investment can ultimately contribute to poverty reduction (Fowowe and Shuaibu, 2014).

Africa continues to account for a relatively low global share of foreign direct investment (FDI) of less than 5 per cent. Moreover, following a peak in FDI in 2015, inflows have been more subdued and reached $46 billion in 2018 (United Nations Conference on Trade and Development, 2019c). Improved macroeconomic conditions, sound growth performance, a rising consumer market and middle class, relatively high rates of return on investment, existing natural resources and recent discoveries of minerals, gas and oil have all contributed to stronger investment inflows (Economic Commission for Africa, 2016).

Experience from Africa and other developing regions of the world reveals, however, that investment may also entail environmental, social and economic costs for the host economy and society without always delivering on its promise. In particular, investment that fosters enclave economies, characteristic of the extractive sector, with limited integration into the local economy, and which insufficiently promotes industrialization and economic diversification (Gui-Diby and Renard, 2015), will add little value and can even undermine African countries' efforts to achieve structural transformation of their economies (Economic Commission for Africa, 2013).

Regulation of investment is a key factor in determining whether growing investment flows in Africa, as in all developing countries, will be translated into tangible and long-term development outcomes (Akyüz, 2015). Depending on their type and origin, investment may be governed by a combination of national policy and law, international law and, in some cases, in particular in large-scale investment projects, by individual contracts with the host State. These various layers of regulation can form a tangled regulatory environment and may be counterproductive when it comes to striking the right balance between the rights and obligations of host Governments, on the one hand, and investors, on the other.

Unlike rules applying to trade governed by the World Trade Organization (WTO), the global investment policy regime is decentralized and characterized in large part by a "spaghetti bowl" of regional and bilateral investment treaties and trade treaties with investment chapters (Muchlinski, 1999; Peterson, 2007), together referred to as international investment agreements.[1] African countries have followed the trend of signing bilateral investment treaties as part of their strategy to promote and attract greater FDI. Within the ongoing regional integration efforts, a number of regional economic communities in Africa, including the Common Market for Eastern and Southern Africa (COMESA), the Economic

[1] The World Trade Organization rules contain multilateral investment-related regulations, namely, the Agreement on Trade-Related Aspects of Property Rights granting protection of intellectual property rights, the General Agreement on Trade in Services covering investment that come in the form of the "commercial presence" of cross-border service providers and the Agreement on Trade-Related Investment Measures banning regulatory requirements on investors that could lead to trade distortions. See Vandevelde (2005) and Economic Commission for Africa (2015) for a discussion of these instruments. In addition, efforts are also under way to promote investment facilitation at the multilateral level (Mukiibi and Barkan, 2017).

Community of West African States (ECOWAS) and the Southern African Development Community (SADC), have concluded protocols and model treaties relating to investment in their member States. Notwithstanding their departure from traditional models of international investment agreement in some aspects, regional instruments may add complexity to the existing web of treaties as they often overlap with bilateral investment treaties on the continent (Páez, 2017).

Investment facilities in taxation are provided through double taxation treaties and conventions. These are bilateral agreements aimed at reducing the administrative complexity of foreign investment and alleviating the risk of double taxation, which is thought to distort resource allocation and negatively affect investment flows (Neumayer, 2007).

In common with many international treaties, both bilateral investment treaties and double taxation treaties emerged as a measure to respond to potential disputes that might transpire between countries on investment and taxation issues, and in varying degrees might also place limits on national sovereign powers. Both types of treaty appear symptomatic of their relevant international regimes characterized by overlapping interests, competition and historical legacy. Their content, which is of great significance to countries, companies and communities alike, is moulded by the objectives, negotiating power and capacities of the treaty negotiators. Against the backdrop of increased awareness and better appreciation of the (unintended) consequences of such agreements, there have been growing global efforts to better align investment and tax treaties with the demands and development ambitions of host Governments and their stakeholders.

Following the Second World War, industrialized countries promoted bilateral investment treaties as a means to counter the efforts of developing and socialist countries to recast the international investment legal order. These countries, encompassing also many newly independent nations, made efforts to obtain more widespread recognition of their rights to exercise greater sovereignty over their resources and economic activities, including in the form of uncompensated expropriation (Vandevelde, 2005).[2] This was also true for many African countries, in particular during the post-independence period, which also used bilateral investment treaties to confirm their status as nascent States (Economic Commission for Africa, 2016).

In turn, double taxation treaties, first concluded at the end of the nineteenth century, were intended to solve disagreements between countries over how to allocate tax rights in instances where double taxation could otherwise occur. The first model tax treaty was introduced in 1928, and subsequently updated by the League of Nations and was used to shape the more recent model conventions developed by OECD and the United Nations in 1963 and 1980, respectively (Avi-Yonah, 2009). The United Nations Model Tax Convention put more emphasis on the rights of source economies, the economies where the investment was placed, and was more favourable to developing, capital-importing countries, compared to its OECD counterparts. OECD and United Nations model treaties have been updated several times since their inception, but their respective patterns of distribution of taxation rights between source and residence economies have remained largely unchanged.

African countries have become reliant on bilateral investment treaties and double taxation treaties not only as instruments to attract and promote

[2] On 1 May 1974, the General Assembly adopted the Declaration on the Establishment of a New International Economic Order, which espoused the principles of "Full permanent sovereignty of every State over its natural resources and all economic activities…, including the right to nationalization or transfer of ownership to its nationals" (art. 4 (e)). The Assembly Charter of Economic Rights and Duties of States (of 12 December 1974) stated that each State had the right "[t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent (art. 2 (a))". While the Declaration on the Establishment of a New International Economic Order is silent on the issue of compensation for expropriation, a cause long promoted by developed States, the Charter introduces it only as a possibility with the valuation method independent of international law standards.

inward investment flows, but also as diplomatic and political tools to promote and advance international economic relationships (Dagan, 2000; Brauner, 2016). Historical ties have often influenced the choice of partners (Allee and Peinhardt, 2000; Braun and Zagler, 2014). Administrative and negotiating capacities have also affected the content of treaties with African countries, often accepting models and drafts proposed by their counterparts, sometimes without fully realizing the potential adverse consequences (Poulsen and Aisbett, 2013; VanDuzer, 2016; Hearson, 2018; Mbengue and Schacherer, 2017).[3]

More recently, a new dynamic in tax and investment treaty practice and discourse has emerged as the negative repercussions of some of these instruments have been deeply felt. Industrialized countries have also proved to be more engaged in the international investment arena having increasingly found themselves in the position of a respondent in arbitration under bilateral investment treaties (Vandevelde, 2005). Consequently, a "new generation" of bilateral investment treaties has emerged to compensate for the overemphasis placed on investors' rights, with greater regard for the right of Governments to regulate, the need to safeguard policy space and the observance of human rights and obligations by companies (Seatzu and Vargiu, 2015; United Nations Conference on Trade and Development, 2017). The Group of Twenty, also inclusive of the so-called BRICS (i.e., Brazil, Russian Federation, India, China and South Africa) and OECD countries, is currently leading the work on changes in the global tax system to put an end to "tax dodging" practices engaged in by multinationals (Brauner, 2017).

Just as bilateral investment treaties are thought to restrict policy space in some instances, double taxation treaties can be seen as affecting the tax revenue mobilization of host economies (United Nations Conference on Trade and Development, 2000; ActionAid, 2016b). These two instruments can also interact in cases of treaty-based arbitration resulting from misalignments between them, which can potentially play a negative role. African countries are, therefore, advised to reappraise jointly their existing investment and tax treaties and are encouraged to choose from a menu of options offering a better balance between investors' rights and member States' ability to attract and retain investment that promotes sustainable development.

Wishing to promote investment and tax instruments and approaches responding more effectively to the developmental needs of their countries, in November 2016, the African ministers of trade requested the African Union and the Economic Commission for Africa to conduct a scoping study on the linkages between bilateral investment treaties and double taxation treaties that would advance and build on the ongoing continental policy dialogue on investment, initiated at the eighth Ordinary Session of the African Union Conference of Ministers, in October 2013. As investment and tax regimes are usually deliberated in various forums and negotiated by various public actors, inconsistencies and overlaps between the two instruments emerged. By linking the two debates and zooming in on the area of taxation, this study is intended to contribute to the ongoing reflections on how African countries can recalibrate their approach to investment and tax treaties to attract higher volumes of productive investment without compromising other important enablers of sustainable development, notably their ability to harness domestic tax revenue and enjoy sufficient policy space in formulating and enacting policies, in line with evolving national conditions and ambitions.

This study is aimed at highlighting some of the possible consequences that African countries, predominantly capital importers, may face as a result of interactions between bilateral investment treaties and double taxation treaties. The structure of this paper is as follows: section 1 introduces the most salient elements and features of these treaties and takes stock of the current investment and tax treaty networks in Africa; section 2 contains a discussion of the potential

[3] De Brabandere (2017) observes that, in the case of the provisions on fair and equitable treatment in bilateral investment treaties, African countries had tended to accept the definitions provided by their partners.

hurdles that these treaties may pose to governance, both individually and cumulatively; more in-depth consideration is given in section 3 to the individual clauses in investment treaties that are most likely to interact with tax treaties; the focus of section 4 is on the company level and how investment and tax treaties may be appraised in conjunction by investors when structuring their global operations; section 5 presents possible ways forward and policy recommendations; and a template with more specific actions and treaty changes can be found in section 6.

2. Bilateral investment treaties and double taxation treaties

Although African countries have been making important strides in governance in recent years, they continue to grapple with a perception of elevated risk, which holds them back from realizing their investment potential. This cautious perception, in particular held by investors not yet established on the continent (Ernst and Young, 2016),[4] has been, to a large extent, shaped by events of the past, a lack of understanding of the underlying risk factors and high information costs on real investment opportunities.

Investment treaties are designed to provide investors with credible guarantees against risks such as expropriation or unanticipated policy reversals and malpractice and misapplication of the law by the host Government or authorities, which would significantly undermine or even entirely wipe out the value of their investment. Bilateral investment treaties have therefore been touted as tools to promote the protection of investor rights and obligations on the part of host countries receiving such investment, reducing the risks and thereby raising the investment attractiveness of the country (Mina, 2015). Bilateral investment treaties also effectively signal an openness to investment and associated business and recognize the need of investors to protect their investment (Tobin and Rose-Ackerman, 2011).

Double taxation treaties are designed to ensure that foreign investors will not face instances of taxes levied on the same income or activity by both home and host tax authorities. As corollaries to this overarching aim, tax treaties can also eliminate "excessive" taxation at the source (i.e., in the host economy), prevent tax discrimination between domestic and foreign investors and reduce administrative complexity, while enhancing transparency and predictability of the tax environment (Pickering, 2014). Many double taxation treaties are also explicitly intended to reduce the scope for fiscal evasion by providing national tax authorities in the two economies with information-sharing and tax assistance mechanisms. Essentially, double taxation treaties showcase a country's readiness to apply "internationally accepted taxation norms" and its desire for deeper integration into the global economy (Cooper, 2014: 3). These qualities of double taxation treaties are considered by investors looking for a conducive investment environment to be tools that will allow them to repatriate the proceeds of their future investment activity under the most beneficial conditions available.

In the light of the benefits and protection that bilateral investment treaties and double taxation treaties offer to investors, they are often perceived as instruments that raise investment attractiveness and hence promote investment. Both instruments, however, must be analysed carefully, for they have many dimensions relating to the protection of investment, as discussed in greater detail in subsequent sections.

2.1. Objectives and main features of bilateral investment treaties

Bilateral investment treaties furnish investors with specific standards of treatment that give rise to a set of rights. The rationale behind such standards is to establish a level playing field vis-à-vis other

[4] The Africa Attractiveness programme devised by Ernst and Young (2016), focusing on sub-Saharan Africa, indicates that Africa is the most attractive investment destination in the world for investors already present on the continent, with 66 per cent of them believing that the continent's attractiveness improved during the past year and 81 per cent foreseeing improvements in the coming three years. By contrast, for the group of investors not established on the continent, Africa is the second-most attractive destination, with only 30 per cent of them believing the continent's attractiveness improved during the past year and half of them expecting attractiveness to increase in the coming three years.

domestic and international investors and to shield them from discriminatory and arbitrary behaviour on the part of the host country's authorities, as well as other types of political risk. These rights are typically buttressed by the possibility of direct recourse to international investment arbitration.

Although most bilateral investment treaties are very similar in format, they can vary greatly in substance (Muchlinski, 2009). The most prominent elements of investment treaties include, but are not limited to, a preamble, scope, definitions, standards of treatment, protection against discrimination, an umbrella clause, performance requirements, transfer of funds and dispute settlement.[5] The following is a brief description of the most salient elements:

(a) Preamble

The preamble to a bilateral investment treaty states its objectives and purposes. It typically alludes to the goals of establishing favourable conditions for investment, highlighting investors' rights, and the intention to reinforce mutual economic relations, such as the 1993 Switzerland–The Gambia bilateral investment treaty. Preambles in more recent treaties are also increasingly likely to make a reference to sustainable development, which can be seen for instance in the 2016 Brazil–Malawi bilateral investment treaty. Preambles do not engender any legal obligations but are taken into consideration by arbitrators in the event of a legal dispute.[6]

(b) Scope

The scope of a bilateral investment treaty can vary from a narrow focus on protection of investment and investors to other activities relating to the declared aim of tighter economic links, such as investment promotion and investment cooperation. By default, these treaties are concerned with all dimensions of investment that may be affected by the violation of the treaty standards through a legal or administrative measure, including environment, health and safety laws and regulations. Unless otherwise stated, it is understood that these treaties also encompass taxation and double taxation treaties (Davie, 2015; Demirkol, 2018, for instance the 2001 Burundi–Comoros bilateral investment treaty). A case review conducted by Chaisse (2016b) shows a wide range of tax measures that have been subject to treaty-based challenges including windfall taxes, tax investigations, value added tax (VAT), corporate taxes, import taxes and taxation of income trusts. An investment treaty may either cover investments only once they have been made or both the pre-establishment and post-establishment phases of the investment.

(c) Definitions of investor and investment

Definitions of investor and investment delineate what entities and assets are covered by the treaty. An investor is, for the most part, defined as a natural or juridical person resident in the signatory member's jurisdiction, even though a substantive presence in the home economy may sometimes be required (Yannaca-Small, 2008; for example the 2017 Morocco–Nigeria bilateral investment treaty). In some agreements, the form of juridical person is qualified to bring under its scope only a specific type or form of investment ownership. The definition of investment varies between treaties (United Nations Convention on Trade and Development, 2011). In older treaties in particular, investment is often defined in an open manner, encompassing "every kind of asset", usually followed by an indicative list of assets covered, including the 1989 Netherlands–Ghana bilateral investment treaty. Newer treaties may contain clearer criteria, and exhaustive lists of types of covered assets sometimes accompanied by "negative" lists of assets that fall outside the remit of the treaty as in the 2015 Canada–Guinea bilateral investment treaty. Some investment treaties, such as the 1986 United States of America–Egypt

[5] Bilateral investment treaties also typically contain the "full protection and security" standard. Jurisprudence, however, is not consistent on whether this standard also applies to State measures and, if so, to what degree it can be dissociated from the fair and equitable treatment standard (Schreurer, 2010). In treaty practice, fair and equitable treatment and full protection and security are often mentioned in conjunction, such as the 2007 Congo– Namibia bilateral investment treaty and the 2014 Kenya–Qatar bilateral investment treaty.

[6] When investment arbitrators assess investors' claims in the light of an investment treaty, they apply the general rule of interpretation as defined in article 31 of the 1969 Vienna Convention on the Law of Treaties. Paragraph 2 of article 31 reads as follows: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes".

bilateral investment treaty, also allow for indirect ownership through affiliated entities.

(d) Standards of treatment

All bilateral investment treaties contain some form of relative and absolute standards of treatment. While the former prevents discriminatory treatment in relation to a comparator, the latter implies that treaty compliance needs to be assessed in the light of a set of criteria, rather than in relation to other entities. The most commonly used standards of treatment include national treatment, most-favoured-nation treatment and fair and equitable treatment.

National treatment and most-favoured-nation principles embody the relative standards of treatment. National treatment stipulates that foreign investors cannot be subject to a treatment inferior to the treatment enjoyed by domestic investors. The most-favoured-nation clause ensures that privileges accorded to an investor from a third country, principally privileges contained in a bilateral investment treaty or another treaty between the host State and the third country, need to be extended to investors covered by the base treaty. Accordingly, foreign investors cannot be treated less favourably than their international peers. Consequently, most-favoured-nation treatment ensures that the relative value of the base treaty is not eroded over time as new treaties with other partners are concluded (Schill, 2008).

In turn, fair and equitable treatment represents an absolute standard of treatment, for it is considered in the light of a set of specific elements. Its wording can be left broad, such as in the 2001 Burkina Faso–Benin bilateral investment treaty, linked to customary international minimum standards of treatment with an indicative list of elements, for example, in the 2016 Nigeria–Singapore bilateral investment treaty or specified in the treaty, which was the approach taken in the 2016 European Union–Canada Comprehensive Economic and Trade Agreement. Investors also often claim, and many tribunals have concurred, that fair and equitable treatment also protects investor's "legitimate" or "reasonable expectations" (Dolzer, 2014). Injured investors avail themselves of the fair and equitable treatment standard to support claims of breaches of other standards or as a catch-all clause insulating them from any mistreatment on the part of the host State not covered by the other standards (Kläger, 2010; United Nations Conference on Trade and Development, 2015a).

(e) Protection against expropriation

Protection of investors against uncompensated and discriminatory seizure has traditionally been the cornerstone of bilateral investment treaties (Park, 2009). Both direct expropriation in the form of a direct seizure of an investor's assets (and returns thereon) by the State, typically nationalization, and its indirect variant, which occurs as a result of specific policies and measures, including its subcategory of creeping expropriation,[7] are covered in many bilateral investment treaties.

International law allows countries to expropriate assets of international investors when both the conduct and compensation of expropriation requirements are satisfied. Expropriation ought to be carried out for public purposes, in a non-discriminatory fashion, in compliance with due process of law and followed by "prompt, adequate and effective compensation", also known as the "Hull Formula" (United Nations Conference on Trade and Development, 2004, 2012a; such language can be found in the 1998 South Africa–Senegal bilateral investment treaty).

Arbitrators have applied a number of approaches in the assessment of fair and equitable treatment and indirect expropriation. As with fair and equitable treatment, the concept of investors' "legitimate expectations" has enjoyed recognition in case law. In their reasoning, they are increasingly likely to apply the proportionality test and consider an investor's protection against the risk against the State's right to regulate (Radi, 2013). Put differently, they engage in the task of weighing the impact of a measure on the investor versus the State's legitimate interest behind the measure in question (Fortier and Drymer, 2005). This approach can be seen as a compromise between two opposed

[7] The term "creeping expropriation" denotes a kind of indirect expropriation, which results from the cumulative effect of a series of measures.

methods that have also been applied by arbitrators: "the police powers" doctrine and the "sole effects" doctrine. The former, in its extreme version, shields all measures taken in the public interest from liability under investment treaties, while ignoring the impact of such measures on the investor. The latter takes into consideration only the implications of these measures with regard to the investor (Dolzer, 2002; Kriebaum, 2007b; Radi, 2013; Pellet, 2015).

(f) Umbrella clause

The umbrella clause contained in some bilateral investment treaties extends protection under international law to agreements between investors and the State, as can be found in the 1989 United Kingdom of Great Britain and Northern Ireland–Ghana bilateral investment treaty. Such arrangements would otherwise be enforceable only either through the means provided by domestic legislation, which may allow for international arbitration, or a special mechanism if provided for in a contract with the host State. Individual contracts concluded with large investors in the extractive sector or concession contracts illustrate this type of commitment.[8] In addition to a breach of a contract, at least one of the standards of treatment under a bilateral investment treaty would also have to be violated for a treaty-based challenge invoking an umbrella clause to succeed.

Case law is, however, not entirely consistent regarding jurisdiction, admissibility[9] or interpretation of the umbrella clause (Footer, 2017). For example, arbitrators have sometimes refused to entertain claims based on contracts containing an exclusive forum clause, that is, a specific dispute settlement mechanism (Demirkol, 2018). On the other hand, even in the absence of an umbrella clause, a specific contract or commitment made to an investor may strengthen their allegation of a breach of fair and equitable treatment or expropriation under a bilateral investment treaty.

(g) Prohibition of performance requirements

Contracting parties may also waive the right to impose mandatory performance requirements compelling investors to forge closer links with the host economy, as agreed for instance under the 2014 Canada–Cameroon bilateral investment treaty. These mandatory criteria can take on different forms, including a requirement of local sourcing, quotas on local jobs and training for local staff, technology transfer, a minimum domestic share in the ownership of the company and mandatory minimum export levels (Nikièma, 2014). In lieu of mandatory requirements, capital-importing countries can furnish fiscal incentives to encourage compliance with similar conditions. Even if a bilateral investment treaty does not prohibit performance requirements, members of the WTO are may still be prevented from imposing specific obligations on investors by virtue of the WTO Agreement on Trade-Related Investment Measures.[10]

(h) Transfer of funds

Investment treaties also guarantee the repatriation of funds from the host economy to the home country, in general granting investors the right to move returns on their investment, including profits, dividends and interests. The provision is aimed at granting investors complete freedom of transfer, although many bilateral investment treaties associate compliance with domestic tax laws as a

[8] The international arbitration between Randgold, a mining company based in Jersey, and Mali highlights the relevance of individual agreements between Governments and companies (International Centre for Settlement of Investment Disputes case No. ARB/13/16). The company disputed income taxes collected by the Malian authorities in 2013 as "without merit or foundation" and in contravention of the guarantee of tax stability (i.e., no change in the applicable tax regime) contained in bilateral mining conventions. Following a three-year process, the International Centre tribunal reportedly ruled in June 2016 in favour of the investor and ordered the Government of Mali to compensate the company in the amount of $29.2 million (Biesheuvel, 2016).

[9] The Hochtief AG v. Argentina tribunal (International Centre for Settlement of Investment Disputes case No. ARB/07/31) summed up the difference between jurisdiction and admissibility as follows: "jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal" (para. 90).

[10] Trade-related investment measures prohibit obligations that are (a) inconsistent with the national treatment standard, namely minimum local content requirements and/or maximum import content in relation to the volume or value of exports; (b) inconsistent with the obligation of general elimination of quantitative restrictions under the WTO General Agreement on Tariffs and Trade 1994 (GATT), such as direct limitations on the importation of products for local production, limitations on the importation of products for local production by restricting the enterprise's access to foreign exchange or mandatory minimums on the exportation or sale for export by an enterprise of products.

prerequisite to the exercise of this right, such as the 1997 Egypt–Russia bilateral investment treaty, or allow for a temporary suspension at times of crisis, as specified under the 2016 Rwanda–Morocco bilateral investment treaty.

(i) Dispute settlement

Bilateral investment treaties authorize private entities to defend their treaty rights vis-à-vis foreign States through international arbitration.[11] Most bilateral investment treaties make provision for investor-State dispute settlement under which the injured investor files its claim directly, as well as the State-State dispute settlement whereby the home State defends the investor on its behalf. In addition to bilateral investment treaties, investors can also gain recourse to international arbitration if specified in an investment contract with the host country Government or even under the domestic legislation of the host State[12]. A vast majority of bilateral investment treaties require a "cooling-off" or interim period before investors can bring a claim, sometimes also on the condition that an amicable resolution is sought in the interim period, such as six months in the 2000 Sudan–Ethiopia bilateral investment treaty; Organization for Economic Cooperation and Development, 2012a). In practice, whenever the defending State was found to be in breach of the treaty, the investor was awarded compensation, but the State was not ordered to reverse the disputed measure (Bonnitcha and others, 2017).

The investor can initiate proceedings at an international tribunal of its choice, which may be explicitly or implicitly stated in the treaty. Both disputing parties then appoint a judge on an ad hoc panel convened to assess the claim and are legally bound to observe its decisions (International Centre for Settlement of Investment Disputes, 2006, United Nations Commission on International Trade Law, 2010). The chair of the panel is chosen jointly by the two disputing parties or, in the event that they fail to reach agreement, a judge will be chosen by the arbitration institution in accordance with its internal rules. Decisions of international arbitrators take precedence over those of domestic courts. Arbitrators are not bound by past decisions of other tribunals and treat past awards merely as guidance for interpretation of substantive treaty provisions in a case under their consideration.

Contracting States determine in bilateral investment treaties which arbitral rules can be applied, including those developed by the International Centre for the Settlement of Investment Disputes, the United Nations Commission on International Trade Law, the Stockholm Chamber of Commerce and the International Chamber of Commerce. Arbitral centres may administer proceedings under different arbitral rules than those developed by the institution. Arbitration institutions include the International Centre for Settlement of Investment Disputes secretariat administering arbitration under its own rules or Commission rules, and the Permanent Court of Arbitration often facilitates cases filed under the Commission rules. There are also regional arbitration venues, such as the Southern African Development Community (SADC) tribunal,[13] the regional office of the Permanent Court of Arbitration in Mauritius, the Cairo Regional Centre for International Commercial Arbitration and the Lagos Chamber of Commerce arbitration centre.[14] Both globally and in the African context, International Centre handles the largest number

[11] For an investment arbitration tribunal to have jurisdiction over a treaty-based claim, four conditions need to be cumulatively met: *ratione personae* (governed by the definition of investor), *ratione materiae* (the dispute must concern investment defined as per the treaty), *ratione temporis* (defined in the temporal scope of the treaty) and *ratione voluntatis* (defined by the breadth of consent to arbitration by the two countries concluding the treaty).

[12] Some African countries, including Madagascar and Burkina Faso, provide access to international arbitration through their domestic laws.

[13] The Southern African Development Community tribunal, found against the Government of Zimbabwe for a violation of human and property rights during a land redistribution programme in the case of Mike Campbell (Pvt) Limited and others v Zimbabwe (2007). In the wake of the case, regional governments circumscribed its jurisdiction to inter-States disputes.

[14] The Cairo Regional Centre for International Commercial Arbitration, for example, ruled in the case of Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others (2011) under the Unified Agreement for the Investment of Arab Capital in the Arab States. The case revolved around a cancelled tourism project led by the Kuwaiti Kharafi group. The tribunal awarded the claimant $934 million for the failure of the Libyan authorities to provide available land under the terms of the land-leasing contract with the Tourism Development Authority and the decision of the Ministry of Economy to discontinue the project in 2010.

of investment disputes,[15] followed by disputes based on Commission rules. Treaties may also make provision for ad hoc arbitrations, often under Commission rules, which are not facilitated by an administrative arbitration institution.

Investors are thought to prefer arbitration to filing a claim to national courts because they may perceive national venues as biased in favour of the host State or possibly inefficient (Brower and Schill, 2009). Similarly, by using investor-State dispute settlement, investors do not need to request the home Government to sue the host country on their behalf, as would be the case in State-State dispute settlement, which could delay, complicate and politicize the dispute (Schwebel, 2014). Proceedings concluded at the International Centre for the Settlement of Investment Disputes (2015) in the fiscal year 2014-2015 took an of average 39 months to be completed though it not uncommon for arbitration proceedings to take much longer, particularly in case of jurisdiction objections.[16]

2.2. Objectives and main features of double taxation treaties

By reducing the administrative complexity and uncertainty that foreign investors face, tax treaties and conventions may complement bilateral investment treaties, notwithstanding the fact that they are completely freestanding instruments (Choudhury and Owens, 2014). Double taxation treaties or conventions allocate tax rights on cross-border income between the host and home economies, with the aim of preventing instances of double taxation, which occur when the same income or economic activity is taxed in both the home and host economies. Double taxation treaties also offer recourse to redress, usually taking the form of dialogue between the competent tax authorities through the mutual agreement procedure.

[15] By April 2017, of a total of 617 cases filed to the International Centre, 128 had been against African countries.

[16] The average length of proceedings is not indicated in the more recent International Centre reports.

The absence of tax treaties and information asymmetry between investors and tax authorities may open up opportunities for tax evasion. By establishing formal channels of communication between national tax authorities, double taxation treaties can also therefore strive to prevent tax evasion by facilitating the exchange of information and assistance in tax collection between tax authorities (Pickering, 2014; Brauner, 2016).

These treaties tend to be relatively uniform in terms of their format, content and sequence of individual chapters (Avi-Yonah, 2009). Tax treaties in Africa, in common with other regions of the world, are derived from either OECD or United Nations double taxation convention models[17] (Organization for Economic Cooperation and Development, 2014; United Nations, 2011).

The treaties set out which entities and taxes they cover, such as articles 1 and 2 of United Nations and OECD model treaties or the 2011 United Kingdom–Ethiopia double taxation treaty). Tax treaties usually apply to residents, both physical persons and legal persons, such as companies, of either of the two contracting States. The classes of taxes covered by the treaty may, however, be different for the two countries.[18] Under general definitions (article 3 of either model), the applicability domain of the tax treaty in both models is determined by residency (article 4) and permanent establishment conditions (article 5).

Residency criteria set down the conditions necessary for the investor to meet to be considered a resident of the home economy, such as in which jurisdiction the taxpayer is incorporated. A permanent establishment is, under the terms of article 5 (1) of the OECD model, a "fixed place of business through which the business of an enterprise is wholly or partly carried on" and used

[17] In practice, countries negotiating new tax treaties usually adopt either of the two models as a basis, which they then customize to match their goals and policy priorities (e.g., Nigeria and Uganda use and modify specific provisions of the United Nations model; ActionAid, 2015b; Hearson and Kangave, 2016).

[18] For example, the United Kingdom–Ghana double taxation treaty (1993) specifies that the taxes liable to be levied are, in the case of the United Kingdom, income tax, corporation tax and capital gains tax, while, in the case of Ghana, they include income tax, capital gains tax, petroleum income tax and mineral and mining tax.

as a yardstick to determine whether the investor's economic presence in the host economy is substantial enough to warrant taxation rights for the country's authorities. For example, under the OECD model, the minimum duration for a permanent establishment is 6 months and 12 for construction sites. Examples of a permanent establishment include a branch (of a company), an office, a factory, a farm and a mine.

Host countries cannot levy source taxes (i.e., taxes on income accrued or business activity) on companies whose presence in their jurisdiction falls below the permanent establishment threshold. This scenario contrasts with the situation whereby there is no double taxation treaty in place, in which case the host country can tax all income generated on its territory by foreign companies. Tax relief may be allowed to the extent that the domestic code provides special incentives or tax holidays, which may be granted by special regulations and protected under bilateral investment treaties, including those of a special economic zone.[19]

Withholding taxes on passive income, that is, on dividends, interest and royalties (articles 10-12 of both the OECD and United Nations model treaties),[20] are a critical tool in distributing tax rights between the two contracting countries (Daurer and Krever, 2012). Capital gains taxes imposed on the increase in value of a capital asset between the moment of purchase and its sale are also usually governed by double taxation treaties (article 13). Tax treaties either abolish taxes on specific classes of revenue or fix the rates that the host authorities can apply at or below the levels prevailing in domestic legislation. Tax treaties alone cannot create new classes of taxes but only modify taxes already existing under the domestic tax code (Keen and others, 2014). The United Nations model, which accords more tax prerogatives to host economies, is deemed more appropriate for developing countries, typically net capital importers (Lang and Owens, 2014).[21]

Tax authorities in the country of residence of investors exempt investors from the taxes to which they are subject in the host economy to prevent double taxation (article 22). There are two broad methods to prevent double taxation. Under the source-based exemption method, the taxpayer is exempted from domestic tax. The residence-based credit method dictates that earnings from abroad are credited against domestic liabilities. Tax-sparing provisions then ensure that the residence economy excludes the tax relief obtained through fiscal incentives in the host economy.

Although fair and equitable treatment is granted under bilateral investment treaties, it is not provided under double taxation treaties. Nevertheless, article 24 of the OECD and United Nations tax model treaties restricts discriminatory treatment. Taxpayers liable in the host economy (i.e., investors fulfilling the condition of permanent establishment) can expect treatment that will not be inferior to that afforded to national counterparts. This standard relates to all taxes, not only those covered by double taxation treaties. Although neither the OECD nor the United Nations models contains a most-favoured-nation principle, it can still be found in some tax treaties. The implication of a most-favoured-nation clause is that, if a parallel tax treaty concluded between the capital importing country and a third country grants lower tax rates than that which is offered to the taxpayer in the base treaty, the lower tax rate will apply.

Double taxation treaties regard the various affiliates of the same company as individual entities although, in practice, these entities are often tightly interlinked. Transactions among enterprises belonging to the same parent company are

[19] For example, Goetz and others, a group of Belgian investors, successfully challenged the Government of Burundi in 1995 over the withdrawal of a permit for their local company to operate in a special economic zone according access to tax and duty exemptions (International Centre for Settlement of Investment Disputes case No. ARB/95/3; see box III for further discussion).

[20] Individual articles in the OECD and United Nations model treaties are usually sequenced in the same way but their content or language may differ.

[21] A possible trade-off between the levels of the taxation and investment flows needs to be considered.

recorded in transfer prices.[22] Individual branches of the same group are assumed to interact among themselves as they would with generic, unrelated business partners. Transfer prices should therefore be comparable to competitive prices for a similar product or service on the open market, known as the "arm's-length" principle (Organization for Economic Cooperation and Development, 2010b). In the host economy, applicable source taxes are levied on separate entities that meet the permanent establishment threshold rather than on the entire company as a whole.

In contrast to bilateral investment treaties, double taxation treaties often do not allow arbitration as a recourse of redress for investors who deem a specific tax measure or practice to be in contravention of a double taxation treaty (see table 1 for statistics on mutual agreement procedure cases). Instead, they offer the mutual agreement procedure (article 25 of both models) under which the injured taxpayer files a complaint[23] and the competent authorities from the home and host economies undertake a shared analysis and interpretation of the situation and together seek a remedy consisting of eliminating the instance of double taxation, such as the 1984 Canada–Egypt double taxation treaty.

The mutual agreement procedure takes place at an inter-State level, and the taxpayer is not an active party to the dispute. Whether a local court decision can be overridden by a later procedure settlement is usually contingent on domestic legislation, and for the procedure settlement to take effect the taxpayer needs to withdraw other complaints already submitted on the same issue (Organization for Economic Cooperation and Development, 2010a). The taxpayer can also submit a case for a mutual agreement procedure before actual harm occurs, provided the risk of double taxation is deemed not "merely possible but probable", but no later than three years following notification (Organization for Economic Cooperation and Development, 2004b).

The Organization for Economic Cooperation and Development (2017), compiling statistics for its members and for several non-members, including several African countries,[24] reported that there had been 8,002 outstanding cases at the beginning of 2016, to which a further 1,496 were added over the course of the year. Tax authorities managed to close 2,308 cases in 2016, of which 59 per cent resulted in an agreement fully eliminating double taxation and a further 19 per cent partially eliminating double taxation. Indicative of their heightened complexity, cases relating to transfer pricing[25] took on average of 30 months to resolve, while, for all other types of cases, tax authorities needed only 17 months. Data have been acquired from only a modest number of mutual agreement procedures occurring in the African countries.

Both the United Nations model (2011) and OECD model[26] (2014) allow countries to choose to include the option of arbitration should the authorities fail to find a solution within two years (OECD model) or three years (United Nations model) from the time of presentation of the case.[27] The United Nations model allows only the competent authorities to initiate arbitration proceedings, while the OECD model accords this right to the taxpayer. In neither of the two models does the taxpayer have a say over the appointment of arbitrators, possibly turning to tax officials from one of the countries, nor may he directly influence the proceedings. Only the OECD model suggests that the verdict ought to be legally binding. Unlike in bilateral investment treaties, both model double taxation treaty conventions treat arbitration as a mere complement to the mutual agreement procedure, the prime means of redress for taxpayers.

[22] Transfer price denotes "[t]he price of transactions occurring between related companies, in particular companies within the same multinational group" (African Union Commission and Economic Commission for Africa, 2015:10).

[23] The investor usually files the complaint to the residence economy, but under the OECD model is also allowed to do so with the host authorities.

[24] African countries providing mutual agreement procedure data include Angola, Côte d'Ivoire, Mauritius, Seychelles and South Africa.

[25] Transfer pricing cases comprise the issues of attributing generated profit to the appropriate entity in the same company or group.

[26] As part of its base erosion and profit shifting action plan, OECD is presently reviewing its mutual agreement procedure guidelines.

[27] For a more detailed discussion of the differences in arbitration procedures (article 25) between the OECD and United Nations models, see Ault (2013).

Table 1: Mutual agreement procedure cases in African countries and selected comparators in 2016

Country	Start inventory	New cases	Cases closed	End inventory
Angola	0	0	0	0
Côte d'Ivoire	0	0	0	0
Mauritius	2	3	1	4
Seychelles	0	0	0	0
South Africa	19	6	1	4
Comparators				
Australia	32	22	12	42
Costa Rica	2	0	2	0
Iceland	0	1	1	0
Germany	1 177	353	350	1 180
United Kingdom of Great Britain and Northern Ireland	262	109	57	314
Global total	**8 002**	**1 496**	**2308**	**7 190**

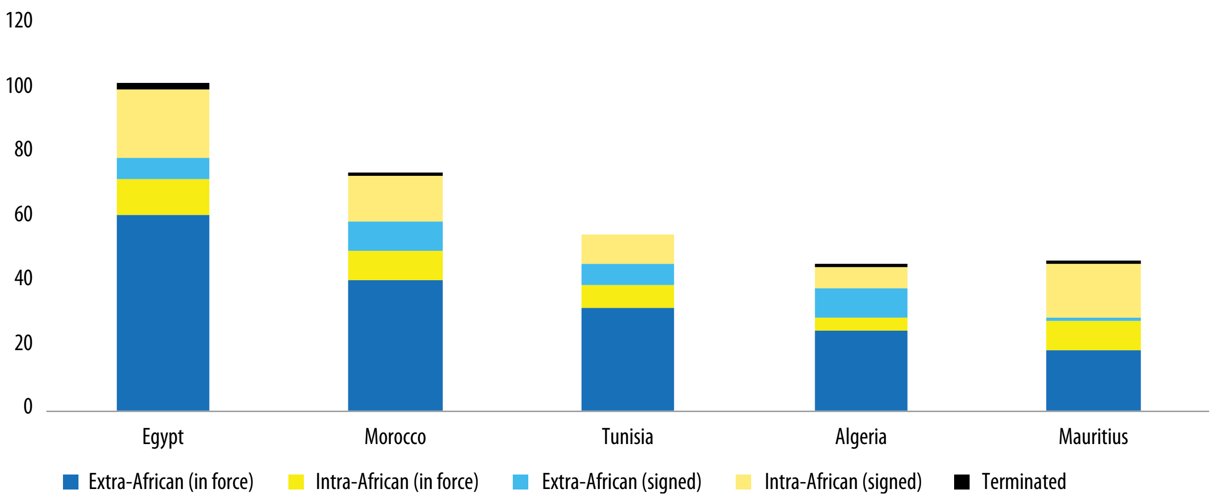
Source: *Organization for Economic Cooperation and Development (2017).*

2.3. Trends in bilateral investment treaties and double taxation treaties

There are 2,896 bilateral investment treaties globally, of which 2,337 are currently in force.[28] These treaties have traditionally been concluded between developed, capital-exporting countries and their developing, capital-importing counterparts, but investment treaties between countries located in the global South have become increasingly common (Poulsen, 2010b).

In line with world developments, Africa experienced a surge in bilateral investment treaties in the late 1990s, which continued, albeit at a slower clip, past the turn of the century (Economic Commission for Africa, 2016). African countries have cumulatively negotiated 881 bilateral investment treaties (of which 515 are in force), including 170 intra-African treaties (of which 47 are in force).[29] North African countries and Mauritius boast the densest networks of these treaties (see figure I). By and large, the same group of countries, along with South Africa, have been among the most committed to negotiating these treaties with other African economies.

Figure I: Top five African countries with active bilateral investment treaties



Source: *United Nations Conference on Trade and Development (2019a).*

[28] Figures as of January 2020. There are also 389 treaties with investment provisions, of which 314 are in force.

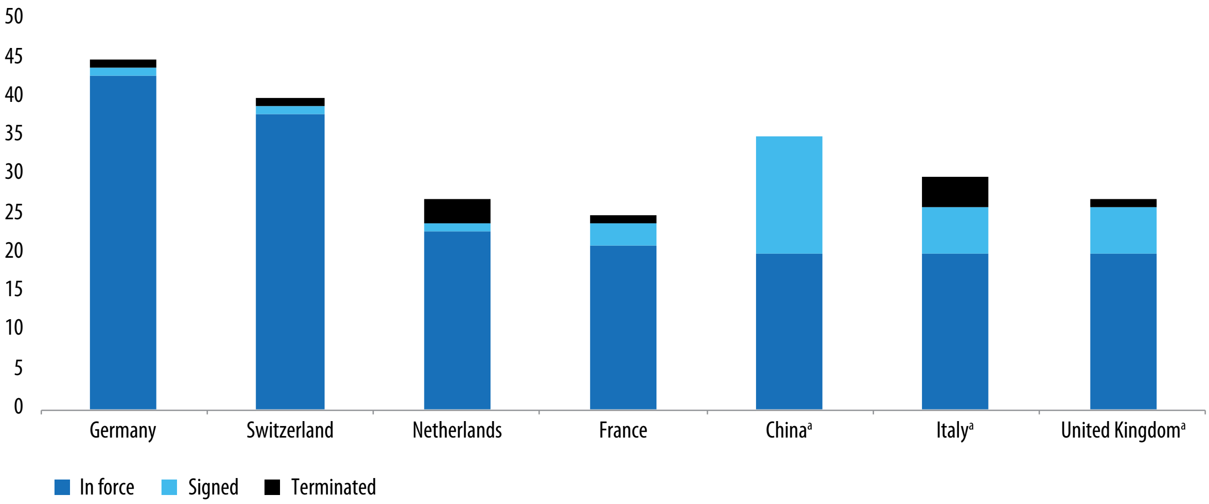
[29] Terminated treaties are included. Original and renegotiated treaties are counted as one and the same.

Western European countries, together with China, claim the biggest number of active treaties with African counterparts (see figure II).[30] Since the 1990s, BRICS has also been active in signing new bilateral investment treaties with African counties. On balance, African bilateral investment treaties with those countries do not appear to mark a substantive departure from the investment treaties signed with other countries, with a possible caveat concerning recent treaties with Brazil (see Kidane, 2016, for Sino-African bilateral investment treaties; Schlemmer, 2016 for South African bilateral investment treaties; Garcia, 2017).[31] As a further sign of intensifying South-South relations, Turkey currently boasts bilateral investment treaties signed with 32 African countries, in contrast to a mere 6 in 2010, although most of the recent treaties have yet to come into force.

It is notable that, while the rate of ratification of extra-African treaties stands at 66 per cent, only 28 per cent of investment treaties between African economies have hitherto entered into force possibly because the signature of the latter treaties remains in use as an act of diplomacy. In the cases of Ghana and Zimbabwe, for example, merely one of their 10 and 9 respective intra-African bilateral investment treaties has entered into force (with Burkina Faso and South Africa, respectively). Egypt and South Africa have, respectively, 21 and 19 bilateral investment treaties with other African countries that have never come into effect.

As the global network of bilateral investment treaties has continued to expand and the number of arbitration cases has increased, investment treaties have also become more contested. Many developing countries, including those in Africa, have begun to work on articulating their own conceptions of investment law and practices at both the national and regional levels. Several countries, notably India, Indonesia and South Africa, have, in recent years, unilaterally terminated or cancelled some, or even, like

Figure II: Top countries with active bilateral investment treaties with Africa



a *China, Italy and the United Kingdom are tied for fifth place with 20 treaties in force.*

Source: *United Nations Conference on Trade and Development (2019a).*

[30] Bilateral investment treaties with Germany and Switzerland are also among the oldest, given that 50 per cent and 42 per cent of them, respectively, were concluded with African countries more than 30 years ago.

[31] All treaties between African countries and India assessed by Garcia (2017) predate the 2015 Indian model bilateral investment treaty.

Ecuador, all of their bilateral investment treaties.[32] South Africa, for example, has also started reformulating its domestic laws concerning foreign investment (Schlemmer, 2016; see box 6.3 in Economic Commission for Africa, 2019a). Other countries, namely, Venezuela (the Bolivarian Republic of) and Bolivia (the Plurinational State of), have withdrawn from the International Centre for Settlement of Investment Disputes following a spate of lost arbitration cases.

Brazil, apprehensive about the potential impact on its sovereignty, has, to date, not ratified any of its 20 bilateral investment treaties but has, since 2015, signed a series of agreements on cooperation on and the facilitation of investment with countries, including Angola, Ethiopia, Malawi and Mozambique (United Nations Conference on Trade and Development, 2019a). These agreements do not cover indirect expropriation and do not offer recourse to investor-State dispute settlement (Arroyo Picard and Ghiotto, 2017). Nevertheless, by and large, countries around the world remain committed to the international investment system composed of international investment agreements (Brower and Blanchard, 2014).

In addition to regional initiatives, African countries have become more proactive in shaping their regulatory environment on investment. The pan-African investment code adopted by ministers at the Specialized Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration of the African Union in October 2017 and the planned investment chapter of the African Continental Free Trade Area are an indication of this development. The objective of the code is to articulate a common and coherent position on investment policy, which would better balance the objectives of promoting inward and intra-African investment flows, domestic policy sovereignty and ongoing efforts to foster regional integration. In turn, the investment chapter could help to promote intra-African FDI and foster forward and backward economic linkages (United Nations Conference on Trade and Development, 2017). African policymakers have been exploring opportunities for harmonizing the two instruments.[33]

The global network of double taxation treaties has grown during the past decades to stand currently at approximately 3,000 treaties (Arnold, forthcoming). A number of similarities in the patterns of expansion between bilateral investment treaties and double taxation treaties have become clear. Both types of treaties in Africa exploded at the end of the past century, followed by a relative slowdown in the more recent past (Economic Commission for Africa, 2016). At the same time, African countries have become more likely to sign treaties with other developing and emerging economies (Hearson, 2015). Using a sample of 48 countries for which data were available (PwC, 2013-2017), the continent has some 450 double taxation treaties, of which 391 are with jurisdictions in other parts of the world. The remaining 59 treaties link to other African countries. As in the case of bilateral investment treaties, North African countries, but also Mauritius and South Africa, have been found to be most proactive in concluding double taxation treaties (see figure III).

African countries have been particularly likely to conclude double taxation treaties with Western European ones. Canada, France, Italy, Norway

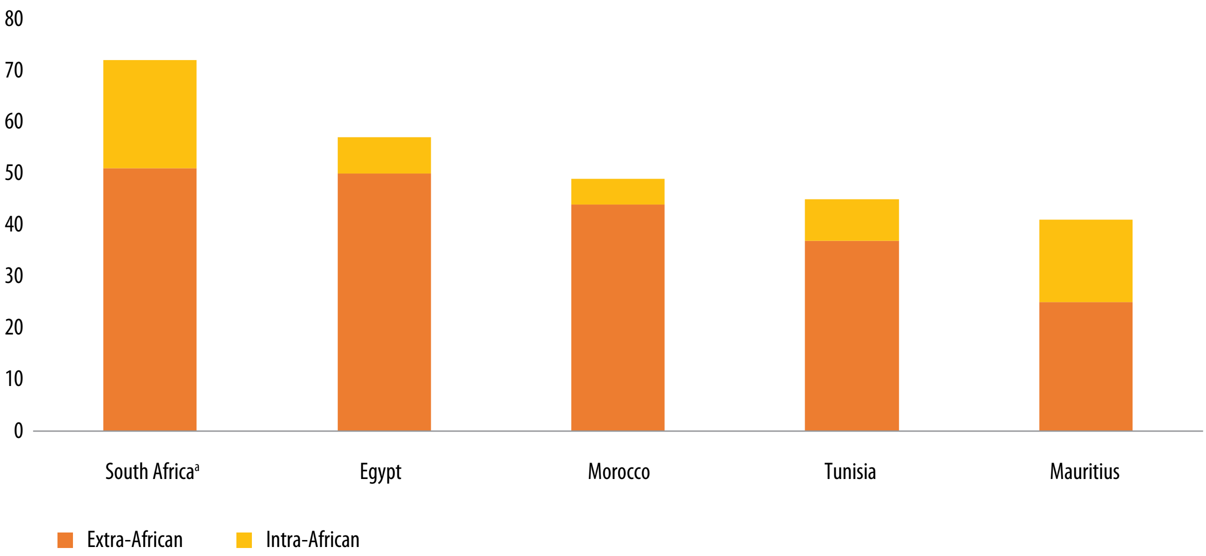
[32] Since 2012, South Africa has terminated ten bilateral investment treaties, including with France (1995), Germany (1995), the Netherlands (1995) and the United Kingdom (1994).

[33] For example, during the second meeting of African Union ministers of trade, held in Addis Ababa on 29 and 30 November 2016, the ministers strongly recommended that "the pan-African investment code be presented to the [Af]CFTA-NF to ensure alignment to the investment chapter under [Af]CFTA, as well as other synergies", and a side event of the 10th Joint Annual Meetings of the African Union Specialized Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration and the Economic Commission for Africa Conference of African Ministers of Finance, Planning and Economic Development in Dakar, Senegal in March 2017 saw policymakers and experts discussing opportunities for and the challenges of "Aligning the Pan-African investment code with the investment chapter of [Af]CFTA".

and the United Kingdom are the top five countries having active double taxation treaties with African countries (see figure IV).

As in the case of bilateral investment treaties, the growing top-line global and regional figures conceal a mounting level of discontent with the international tax regime. The decision taken by Argentina and Mongolia to terminate several tax treaties because of their restrictive nature exemplifies the growing sentiment that poorly designed double taxation treaties may cause more harm than good to host economies. Rwanda and South Africa recently renegotiated their tax conventions with Mauritius in a bid to reclaim some of their taxing rights. Following criticism of the tax treaties for facilitating tax avoidance, the Netherlands has, in recent years, renegotiated a number of double taxation treaties with developing countries, including Malawi in 2015, Kenya and Zambia in 2016.

Figure III: Top five African countries with active double taxation treaties



[a] *Data for 2015.*

Figure IV: Top five countries with active double taxation treaties with Africa

Source: *PwC (2017).*

A review of the bilateral investment treaty and double taxation treaty networks by UNCTAD (2015b) shows that the two are intertwined, with approximately two thirds of bilateral investment treaties being supported by corresponding double taxation treaties, whereas the reverse is true for approximately half of double taxation treaties. In approximately one third of cases in which two countries are linked by both bilateral investment treaties and double taxation treaties, the two treaties were brought into effect within two years of each other.[34] Compared with bilateral investment treaties, double taxation treaties correlate more strongly with investment. Approximately 90 per cent of FDI stocks are protected by these treaties and only approximately 15 per cent by bilateral investment treaties. Nevertheless, double taxation treaties are also more likely to be concluded between developed economies with larger stocks of investment.

[34] An example of purposeful linking of bilateral investment treaties and double taxation treaties in treaty practice can be found in article VI of the Italy – Guinea bilateral investment treaty (1964), which reads as follows: "The two Contracting States endeavour to avoid double taxation and will to this effect stipulate special conventions" (original in French). Article 2 of the France – Senegal bilateral investment treaty (2007) stipulates that "[t]he present Agreement does not apply to questions in the domain of the bilateral tax convention signed by the Contracting Parties on 29 March 1974 or any such convention that would follow it" (translated from the original French).

3. Problematic themes in bilateral investment treaties and double taxation treaties

3.1. Heterogeneous empirical evidence calls for scrutiny of both bilateral investment treaties and double taxation treaties

African countries enter into investment and tax treaties with the intention of promoting and encouraging inward investment. Only a part of the vast literature, however, lends support to this cause.[35] Little is also known about the relative importance of individual provisions in bilateral investment treaties for investors and whether they can effectively compensate for weak domestic institutions. Similarly, in the case of double taxation treaties, questions remain over whether benefits resulting from these treaties may entail compensation for forgone tax revenue. To date, no known empirical study has sought to quantify the cumulative effects of bilateral investment treaties and double taxation treaties on investment flows.

While some early studies cast doubt on the positive influence of bilateral investment treaties on capital inflows to developing countries (see Hallward-Driemeier, 2003; Aisbett, 2007; Yackee, 2010), more recent studies have tended to bear this effect out (for example Neumayer and Spess, 2005; Busse and others, 2010; Haftel, 2010; Bankole and Odewuyi, 2013, for flows from European Union countries to ECOWAS countries; Berger and others, 2013; Mina, 2015; see United Nations Conference on Trade and Development, 2009). Lejour and Salfi (2011) found that bilateral investment treaties were conducive to higher levels of investment, in particular for upper middle-income countries, but fall short of statistically corroborating this link for African countries. Using firm-level data, one study indicates that German multinational corporations tend to be more active in developing countries if covered by an investment treaty (Egger and Merlo, 2012), but, in a separate paper, the author failed to confirm a similar phenomenon in the case of French multinationals (Yackee, 2016). It was also concluded in a recent study that large differences in gross domestic product (GDP) and, by extension, bargaining power as postulated by its authors, as well as per capita GDP, stimulate a positive effect of bilateral investment treaties on FDI flows (Falvey and Foster-McGregor, 2017).

Questions remain over the extent to which the strength of the dispute resolution mechanism influences investment decisions (see Yackee, 2008; Berger and others, 2011; Berger and others, 2013; Busse and others, 2013). For example, investors may be interested in the dispute settlement mechanism available only when attempting to invoke the mechanism rather than at the point of making their investment decisions (Poulsen, 2010a). Some studies have also found that bilateral investment treaties lead to increased investment flows from partner countries, yet once the host country faces or, in particular, loses arbitration, there is a significant fall in investment flows from the other economy (Allee and Peinhard, 2011; Aisbett and others, 2016).

Evidence is also inconclusive on whether bilateral investment treaties can reduce political risk by replacing imperfect domestic institutions and weak legal regimes. A number of studies point towards bilateral investment treaties having a

[35] Empirical studies on the effects of treaties on foreign direct investment are subject to considerable methodological and data challenges (see Bonnitcha and others, 2017, for discussion in the context of bilateral investment treaties and Hearson, 2014, for double taxation treaties).

positive effect on FDI when complementing quality institutions (such as Siegmann, 2008, Tobin and Rose-Ackerman, 2011; Falvey and Foster-McGregor, 2017). On the other hand, some authors maintain that bilateral investment treaties prove more stimulating for investment in economies characterized by higher risk (see Tobin and Rose-Ackerman, 2003; Sokchea, 2007; Kerner and Lawrence, 2012) and weak institutions (Busse and others, 2010).

The causal link between tax conventions and investment inflows in developing countries appears to be even more tentative, compared with investment treaties (see Sachs and Sauvant, 2009; Hearson and Cangave, 2016), although some econometric studies found a positive relationship between double taxation treaties and investment inflows in developing countries (see Siegmann, 2008; Barthel and others, 2009; Blonigen and others, 2014). Nevertheless, in a paper based on 11 East African studies, the authors failed to identify a link between lower tax prerogatives of host economies and increased investment inflows (Daurer and Krever, 2012). Baker (2014) also found no evidence of a positive relationship between double taxation treaties and increases in investment, arguing that this effect was precluded by developed countries introducing unilateral measures to prevent double taxation. When a positive relationship is identified, some research also suggests that middle-income countries, rather than lower-income developing countries, profit from double taxation treaties in terms of higher volumes of capital imports (see Neumayer, 2007; Braun and Fuentes, 2014).

Doubts have also been raised over the direction of the relationship between tax treaties and investment inflows reported in empirical studies (Hearson, 2014). For example, Egger and others (2006) found a negative relationship between double taxation treaties and outward FDI stocks from OECD countries. This result is consistent with the view that tax treaty negotiations follow significant investment rather than occur between countries with very few investment links. Moreover, taxation is ultimately only one among many factors influencing investors' decisions regarding where to place their investment (United Nations Conference on Trade and Development, 2015b).

Neither bilateral investment treaties nor double taxation treaties are entirely cost free for capital-importing economies. The lack of unequivocal empirical evidence in favour of the two instruments warrants careful consideration on the part of policymakers. For bilateral investment treaties, the question is where to draw the line between being bound to ensure a safe and predictable business environment and unduly limiting the right to regulate. In the case of double taxation treaties, these are beneficial for the capital importer only if the overall welfare derived from higher (future) investment and possibly lower leakages through tax evasion outweigh forgone tax revenue as a result of their impact on source taxation (Baker, 2014; Pickering, 2014). Serious questions need to be raised about tax treaties that do not pass this test and reduce tax receipts without bringing extra capital.

3.2. Developing countries bear the brunt of tax and investment treaties

The provisions contained in bilateral investment and tax treaties are binding on both contracting States. These obligations, however, entail vastly different consequences for capital importers, such as African countries, and for capital exporters, typically their more industrialized counterparts. These differences stem largely from the pursuit of different albeit complementary policy objectives taking place against a backdrop of unequal power and economic relations and negotiating capabilities (Krisch, 2005; Daurer and Kreurer, 2012; Hearson, 2018).

Investment treaties tend to impose obligations solely on the host country, notwithstanding an oft-present declaration of intentions of furthering mutual economic relations. A much softer language to "encourage" engagement is usually employed in the case of the home country, as opposed to binding commitments, such as to enhance export insurance schemes, for example, which appears to be incongruous with the intended aim of promoting investment flows between the two countries (Van Harten, 2016). Stress is also laid on the host country's obligations rather than those of foreign investors (Kingsbury and Schill, 2010). Companies' behaviour is thought to be sufficiently governed by domestic law or even international law if a contract between the Government and private company so allows (Brower and Blanchard, 2014).[36] Nevertheless, a host State can, over time, begin to export capital to a source State, thus contributing to a more equitable distribution of rights and obligations in the presence of a bilateral investment treaty between the two countries.

Instead of levelling the playing field between national actors and international companies, bilateral investment treaties can slant it away from the former towards the latter. The rules for arbitration contained in bilateral investment treaties typify this imbalance. Investors can usually choose the tribunal with which they wish to file the complaint. By contrast, investment treaties often do not provide Governments with a legal basis to launch proceedings against investors. [37] Likewise, domestic companies do not usually have access to such institutions. Many bilateral investment treaties are also not drafted in such a way as to give countries easy access to filing counterclaims against an investor (Bjorklund, 2013; Kalicki, 2013). Nevertheless, a breach of domestic law or other legal obligations by investors may also be taken into account by the tribunal and result in a lower award or even an outright dismissal of the claim brought by the claimant (Brower and Blanchard, 2014). The treaties also do not allow local organizations and communities to assert a claim against a foreign investor in international arbitration (Van Harten, 2016). In sum, bilateral investment treaties ensure that investors' interests are safeguarded but do not always play the same role for host countries and their communities.

Research suggests that stringent enforcement provisions are more likely to be found in bilateral investment treaties characterized by significant power asymmetries between the two contracting States rather than in treaties with countries with inadequate domestic institutions (Allee and Peinhardt, 2014). Capital-importing countries also tend to consent to more constraining treaties if the negotiations take place during an economic downturn (Simmons, 2014) and when they perceive that their competitors for FDI from the same source economy have already agreed to them (Neumayer and others, 2016). More generally, these treaties reflect the reality of international law, to which developing countries have adhered but which they have rarely shaped (Vandevelde, 2005; Salacuse and Sullivan, 2005).

The phenomenon of an unequal distribution of costs also plays out in the context of tax treaties. Double taxation treaties place significant limits on the host countries, often developing economies, curtailing their tax-raising powers. These treaties do not, in general, have a significant impact on home countries, which, for the most part, have adopted double tax relief measures in their national codes regardless of double taxation treaties (Dagan, 2000; Baker, 2014). In the absence of tax-sparing measures, a reduction in withholding taxes would lead to a reallocation of taxing rights between the two economies without affecting the company's net earnings (ActionAid, 2016b). Limits on taxation in the host country and an automatic waiver of tax rights in the home economy can give rise to double non-taxation, whereby the host country is prevented from raising taxes on a specific activity, while the home economy does not tax it either under its domestic legislation.

Investment and tax treaties have to be seen in conjunction with the overall domestic regulatory framework. Robust obligations towards foreign investors (Hepburn, 2018), as well as var-

[36] The underlying assumption is that domestic regulatory structures in developing countries on their own are robust enough to provide sufficient oversight to the activities of large multinational corporations (Mann, 2013).

[37] Nevertheless, arbitration rules, including those of the International Centre for Settle of Investment Disputes and the United Nations Commission on International Trade Law, do not preclude the option of claims triggered by the host State, and a handful of such proceedings have already been initiated, for example, Gabon v. Société Serete S.A. (International Centre for Settlement of Investment Disputes case No. ARB/76/1), on the basis of a contract between the company and the host State. The case was ultimately settled.

ious fiscal incentives, including those specific to special economic zones or otherwise qualifying investors, can be found in the domestic legislation (Economic Commission for Africa, 2019) and can interact with international treaties. A comprehensive review of the domestic legal regimes in Africa is needed to ensure policy alignment across different levels.

Treaties and domestic tax laws can also form part of a wider strategy to create confidence for foreign investment. However, a reduction in taxation on the highly mobile capital results in losses in tax receipts and may prompt governments to shift a part of the tax burden to less mobile sources, such as labour and consumption (Avi-Yonah, 2000), an option that raises questions of fiscal justice and which may not be easily available to developing countries (Dietsch, 2015). As discussed in sections 3.3 and 5.3, tax treaties may also facilitate tax avoidance (Economic Commission for Africa, 2018).

More stringent investment and tax treaties may also spread more widely over time as countries vie for a limited pool of mobile capital to spur their development. Several authors have pointed out that developing countries could collectively derive more benefits from foreign investments if they provide lower standards of protection and maintain more robust taxation rights but individually they find themselves in a mutually competitive relationship, which is favourable to mutual undercutting, resulting in more stringent investment obligations (Guzman, 1998) and lower prerogatives (Baistrocchi, 2008; Barthel and Neumayer, 2012; Quak and Timmis, 2018). Neumayer and others (2016) have found that once a developing country has signed a constraining investment treaty with a particular source economy, other countries competing for the capital from the same country are likely to follow suit. Nonetheless, the propensity of African countries to adopt the models of their mode developed counterparts may also play part in this finding. Several studies have then indicated that the intensity of tax competition might be heightened in Africa compared to other regions (Park et al., 2012; Sokolovska, 2016) and withholding taxes in African countries have also been found to have been falling over time (Hearson, 2016; see section 3.3.4),

3.3. Bilateral investment treaties and double taxation treaties can pose challenges to development-oriented policies

The ability of governments to articulate and implement effective and appropriate development policies is contingent on a degree of policy freedom and the capacity to carry out these policies, but bilateral investment treaties and double taxation treaties may sometimes complicate these objectives. While the former may, for example, curtail the choice of some policy measures or result in a fear of breaching treaty obligations by introducing new legislation or policy, double taxation treaties can weaken tax resource mobilization capabilities. These negative consequences can be accentuated by treaty abuse on the part of some investors. Governments may find themselves in this undesirable position over long stretches of time, seeing as such treaties tend to be in force over decades. The two instruments may induce cumulative effects in the case of a treaty-based arbitration. The following subsections highlight some of the challenges that bilateral investment treaties and double taxation treaties may pose for government action.

3.3.1 Bilateral investment treaties limit a Government's policy space

Bilateral investment treaties may engender a tension between commitments to investors, on the one hand, and sovereignty and obligations to the rest of the society, on the other (Salacuse and Sullivan, 2009; Spears, 2010). In the words of one prominent commentator, bilateral investment treaties may occasion "[a] perverse shift in bargaining power to the most powerful private economic actors on the planet at the expense of institutions and processes that represent everyone else" (Van Harten, 2016: 50). It is therefore essential that decision-makers understand the degree to which their sovereign prerogatives may be limited.

Investors can seek to block new regulation through bilateral investment treaties (Cotula, 2014). Such concerns have been raised in the areas of the provision of public services, the promotion of human rights and environmental protection (Kriebaum, 2007a; Bohoslavsky and Justo, 2011; Cosmas, 2015). The fair and equitable treatment principle has been evoked to challenge laws promoting general welfare because its often nebulous definitions give companies wide latitude to challenge States (Bernasconi-Osterwalder and others, 2012; Mann, 2013). Virtually all investor-State dispute settlement cases have been at least, in part, underpinned by the fair and equitable treatment provision (United Nations Conference on Trade and Development, 2015a). For its part, national treatment can serve as a springboard for legal challenges to policies furthering the interests of specific disadvantaged groups, such as indigenous peoples,[38] or to policies protecting and stimulating infant industries (United Nations Conference on Trade and Development, 2004). Although host States enjoy some latitude in taxation, the issue of investment treaty protection may still come up, including in the context of the ongoing anti-tax avoidance efforts (Chaisse and Marisi, 2017). A more detailed discussion of the implications of these standards in the area of taxation, a specific case in point of a potential clash between regulatory powers and investment protection, is offered in section 4.

Some bilateral investment treaties prevent Governments from imposing performance requirements, which would mandate the prospective investor to comply with specific additional criteria before their investment projects are approved by the authorities (Mann, 2013). These performance requirements have a number of aspects central to economic development, notably encouraging technology and/or skills transfer, ring-fencing employment opportunities for the native population and fostering linkages with domestic industries. The expected benefits of FDI may not always materialize as there is no guarantee that the business objectives of foreign companies coincide with the development strategies and aspirations of the host economy (Boone, 2011). For example, investors may not be inherently given incentives to devote resources to upskilling local staff or to facilitating technology transfers (Vandevelde, 2000). On the other hand, over-strict performance requirements will diminish the attractiveness of a prospective investment project. Domestic suppliers may be less competitive than their international peers or limited in number, and obliging international investors to source for them could raise their production costs. On balance, performance requirements can unlock development opportunities through FDI, but they must be crafted carefully (United Nations Conference on Trade and Development, 2003).

3.3.2 Investor-State dispute settlement may be vulnerable to bias

Since the turn of the century, the number of arbitration cases brought by private investors against national Governments has exploded (United Nations Conference on Trade and Development, 2013). During the 2016-2017 fiscal year, the International Centre administered 279 cases, more than ever before, representing 41 per cent of its lifelong workload (International Centre for Settlement of Investment Disputes, 2018), Although recently re-emerging, State-to-State arbitrations are not yet commonplace (Bernasconi-Osterwalder, 2016).

While more than two thirds of investor-State dispute settlement cases were opened against developing and transitional economies, approximately 85 per cent were initiated by enterprises based in developed countries (Zhan, 2016).[39] Of 942 known concluded investor-State arbitrations,

[38] Limitations on affirmative action was one of the reasons why South Africa terminated a number of bilateral investment treaties after 2012 (Carim, 2016). On the other hand, the Czechia-South Africa bilateral investment treaty (1998) contains a special-purpose exception that allows for action aiming to "promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination" (article 3c).

[39] Countries that have most often responded in arbitration include Argentina (60), Spain (36), the Bolivarian Republic of Venezuela (47), Czechia (38) and Egypt (33). The nationality of the claimants has most often been the United States (174), the Netherlands (108), the United Kingdom (78), Germany (62) and Canada (9) (United Nations Conference on Trade and Development, 2019b).

35.7 per cent were decided in favour of the State, 28.7 per cent in favour of the investor, 22.8 per cent settled, 10.6 per cent discontinued and 2.4 per cent considered decided in favour of neither of the parties (United Nations Conference on Trade and Development, 2019b). Looking only at the awards, however (i.e., leaving aside cases that the arbitrators have thrown out on jurisdictional or procedural grounds), investors' success rate in investor-State dispute settlement rises to 60 per cent (United Nations Conference on Trade and Development, 2018b).[40] In addition, settlements usually entail financial compensation and, by extension, an admission of a treaty breach on the part of the State, which are, in general, not budgeted for and hence have a bearing on existing public revenue and government resources.

The findings resulting from current empirical literature have not yet categorically confirmed or refuted claims of systemic bias in international arbitration. Developing countries are less successful, compared with their richer peers (Pelc, 2017), and a clear answer has yet to emerge on whether this phenomenon is attributable mainly to lower levels of development or is "conflated" with associated imperfect domestic institutions (see Behn and others, 2017; Donaubauer and Nunnenkamp, 2017). Nevertheless, countries with poor governance appear to attract more arbitration claims (Dupont and others, 2016).

Jurisdiction and admissibility of cases have been found to be interpreted in a more expansive manner, favouring the claimant, when the dispute is initiated by Western claimants and when adjudicated by frequently appointed arbitrators (Van Harten, 2012).[41] The major beneficiaries of the investor-State dispute settlement system tend to be large international corporations with annual turnovers exceeding $10 billion and individuals with a net worth of more than $100 million (Van Harten and Malysheuski, 2016).

Arbitration proceedings and awards can be costly. The average award amounts to $504 million and the median stands at $20 million, with successful investors being awarded on average 40 per cent of their original claims (United Nations Conference on Trade and Development, 2018bd). Average awards have been estimated to amount to 0.53 per cent of national annual budgets of developing countries (Gallagher and Shrestha, 2011). Combined legal and arbitrary costs for claimants and defendants on average exceed $8 million (Organization for Economic Cooperation and Development, 2012b). Such arbitration proceedings divert resources that could be spent on objectives, including developing infrastructure or strengthening institutional frameworks, which, in turn, could provide further incentives to FDI (United Nations Conference on Trade and Development, 2005; Bernasconi-Osterwalder and others, 2012). Conversely, it has also been argued that the high costs of arbitration also act as a deterrent to frivolous arbitration by companies, especially given that tribunals have become keener on applying the "loser pays" principle (Brower and Blanchard, 2014). This hurdle may, however, be more important for small and medium companies than for large enterprises.

In the face of high potential costs and an uncertain outcome, it has been suggested by various commentators that the mere prospect of potential litigation can discourage Governments from legislating. Concerns have been raised over the so-called "regulatory chill", whereby Governments are wary of introducing new legislation for fear of international arbitration (Peterson, 2007; Boone, 2011; Mann, 2013). The existence of this phenomenon, which is inherently difficult to observe from the outside, is often disputed, however (see Brower and Blanchard, 2014; Bonnitcha et al., 2017). It was concluded in a review study of publicly available cases commissioned by the Government of the Netherlands that "claims that ISDS causes regulatory chill are overstated", in part because most investor-State dispute settlement cases were related to administrative measures rather than changes in legislation (Tietje and Baetens, 2014: 92).

[40] This figure is based on the 495 publicly known proceedings concluded by the end of 2016.

[41] The cited findings were statistically significant in the case of the claimants from France, the United Kingdom and the United States. Data used did not corroborate the same phenomenon in the case of German capital exporters.

By conferring additional rights and privileges on foreign investors vis-à-vis all other (potential) enterprises, be they third party or domestic, bilateral investment treaties may skew the playing field in their favour. Unless provided for in the domestic investment code or government contracts, investors not enjoying treaty protection have access only to domestic courts.

3.3.3 Investor-State dispute settlement system still exhibits systemic flaws

The international arbitration system has also become subject to questions over legitimacy, consistency and arbitrators' independence (United Nations Conference on Trade and Development, 2012d). Legitimacy is seen as being undermined by an inconsistent interpretations of clauses enabling unintended use and abuse of the system on the part of the investors and high financial costs associated with litigation (United Nations Conference on Trade and Development, 2013, 2015a). Individual arbitration panels have come to divergent interpretations of identical, or nearly identical, clauses and treaty provisions that, especially in earlier bilateral investment treaties, were vaguely defined (Benasconi-Osterwalder and others, 2012).

The current set-up also does little to dispel suspicions of a possible bias on the part of arbitrators. Both the claimant, usually the investor, and the defendant, typically the host State, may have an incentive to select arbitrators sympathetic to their cause (Donaubauer and others, 2017). Arbitrators, on the other hand, lacking security of tenure, may have a vested interest in being reappointed in other cases, for example, as counsels (Zhan, 2016; Van Harten, 2016). The question of conflict of interest may arise when arbitrators assume different roles in cases of investment dispute settlement. There appears to be a circle of well-connected arbitrators often engaging in "double-hatting" or even "triple-hatting" (i.e., simultaneously performing different roles, such as arbitrator, legal counsel, expert witness and tribunal secretary) in various cases (Langford and others, 2017).

The figure of the tribunal president looms large in the final award. Investors appear more likely to win the case if the presiding arbitrator has, in the past, been more often appointed by the claimant than the responding country (Donaubauer and others, 2017). Research also suggests that personal policy preferences weigh on arbitrators' decisions (Waibel and Wu, 2017). These factors also need to be seen in the context of law firms representing the disputing parties, which, by dint of their activities, may have unique insights into the personal traits of arbitrators and have knowledge of unpublished awards (Maupin, 2013).

In the light of the possible implications of investor-State dispute settlement on the ability to pursue desired development objectives, the issue of transparency balancing confidentiality and public interest has become of great importance. Issues covered by transparency include public access to information and allowing non-disputing parties, such as civil society organizations, the ability to participate in the proceedings and thereby offer additional relevant information. Information on arbitration proceedings, however, may still be withheld from the public under specific arbitration rules, and neither the outcome nor indeed the very existence of a treaty-based dispute may be publicly known (Maupin, 2013; see box IV). Pre-judgment settlements appear to be a popular method to conceal both procedural and substantive aspects of arbitration with respondent States with a history of lost arbitrations (Hafner-Burton and Victor, 2016).

The stakes of these issues are further increased by the inconsistency of case law and absence of an appeal body. The rules for a challenge to the award resulting in a possible annulment, however, are severely circumscribed.[42]

[42] The International Centre for Settlement of Investment Disputes rules allow only (partial) annulment on the following grounds: (a) the tribunal was not properly constituted; (b) the tribunal has manifestly exceeded its powers; (c) there has been corruption on the part of a member of the tribunal; (d) there has been a serious departure from a fundamental rule of procedure; and (e) the award has failed to state the reasons on which it is based (International Centre for Settlement of Investment Disputes, 2006). The International Centre (2017) reports a 4 per cent rate of annulment between January 2011 and June 2017.

3.3.4 Double taxation treaties place considerable limits on taxing rights of countries

Double taxation treaties limit the set of economic activities liable to tax in the host country and cap the applicable tax rates, including retention taxes on dividends, interest payments and royalties on a par with or below the statutory rates. If the company's presence in the host country falls below the permanent establishment criteria established in the double taxation treaty, companies are not subject to source taxes. Some classes of retention taxes can be completely abolished for investors covered by such a treaty. Inasmuch as economies of origin do not subject foreign income to taxation and cuts in the withholding tax rates effectively amount to tax incentives. Taxing rights of source countries can also be circumscribed through gains taxes, which may be tilted broadly or completely in favour of the residence economy. Multinational corporations can, in some cases, completely avoid taxes on capital gains, for example, if these are exempted in the residence economy.

There are various ways in which taxing rights for capital importers can be curtailed. For example, the domestic tax code of Uganda sets all withholding taxes at 15 per cent. Under the 2004 Uganda–Netherlands double taxation treaty, however, retention taxes on interest and royalties are 10 per cent and on dividends may be 0, 10 and 15 per cent. The 1988 Congo–France double taxation treaty and the 2006 Zimbabwe–Kuwait one completely abolish source taxes on interest to lenders in treaty partner countries (ActionAid, 2016b). The Mauritius– Kenya and Mauritius–Nigeria double taxation treaties, both of 2012, award all capital gains taxes to the economy of residence (ChristianAid and ActionAid, undated), thus stripping countries of a potentially important source of income. Similarly, the 1955 United Kingdom–Malawi double taxation treaty prevents Malawi from taxing dividends, yet in many instances the United Kingdom does not tax it either, leading to double non-taxation (ActionAid, 2016b). On the other hand, double taxation treaties between developed and developing countries appear to be associated with an increase in official development assistance of $6 million on average in the year of signature, which, according to Braun and Zagler (2017), may be a "compensation" to sweeten the loss in tax rights of the host economy.

A specific North–South divide was observed by Hearson (2016) in the evolution of African double taxation treaties suggesting an erosion of the taxing rights of African countries, due to the fact that both the definition of permanent establishment and the rate of withholding taxes have, over time, become less favourable for the host economy in the tax treaties between African and OECD countries. By contrast, in double taxation treaties concluded between African countries and non-OECD economies, the definition of permanent establishment has tended increasingly to favour the host economy, and the pace at which the rates of withholding taxes have fallen is slower.

3.3.5 Double taxation treaties may facilitate tax avoidance of multinational corporations

The international tax system allows for opportunistic tax behaviour by international companies, notably by multinational corporations. Double taxation treaties can enable tax avoidance by opening up avenues for aggressive tax planning techniques, which take advantage of tax rate differentials in individual jurisdictions and loopholes in national legislation. Unlike tax evasion, which is illegal, foreign companies avoiding tax may comply with the word of the law but not its spirit when they push the legal means available to the limit to minimize their tax liabilities. Tax treaties allow investors to avoid taxes by working around the definition of permanent establishment, as well as opportunistically shifting funds through entities in different jurisdictions.

There are several ways in which foreign investors can structure their activities in the host economy so that they fall below the definition of permanent establishment. Foreign companies can split their local commercial subsidiary from the overall enterprise structure through commissionaire arrangements (in common law countries), fragment their activities in the domestic economy or exploit the exceptions in the definition of permanent establishment (Organization for Economic Cooperation and Development, 2015a, b). Even when meeting the permanent establishment criteria, registering through several entities in the host economy puts a further strain on tax authorities as it makes monitoring these companies more onerous.

Taxable liabilities faced by entities meeting the permanent establishment criteria can be lowered by accounting manipulation of financial transactions. Two broad and complementary approaches have emerged (Organization for Economic Cooperation and Development, 2012c; United Nations Conference on Trade and Development, 2015b). Under the first one, profit can be shifted from the jurisdiction where that profit was realized to a low-tax jurisdiction using transfer pricing for intermediate goods and services, such as administrative, intellectual property rights and technology transfers between individual entities of the same organization (McNair and others, 2010). This technique is often used in moving profit from e-business operations and extractive industries. The second approach favoured by capital-intensive investment in the primary and secondary sectors relies on an excessive and/or unnecessary debt financing through intermediate entities based in low-tax jurisdictions. If interest is tax deductible in the host economy and withholding taxes do not apply on interest, artificially constructed debt financing, or so-called thin capitalization, within the same group can be used as a powerful tool for profit shifting (Keen and others, 2014).

Exceptions contained in national legislation can be further leveraged to drive down tax payments as part of a tax optimization strategy. These special allowances can take various forms, including preferential tax rates, tax holidays, investment tax credits, free zones, subsidies and stabilization agreements. Tax sparing on the side of the residence economy can further facilitate aggressive tax reduction practices and encourage profit repatriation at the expense of reinvestment in the host economy (Organization for Economic Cooperation and Development, 1998b).

3.3.6 Fiscal impact of double taxation treaties on African countries

Source countries can suffer significant fiscal losses because of taxation treaties through the curtailment of their taxing rights and tax avoidance. The risk of leakage of financial resources due to tax avoidance is worrying for developing countries where corporate taxes feature prominently in the overall government revenue (Durst, 2014), which, in turn, accounts for a lower share of GDP compared with OECD countries (United Nations Conference on Trade and Development, 2015b; Organization for Economic Cooperation and Development, 2017). The situation is even more acute in Africa. Foreign affiliates in Africa account for 26 per cent of total corporate contribution and 14 per cent of government revenue. The comparable figures for developing countries as a whole are 23 per cent and 11 per cent, respectively (United Nations Conference on Trade and Development, 2015b).

Developing countries are relatively more affected by and exposed to tax avoidance, in part owing to weak and under-resourced domestic institutions struggling to cope with sophisticated tax optimizing practices and insufficiently developed domestic legal frameworks (United Nations Conference on Trade and Development, 2015b; Johannesen and others, 2016; Oguttu, 2016). Tax avoidance is known to contribute to illicit financial flows from Africa,[43] with estimates of such flows averaging annually $73 billion between 2000 and 2015 (Economic Commission for Africa, 2018).[44]

[43] While tax evasion refers to practices that are illegal, tax avoidance denotes strategies that are legal but aggressive tax-optimizing strategies. Inasmuch as both practices lack legitimacy and have a similar impact on development, the Economic Commission for Africa has adopted a broad definition of illicit financial flows, which encompasses both tax evasion and tax avoidance (African Union and Economic Commission for Africa, 2016; Economic Commission for Africa, 2018).

[44] Some estimates put the figure of annual lost tax revenue in developing countries resulting from tax avoidance and tax competition at approximately $200 billion (Crivelli and others, 2015), equal to between 6 and 13 per cent of overall tax revenue (Oxfam, 2016).

Corporations may avail themselves of the combined benefits and loopholes in domestic legislation, tax treaties and investment incentives. Because national definitions and scope of investment incentives differ between countries, a study was based on an extrapolation of data from a sample of 16 developing countries (ActionAid, 2013), and the annual loss suffered by developing countries to statutory corporate income tax exemptions was valued at approximately $138 billion. In an earlier study, it was estimated that the fiscal cost of Rwanda's tax incentives was $234 million between 2008 and 2009 (Tax Justice Network Africa and Action Aid, 2011).

The relative desirability of tax incentives needs to be assessed beyond the immediate fiscal advantages that they offer to investors. Their direct financial cost can, in theory, be outweighed by positive spillover effects that the promoted investment projects may have on the economy. Tax incentives' effectiveness in promoting structural change and their impact on resource allocation still has to be determined, however, in particular in developing countries (International Monetary Fund and others, 2015; Zolt, 2015).

3.4. Investment treaties can hinder crisis management

The long-term challenges posed by double taxation treaties can also dynamically interact with the limits posed by bilateral investment treaties at the time of an acute crisis. Governments may find themselves in a more precarious fiscal position in responding to an economic crisis on account of the long-term adverse impacts double taxation treaties may have on public finances. The lower potential for raising funds undermines the fiscal firepower at hand and can affect credit rating and, by extension, the cost of borrowing on international financial markets.

Bilateral investment treaties lacking safeguards or exceptions can sanction policymakers for adopting emergency economic measures to forestall the slide of an incipient economic downturn or balance of payments crisis into an economic collapse. The tale of Argentina at the beginning of the century exemplifies what is at stake when a Government finds its economic conduct in a crisis situation curtailed by investment treaties. In response to an economic meltdown, the Government of Argentina adopted a raft of measures, including currency devaluation, "pesification" of contracts with companies and the freezing of tariffs in contracts. More than 50 investor-State dispute settlement cases were subsequently filed against the Government in relation to the emergency measures adopted in response to the 2001 financial collapse under various treaties, including violation of fair and equitable treatment, the umbrella clause and expropriation. By 2015, Argentina had allegedly lost almost 45 per cent of the cases filed against its conduct during the crisis (Lavopa, 2015). In 2016, its Government agreed to pay $217 million in compensation to two foreign energy companies, having lost two arbitrations against them in 2014 (Ministry of Treasury, 2016). The core arguments of the Government resting on the state of necessity and the treaty exceptions were not accepted by tribunals in a consistent manner (Sacerdoti, 2013). Although later decisions tended to be more in favour of the responding State, separate arbitral tribunals issued different rulings on nearly identical cases, thereby raising questions over the legitimacy of the tribunal system (Burke-White, 2008; Alvarez and Khamsi, 2009).

The free movement of capital can aggravate business cycles by the entry and departure of "hot money". Short-term capital controls can, under specific conditions, be a useful macroprudential measure (International Monetary Fund, 2012), although concerns over their efficacy and effectiveness have to be acknowledged (Edwards, 1999; Eichengreen and Rose, 2014; Fernández and others, 2015). Consequently, periods of crisis may heighten the tension between providing specific standards and assurances to investors in bilateral investment treaties and protecting the government's manoeuvring space (Sacerdoti, 2013).[45]

[45] Older bilateral investment treaties with the United States often appear to be particularly restrictive (Gallagher, 2010).

In a similar vein, misgivings persist over potential repercussions of unfettered freedom on the transfer of funds relating to investment, which can be found in treaties such as the 1996 Ethiopia–Kuwait bilateral investment treaty and the 2002 Nigeria–Spain bilateral investment treaty, during a time of an economic crisis. Although international law accords States the right to manage capital flows, some commentators suggest that a provision worded in open-ended terms on free transfers can obstruct efforts to stabilize the currency or avert a sudden capital flight (Waibel, 2009; Bernasconi-Osterwalder and others, 2012). For example, an unqualified provision on the transfer of funds may also collide with specific modalities of the International Monetary Fund (IMF) articles of agreement governing the provision of IMF credit lines for countries facing acute liquidity problems (Waibel, 2009). To date, legal practice does not offer definitive guidance on the possibility of leveraging the right of the free transfer of funds during a legal challenge to a Government over crisis measures (De Luca, 2014).

4. Clauses in bilateral investment treaties that may interact with double taxation treaties and tax-related measures

Bilateral investment treaties have a bearing on taxation matters and on double taxation treaties by default, which may create tensions and lead to unplanned consequences. Although, under bilateral investment treaties, countries are allowed a degree of deference by arbitrators, some tax-related measures may attract arbitration challenges (Simonis, 2014). These measures may include sudden changes in investment incentives regimes, confiscatory taxes or taxes causing the sale of assets in distress, sharp increases in taxes, discriminatory treatment by tax authorities and, in particular, reneging on a specific commitment, such as stabilization clauses in concessions and contracts that protect companies against future regulatory or legal changes (Bishop and others, 2006; van der Bruggen, 2012).

Although double taxation treaties may provide for a different dispute resolution mechanism, typically the mutual agreement procedure, disputes relating to matters covered by them, unless expressly carved out, may also be invoked in a bilateral investment treaty arbitration Taken together, the gaps between bilateral investment treaties and double taxation treaties can expand instances of arbitration and broaden grounds on which specific tax measures may be challenged. Table 2 points to some of the clauses in bilateral investment treaties that have an impact in the area of taxation and possible linkages with double taxation treaties in some of these instances.

Gaps and inconsistencies between the definitions of the term investor in a bilateral investment treaty and permanent establishment criteria in a parallel double taxation treaty may arise, given that the two types of treaties are often negotiated separately and by various government authorities. Bilateral investment treaties are typically negotiated by the ministry of trade or foreign affairs while the ministry of finance is often responsible for double taxation treaties (United Nations Conference on Trade and Development, 2015b).

Table 2: Potential tax-related sources of problems in international investment agreements

Element of a bilateral investment treaty	Potential negative consequences	Example of problematic language
Preamble	Treaty interpretation can be informed by a strong emphasis on States' responsibilities and investors' privileges.	"DESIRING to intensify economic cooperation between both States, INTENDING to create favourable conditions for investments by nationals and companies of either State in the territory of the other State, and RECOGNIZING that encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations…" Preamble of Germany–Zambia bilateral investment treaty (1966)
Definition of investor	An investor can be covered by a bilateral investment treaty but still fall below the permanent residency threshold in a double taxation treaty. Too broad a definition can result in forum shopping if barriers in domestic legislation are low.	"[T]he term 'nationals' shall comprise […] legal persons located either in Ghana or the Netherlands and controlled, directly or indirectly, by nationals of that Contracting Party" Article 1 (b) (iii) of Netherlands–Ghana bilateral investment treaty (1989)
Definition of investment	Open-ended definitions may bring under treaty protection assets that are not, from the point of view of the State, essential to its structural transformation and create uncertainty about the host State's potential liability.	"The term 'investments' comprises every kind of asset…" Article 1 of Japan–Egypt bilateral investment treaty (1977)
National treatment	Targeting tax incentives can prove problematic to support domestic industries. The national treatment principle might be violated if changes in tax legislation (e.g., more onerous reporting) were directed only at multinational corporations. International investors could challenge anti-avoidance measures in court if targeted against foreign entities.	"Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State" Article 3 (1) of United Kingdom–Kenya bilateral investment treaty (1999)

Element of a bilateral investment treaty	Potential negative consequences	Example of problematic language
Most-favoured-nation treatment	In principle, companies may seek to import more preferential tax treatment from double taxation treaties. Similarly, when a country changes its double taxation treaties with another party, this may potentially be negated by interaction with most-favoured-nation treatment in another bilateral investment treaty or double taxation treaty. Barriers to (tax-related) arbitration may be lowered by importing them from another bilateral investment treaty.	"In matters governed by this article, nationals or companies of one of the Contracting Parties enjoy favoured-nation treatment on the territory of the other contracting party" Article 3(4) of Germany–Central African Republic bilateral investment treaty (1965; original in Frenc h)
Fair and equitable treatment	Vague definitions can increase uncertainty around the scope of the treatment. Investors may try to mount a legal challenge against tax-related measures, including those aimed at tax avoidance.	"Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment…" Article 3(1) of Ethiopia–China bilateral investment treaty (1998)
Expropriation	Investors may try to mount a legal challenge against tax-related measures, including those aimed at tax avoidance.	"Investments of investors of one of the Contracting Parties will not be, de jure or de facto, directly or indirectly, nationalized, expropriated […] on the territory of the other Contracting Party except for public purposes or national interests and upon payment of prompt, adequate and effective compensation and on the condition that such measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures" Article 7 (2) of Italy–Malawi bilateral investment treaty (2003; translated from the original in Italian)
Dispute settlement mechanism	Investors may prefer investor-State dispute settlement to the mutual agreement procedure or use both simultaneously. The two dispute mechanisms may consider the same issue and yield differing results. Investor-State dispute settlement tribunals do not have a completely coherent approach to tax-related disputes, raising uncertainty for defending States.	"If [a] dispute has not been settled within a period of six months from the date it was raised by either Contracting Party, the dispute shall be submitted at the request of the concerned investor for arbitration…" Article 8 of France–Senegal bilateral investment treaty (2007; translated from the original in French)
Umbrella clause	Umbrella clause can provide investors further leverage in claims of expropriation and fair and equitable treatment.	"Each Contracting Party shall observe any obligation it may have entered into with regard to investments and investment activities of investors of the other Contracting Party" Article 4 (2) of Japan–Mozambique bilateral investment treaty (2013)

Element of a bilateral investment treaty	Potential negative consequences	Example of problematic language
Transfer of funds	A broadly worded transfer of funds clause can hinder short-term macroeconomic stabilization policy. The clause might also potentially limit a Government's ability to freely set domestic withholding rates of taxes.	"Each Contracting Party will guarantee to investors of the other Contracting Party a free transfer of all funds related to their investments…" Article 7 of Spain–Mauritania bilateral investment treaty (2008; translated from the original in Spanish)
Performance requirements only through incentives	Fiscal incentives can further contribute to "aggressive tax planning" when performance requirements are prohibited.	"Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking: (a) to export a given level or percentage of goods or services; (b) to achieve a given level or percentage of domestic content; (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory; (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment" Article 8 of United States–Rwanda bilateral investment treaty (2008)

Source: *Economic Commission for Africa.*

4.1. Preamble

The preamble typically refers to the intentions of promoting investment flows and often other objectives, including protection of investment and economic prosperity. Investors' rights and the State's responsibilities tend to be emphasized. It is only relatively recently, however, that an explicit allusion to the wider concept of sustainable development has been included in the preamble. Since virtually all substantive clauses concern responsibilities of the host economy, capital importers, such as African countries, can potentially find themselves in a less favourable position in the event of treaty interpretation by international arbitrators. To the extent that economic prosperity can be dissociated from sustainable development considerations, even if taxation is an essential aspect of state regulatory power, a preamble stressing investors' rights over those of States may shift the tribunal's interpretative lens more in favour of the investor in the event of a challenge linked to a tax measure.

4.2. Definitions of investor and investment

Broad definitions of "investor", lacking any safeguards against treaty abuse in investment treaties and of residency in tax treaties, are key enablers of treaty optimization, which consists of foreign companies structuring their investment so as to enjoy maximum benefits derived from existing bilateral investment treaties and double taxation treaties (see Part 5 of this report). Treaties with offshore financial centres whose domestic legislation allows letterbox companies to gain access to treaty benefits, can prove particularly problematic.

The definition of investor in investment treaties may also adversely interact with the criteria for permanent establishment in tax treaties. Both definitions demarcate what entities are covered by the relevant treaties but their approaches are different. It might be possible for some investors to initiate arbitration proceedings while their presence in the country falls below the tax liability threshold. In the event that permanent establishment criteria are opportunistically exploited by foreign investors to avoid taxes, the host country Government can seek to react with additional measures to counter these practices. Provided such a reactive measure could be in conflict with a valid tax treaty (e.g.,, the same activity being already taxed in the home economy), the investor can initiate the mutual agreement procedure under the tax treaty even before the measure takes effect. Should the investor wish to pursue an arbitration route, it would have to prove that the measure is in contravention of one of the standards of treatment guaranteed by the bilateral investment treaty, such as fair and equitable treatment or the umbrella clause, once the measure has been applied.[46] In contrast, investors who are tax liable in the host country, including those enjoying benefits of a treaty, may see their claims denied if the definitional conditions are not met and/or on the grounds of corruption.

Broad definitions of investment can lead to a lack of clarity over the extent of possible exposure of the defending State. Moreover, from the point of view of public authorities, some of the assets covered that are only tangentially linked to the productive investment may still be covered by a bilateral investment treaty being invoked under a claim.

4.3. National treatment

Both bilateral investment treaties and double taxation treaties protect foreign investors from treatment that is less favourable than that of domestic companies. Changes in domestic taxation laws may be open to a legal challenge by foreign investors if they face a less favourable tax treatment and contest that this measure diminishes their rights under a treaty. Vaguely formulated standards of treatment would stoke uncertainty around what may be legitimately expected from a treaty.

A national treatment provision may raise concerns on least two accounts. First, host countries may

[46] The notion that investors can challenge a measure in international arbitration only once the measure has been applied may be put to the test in a recent case in which the Government of Vietnam was reportedly facing a joint arbitration challenge from the seller and purchaser of company assets before a disputed capital gains tax had even been imposed (Peterson, 2018).

struggle to target only specific classes of domestic investors through tax policy. Second, host countries may wish to implement tax measures that are more onerous for foreign companies as their domestic authorities lack the means to stem tax avoidance practices possibly facilitated by a double taxation treaty. National authorities may, for example, seek to undertake more thorough tax assessments or tax passive income of foreign companies on gross income, while taxing their domestic counterparts on profit (Park, 2009).

When assessing claims alleging discriminatory treatment, tribunals usually employ a three-step approach (Wälde and Kolo, 2007). As a first step, they identify a comparator in like circumstances against which they will assess the claimant. Then they proceed to a consideration of whether more favourable treatment has been accorded to the comparator than to the investor. Should such an instance be established, the tribunal will finally consider whether the difference in treatment is justifiable.

If the host State declares that the additional measures are taken to stem tax avoidance practices, it will effectively admit to a differentiated treatment. For such measures not to be found in breach, it appears that arbitrators would either have to dismiss the argument of likeness of circumstances with domestic counterparts or condone "second-best" policies that are intended to root out practices that are effectively allowed in domestic law and in international treaties, to which the State has, in some form, consented. Discriminatory tax laws are infrequent. Host countries are more likely to be found liable for de facto discrimination, for example, through a selective application of law, rather than for enacting legislation, which is discriminatory de jure (Wälde and Kolo, 2007; van der Bruggen, 2012).

4.4. Most-favoured-nation treatment

The most-favoured-nation clause is intended to maintain investors' positions in relation to other international investors but it can also serve to facilitate cherry-picking and thus accrue unintended benefits to the investor (see section 5.2). An unqualified most-favoured-nation clause establishes that any treatment accorded to other foreign investors covered in other international agreements more favourable than those guaranteed by the applicable treaty ought to be extended to investors covered by the base investment treaty.

The most-favoured-nation clauses usually remain silent on whether the standard applies only to substantive matters or to procedural ones. In the event of arbitration, an investor may try to activate the most-favoured-nation clause to "import" elements from other valid treaties' definitions of standards, such as fair and equitable treatment and expropriation, that are "more favourable" than those in the base treaty (Radi, 2007; Gazzini and Tanzi, 2013; Dumberry, 2016).

If the most-favoured-nation clause is broadly worded, the investor could arguably demand a more favourable tax treatment enshrined in a double taxation treaty concluded between the host economy and a third-party country.[47] As a result, painstakingly negotiated terms in tax treaties can be threatened if a parallel bilateral investment treaty allows the incorporation of more favourable treatment from other double taxation treaties. A significant number of bilateral investment treaties exclude tax matters from the scope of most-favoured-nation treatment to prevent a conflict with existing double taxation treaties and maintain regulatory latitude (Bantekas, 2015; Qureshi, 2015).

[47] Existing publicly available jurisprudence does not appear to have any record of an import of better treatment from a parallel double taxation treaty through a most-favoured nation clause in a bilateral investment treaty. Nevertheless, the fact that a large number of bilateral investment treaties exclude double taxation treaties from the scope of application appears to offer indirect evidence of this possibility in practice. By way of illustration, Article 4 (a) of the 2016 Rwanda–Turkey bilateral investment treaty states that "[t]he provisions of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of any international agreement or arrangement relating wholly or mainly to taxation". To reason that there is no risk of such a phenomenon would render this type of exception devoid of meaning, which would be hardly the intention of the treaty drafters.

4.5. Fair and equitable treatment

Any tax-related arbitration case may be expected to be at least based in part on the fair and equitable treatment standard. The fair and equitable treatment provision, however, may entail varying levels of protection for the investor and obligations for the State in various treaties and readings of tribunals. The concepts of "fairness" and "equity" are not clearly defined in international law. Fair and equitable treatment standard is often not adequately defined in the treaty and tribunals have interpreted it taking into account its exact wording and the specific circumstances of a case (Schreurer, 2005). Even when fair and equitable treatment is equated to the customary minimum standard of treatment, tribunals have disagreed on how high the bar is for violating the standard (United Nations Conference on Trade and Development, 2012b).

There have been divergent readings of the fair and equitable treatment clause and, in specific cases, the tribunal's interpretation may lead to the extreme outcome of preventing regulatory changes, including to taxation laws, or carrying very onerous expectations on the part of the State. A broadly worded fair and equitable treatment provision can potentially create uncertainty around the State's ability to amend taxation laws, with an impact on international investors. For example, levies on extractive industries or laws and measures intended to prevent tax avoidance potentially enabled by a double taxation treaty can trigger international arbitration (Carim, 2016; Chaisse and Marisi, 2017).

International tribunals are likely to take into account several factors when assessing a possible breach of an unfettered fair and equitable treatment principle by a (tax) measure designed, for example, to curb tax avoidance. Current jurisprudence tends to rely on the principles of good faith, arbitrariness, denial of justice, such as inability to challenge a measure in independent courts, due process, including tax reassessment not allowing a hearing of the taxpayer and undue delays, discrimination, coercion, transparency and predictability, duress and harassment and/or repudiation of an investor's "legitimate expectations" (United Nations Conference on Trade and Development, 2012b; van der Brugge, 2012).

The notion of "legitimate expectations" has become a central and highly controversial feature of interpretation of the fair and equitable treatment standard and of expropriation (see subsection 4.6), even though it rarely explicitly features in investment treaties. In assessing a claim for breach of legitimate expectations, tribunals usually first establish whether such expectations have been formed and their source, such as a State measure, a contract or representation by a government official, before determining how they may have been violated by the State measure, as illustrated in box I. Specific commitments towards an investor, typically concessions or contracts, carry more weight than the general legal framework or political pronouncements and accordingly enjoy stronger protection from treaty breaches (Snodgrass, 2006; Hirsch, 2011; Davie, 2015). Existing jurisprudence does not provide a definitive answer on whether an instance of mere frustration of legitimate expectations equates to a breach of fair and equitable treatment. A legal or administrative measure at odds with a double taxation treaty can be found to be in contravention of legitimate expectations.

Recent case law suggests that States may not be completely absolved from breaching the fair and equitable treatment standard by effectuating a change in the overall legal and business framework once an investment has taken place (i.e., when no specific commitment towards the investor was made), but the bar for liability appears to be high (Potestà, 2016), requiring the presence of additional factors (Hirsch, 2011). Nonetheless, several recent tribunals have still failed to clearly articulate the notion of regulatory stability further fuelling a sense of uncertainty around the policy space available to decision makers (Ortino, 2018).

Case law suggests that bona fide regulation raises the bar for the State to be found liable when enacting a new policy or regulation (Potestà, 2013). A measure taken in bad faith, namely, with an ulterior motive pursued under the guise of a

Box I: Occidental v. the Republic of Ecuador (2002) and EnCana v. the Republic of Ecuador (2003)

The arbitration cases of Occidental v. The Republic of Ecuador (London Court of International Arbitration Case No. UN3467) and EnCana v. The Republic of Ecuador (London Court of International Arbitration Case No. UN3481) highlight the importance of treaty specification. Both Occidental and EnCana challenged the decision of Ecuador to stop reimbursing value added tax (VAT) on goods and services and maintained that the rebates were linked to their relevant contracts with Ecuador and granted under Ecuadorian law. While Occidental, covered by the United States–Ecuador bilateral investment treaty (1993), was ultimately awarded approximately $71 million (see United Nations 3467 Final Award), Encana's challenge, drawing on the Canada–Ecuador treaty (1996), collapsed (United Nations 3481 Final Award).

Both the American and Canadian investment treaties with Ecuador placed several restrictions on the applicability of taxation. Under the United States–Ecuador one, taxation measures applied to fair and equitable treatment, expropriation, the transfer of funds and other agreements. By contrast, the Canada–Ecuador bilateral investment treaty stated, in article 12, that "nothing in this agreement shall apply to taxation measures" except in the event of expropriation (and subject to a joint veto).

Occidental challenged the refusal of the Ecuadorian tax authority to reimburse VAT on several grounds, including fair and equitable treatment, national treatment and indirect arbitration. The tribunal of the United Nations Commission on International Trade Law (UNCITRAL) disputed Occidental's position that the agreement with the central Government had granted Occidental a right to VAT rebates. The tribunal defined a "stable and legal business environment" as a hallmark of fair and equitable treatment, and the modification of tax rules for oil export altered this framework and was therefore in breach of the fair and equitable treatment provision (United Nations Conference on Trade and Development, 2011b). This expansive reading came in the context of a specific contract between the State and the company, however (Brower and Blanchard, 2014). The arbitration tribunal ruled that the decision to refuse a VAT rebate had arisen as a result of an "overall incoherent tax structure", as a result of which the fair and equitable treatment clause in the United States–Ecuador bilateral investment treaty (1993) was breached (Park, 2009).

The Occidental tribunal also made an unusually expansive interpretation of "like" investor under the national treatment standard for comparison, looking at the situation of exporters in other industries, such as flowers and seafood (Spears, 2010; Bernasconi-Osterwalder and others, 2012). The Government of Ecuador, on the other hand, argued unsuccessfully that companies in the oil industry, including PetroEcuador, with which Occidental had concluded a separate agreement, were also not entitled to the rebate.

The UNCITRAL tribunal in the EnCana case, which saw its jurisdiction circumscribed to expropriation, ruled that a refusal to provide a VAT refund neither contravened a specific commitment given to the company nor amounted to expropriation, in part because the Government had acted in good faith and the company had access to open and independent local courts (Bishop and others, 2014). Furthermore, the EnCana tribunal could not apply the fair and equitable treatment provision, which did not cover taxation under the Canada–Ecuador bilateral investment treaty (1996) (Park, 2009).

legitimate political objective, on its own may be sufficient to amount to a breach of fair and equitable treatment (Moloo and Jacinto, 2011). Given the importance of taxation to State sovereignty, this principle may also be expected to be observed in the case of expropriation.

4.6. Expropriation

Measures relating to both direct and indirect taxation are covered, and taxation may result in expropriation (Lazem and Bantekas, 2015; for a tax-related case of expropriation in Africa, see box II).[48] While ordinary taxes are introduced and levied to fund essential government functions, some of which benefit the overall business environment, abusive tax measures may be imposed as a stealth method to ruin or injure property rights of some investors (Park, 2009). Differentiating between legitimate revenue-raising or collection measures and abusive seizure can be challenging in practice. A risk of claims of indirect expropriation may affect government efforts to calibrate their fiscal policies to new and changing economic realities, such as changes in tax rates and windfall taxes. Investors may seek to challenge measures taken to stem avoidance, potentially enabled by a double taxation treaty (Chaisse and Marisi 2017).

[48] The United States–Egypt bilateral investment treaty (1986) is a rare exception, in which it is explicitly stated that "the levying of taxation" can give rise to expropriation (article III).

Box II: Antoine Goetz and others v. Republic of Burundi (1995)

In 1993, the Government of Burundi demanded that Affimet, a locally incorporated company engaged in gold processing and re-export, should pay a deposit of $3 million for the free zone granting tax and import duty exemptions (Lallemand, 2000). Two years later, the Burundian ministry authorities withdrew the permit prompting the company's Belgian investors to seek remedy and $175 million in compensation under the 1989 Belgium-Luxembourg Economic Union and Burundi bilateral investment treaty.

In its 1999 ruling, the International Centre for Settlement of Investment Disputes tribunal noted that the revocation of the permit had deprived the company "of the benefit which they could have expected from their investments" (para. 124 of the Award (in French); International Centre for Settlement of Investment Disputes ARB/95/3). Nevertheless, the revocation was found to have been taken in the public interest, in due process of law and on a non-discriminatory basis. However, no compensation was offered for the withdrawal of the permit and the Government was found in contravention of the bilateral investment treaty. A settlement contained in the award saw the Government pledge to reimburse the inventors to the amount of $3 million with 8 per cent interest and sign a new convention under which the company effectively recovered its previous privileges.

In assessing (tax-related) expropriation claims, tribunals usually weigh up the intent and effect of the measure, extent of deprivation for the investor and legitimate expectations of the investor (United Nations Conference on Trade and Development, 2012a), which may, to some extent, be informed by an active double taxation treaty. There does not currently appear to be a consensus on where to draw the line between permissible and excessively severe tax measures (Davie, 2015; Grégoire, 2015), symptomatic of a wider inconsistency in awards related to expropriation claims (see Nikièma, 2012b; Isakoff, 2013).

The effect of a tax measure should be dramatic, however, for it to result in indirect expropriation (van der Bruggen 2012).[49] Successful claims of compensable expropriation can also be expected to contain elements of arbitrariness or discrimination, bad faith or breach of due process or of a specific agreement with the investor (Wälde and Kolo, 2007; Park, 2009; Brower and Blanchard, 2014).

Case law indicates that arbitrators tend be sympathetic to the defending State in taxation matters and apply a very high threshold in the case of taxation, compared with other forms of expropriations (Lazem and Bantekas, 2015). Nevertheless, arbitrators may also take into account the existence of a valid double taxation treaty should the latter be relevant for the case at hand.

4.7. Umbrella clause

Under a broadly worded umbrella clause, the host Government is obliged to honour obligations that it has entered into towards an investor or specific group of investors. For example, clauses in investor-State contracts, usually covering capital-intensive projects in extractive industries, insulate the investor from future changes in legislation, including in the tax domain, and can therefore be protected by a bilateral investment treaty. Umbrella clauses often differ widely in their wording, however, and case law is not settled on its precise scope. Arbitration tribunals may, for example, dismiss claims relating to contracts between States and investors that already contain a specific forum to resolve disputes.

Investors may also enjoy an individual and more beneficial tax arrangement. Such tax rulings, often hidden from the public eye, may, however, result in considerable losses in tax revenue over time, which can also be coupled with tax avoidance practices facilitated by double taxation treaties. If a bilateral investment treaty does not apply to taxation matters, then investors wishing to defend their contractual rights through arbitration could

[49] A case in point is the reasoning of the EnCana v. The Republic of Ecuador tribunal, according to which "[o]nly if a tax law is extraordinary, punitive in amount or arbitrary in its incidence would issues of indirect expropriation be raised" (para. 177).

do so if the contract itself so permits. Otherwise, they would have to rely on local courts (Wälde and Kolo, 2007). Case law, though related to other types of treaties, would suggest that double taxation treaties are not covered by an umbrella clause, given that the investor is not a party to it.

4.8. Transfer of funds

Bilateral investment treaties usually contain a clause allowing a free transfer of funds relating to an investment in and out of the host economy. However, capital restrictions in a crisis situation may still amount to indirect expropriation and/or a violation of fair and equitable treatment (Kolo, 2007). There are also concerns within the expert community as to whether, in the absence of a double taxation treaty, an unfettered clause on free capital transfer could be successfully used to challenge a rise in withholding tax rates in the host economy because of the precedence of international treaties over national law (Wälde and Kolo, 2007; Polanco Lazo and Yáñez Villanueva, 2016). On the other hand, it may be argued that withholding taxes are a subset of income taxes and a capital controls measure and accordingly do not fall within the remit of the clause on free capital transfer (Bravo and others, 2015). Existing jurisprudence remains insufficient to provide guidance on the extent of the risk of a broadly worded clause for host countries, for example, during times of economic distress.

4.9. Performance requirements

When mandatory performance requirements are not allowed by an investment treaty, they can still be introduced on a voluntary basis and given incentives by more favourable tax treatment. Fiscal incentives promoting economic development goals can, however, potentially be exploited in aggressive tax planning practices facilitated by existing double taxation treaties.

4.10. Dispute settlement

Treaty-based arbitration allows investors to defend their rights in the host economy. Legal challenges against changes in taxation may throw the legitimacy of the measure into doubt, which, in turn, raises questions about the scope of state sovereignty (Park, 2009; Brazier, 2013). Tax-related international arbitration has become increasingly frequent over time. By 2017, more than 45 recorded investor-State dispute settlement cases had been related to tax matters (United Nations Conference on Trade and Development, 2015b, 2017), including against Algeria, Egypt and Uganda.

Investors can challenge taxation measures through a mutual agreement procedure, investor-State dispute settlements or in domestic courts, or a combination thereof. Whether a tax dispute can be resolved on the basis of a bilateral investment treaty, a double taxation treaty or both hinges on the nature of the dispute. If the bilateral treaty is sufficiently broadly worded, failure to comply with a double taxation treaty can be brought to an investment arbitration tribunal (Demirkol, 2018). For tax-related measures to be liable to international arbitration under a bilateral investment treaty, one or more of the guaranteed standards of treatment provided by the treaty would have to be violated (Bantekas, 2008). Some instances may be covered by protection of both bilateral investment treaties and double taxation treaties. Tax measures leading to double taxation may potentially be challenged as violations of fair and equitable treatment or expropriation in a bilateral investment treaty (Bravo and others, 2015) or dealt with under a double taxation treaty. Protection against discrimination can be found in both instruments, albeit in different forms. Double taxation treaties, on the other hand, also deal with instances of "pure" double taxation when the investor does not claim discriminatory treatment.

While the mutual agreement procedure should generally be less costly and onerous for investors, some of them may prefer to gain access to bilateral investment treaties rather than double taxation treaties in dealing with tax issues (see box III). Compared with the mutual agreement procedure, treaty-based arbitration provides them with a stronger agency and contains additional standards of protection (Chaisse, 2016a). However, the investor-State dispute settlement may have a more significant impact on (tax) sovereignty than

Box III: Vodafone v. India (2014, 2017)

In 2014, Vodafone, a British telecom provider, initiated legal proceedings against the Government of India under the 1995 Netherlands–India bilateral investment treaty for the application of a retroactive capital gains tax on the $11.1 billion acquisition of a stake from Hutchison Whampoa in a jointly owned local network operator (Permanent Court of Arbitration Case No. 2016-35; Crabtree, 2014). The Indian tax authorities claimed that the 2007 takeover was liable to $2.2 billion in capital gains tax plus interest under the Indian Income Tax Act. Vodafone contended that the acquisition of assets had taken place in the Cayman Islands where they were held by Hutchinson. In 2012, the Supreme Court of India ruled in favour of Vodafone, prompting the Government to introduce the amendment to the law with retroactive application. The arbitration process, hindered by disagreements over the appointment of the presiding judge, is ongoing. In 2017, Vodafone initiated a parallel arbitration process against the Government over the dispute invoking the 1994 United Kingdom-India investment treaty (Jones, 2017). The Indian courts ultimately allowed the second arbitration proceedings to go ahead in spite of the Government's claims of "abuse a process." Cairn, a mining company, and its mother company have also filed two separate notices of dispute against India over retrospective application of capital gains tax, both on the basis of the United Kingdom-India bilateral investment treaty (Permanent Court of Arbitration Case No. 2016-7).

the mutual agreement procedure or State-to-State dispute settlement (Bird-Polan, 2018). Where there is an overlap between the two, however, the same measure can be challenged under both the bilateral investment treaty and the double taxation treaty, and the arbitration panel and mutual agreement procedure may reach different conclusions (Polanco Lazo and Yáñez Villanueva, 2016).

By investing through a subsidiary registered in the Netherlands, Vodafone is covered by both the Netherlands–India bilateral investment treaty and the 1988 Netherlands–India double taxation treaty. The latter, for example, accords taxation of capital gains almost exclusively to the residence country, and its most-favoured nation provision stipulates that any more favourable treatment of withholding taxes provided by a subsequent double taxation treaty with a third-party OECD country prevails over the base treaty. It is also noteworthy that Vodafone, which invested in India through its Dutch subsidiary, chose international arbitration rather than pursuing a relatively weaker mutual agreement procedure offered by the Netherlands–India double taxation treaty (Choudhury and Owens, 2014), under which the Dutch tax authorities and not the company would play the leading role. The tax treaty also stipulates only that the competent authorities "shall endeavour to resolve" the case without specifying any time limits. The bilateral treaty between the Netherlands and India applies to tax matters in their entirety.

5. Investors are incentivized to structure their investment so as to enjoy maximum benefits accrued by bilateral investment treaties and double taxation treaties

Driven by maximizing value to their owners or shareholders, foreign investors structuring their global operations are given incentives to take into account the standards of protection, tax treatments and loopholes offered by the existing tax and investment treaties between the (prospective) host economy and the rest of the world (see, for example, Sprenger and Boersma, 2014). The relative merits of existing investment and treaties for private investors may encourage third party entities to set up subsidiaries in one of the contracting States of the treaties with no other objective than to reap the benefits and privileges associated with the treaties. Companies can therefore minimize tax liabilities and enjoy expansive legal protection for their investment (for an example of a popular conduit country, see box IV).

What makes treaty abuse different from opportunistic or frivolous usage of bilateral investment treaties and double taxation treaties is the nationality of the investor, which, under normal circumstances, would not allow them to be covered by the treaty. Both types of treaty and national legislation can all become integral parts of a company's treaty optimization matrix, highlighting the importance of all three policy dimensions in stemming these harmful practices. From the point of view of the host economy, treaty optimization can lead to a further erosion of policy space and opportunities for domestic resource mobilization (Legum, 2005).

5.1. Forum-shopping (bilateral investment treaties)

A foreign investor can gain access to the legal protection of a specific bilateral investment treaty by channelling its investment through an intermediate entity in a different country in the event that the treaty in question does not contain a denial of benefits clause or other restrictions. In this way, the company gains access to higher standards of treatment and international arbitration, which would not be the case if it invested directly from its real home economy. This option may act as an indirect incentive for a company to place its investment in a specific country with other desirable characteristics, but is also likely to expose Governments to opportunistic behaviour on the part of investors (Chaisse, 2015). Since 2010, approximately one in three investor-State dispute settlement claims have been launched by entities whose parent company is based in a country that is not party to the treaty on which the challenge is based (United Nations Conference on Trade and Development, 2016b). Domestic companies may also try to reinvest through a different jurisdiction to gain access to otherwise unavailable prerogatives in their own economy (Schill, 2008).

The ability of companies to restructure to enjoy treaty protection does not appear unlimited, however. Tribunals may decline jurisdiction over a treaty claim if the company already active in the host economy restructures so as to be able to

Box IV: Treaty optimization through the Netherlands

The Netherlands has become the country of choice for many investors seeking to optimize their treaty benefits through intermediate companies on the back of the country's wide global network of investment treaties with expansive provisions, a web of favourable double taxation treaties for investors and permissive tax legislation (Van Os and Knottnerus, 2011; Van Leyenhorst, 2014; Eurodad, 2017). On the basis of data from nearly 100 million companies, approximately 23 per cent of international corporate investment exploiting final low-tax jurisdictions have been channelled through the Netherlands, the largest proportion in the world (Garcia-Bernardo and others, 2017).

The features of the "gold standard" of Dutch bilateral investment treaties include a broad definition of investor, which accords protection standards to both directly and indirectly controlled entities, an open-ended, non-exclusive list of investment definition covering "every kind of asset", tangible and intangible, and the right to seek protection under investor-State dispute settlement without having to exhaust local remedies first (Van Os, 2016). Investor-friendly treaties, for their part, often missing essential anti-abuse clauses (in particular in older treaties), such as limitation of benefits and main purpose tests and reduced or abolished withholding taxes, act as a bridge to the lax taxation laws of the Netherlands (Weyzig, 2013b; Oxfam Novib, 2016). Standards of treatment also tend to be vaguely defined (Van Os and Knottnerus, 2011), opening the door for potentially expansive interpretation. Of the known 855 treaty-based investor-State dispute arbitrations, 102 cases, or a little more than 10 per cent of the world total, have been filed under Dutch bilateral investment treaties worldwide, 7 of which have been directed against African countries (United Nations Conference on Trade and Development, 2019b).

An overview conducted by the European Commission revealed that the corporate income tax code of the Netherlands allows 17 of 33 assessed aggressive tax planning techniques, more than any other European Union country (European Commission, 2016), providing "advantages to multinational corporations using these countries as a [pass-through]" (Galeza, 2011). For example, the Dutch regulatory framework does not mandate a substantive economic presence in the country, as a result of which approximately 14,400 conduit companies, of which a large majority are letterbox companies, are currently registered in the country (Oxfam Novib, 2016). Dutch special purpose companies are capable of avoiding withholding taxes and moving funds to low-tax jurisdictions (Weyzig, 2013a).

Uganda, for instance, concluded bilateral investment and tax treaties with the Netherlands in 2000 and 2004, respectively. Ugandan domestic law sets all types of withholding taxes at 15 per cent but also tends to have relatively restrictive tax treaties (ActionAid, 2016a). Under the Dutch tax treaty, the retention taxes on interest and royalties are 10 per cent and on dividends they may be, depending on the structure of the company, 0 per cent, 10 per cent and 15 per cent (Kangave, 2009). An inadequate definition of permanent establishment, restrictive capital gains tax rules and no anti-abuse clauses create further loopholes for opportunistic tax optimization (Hearson and Kangave, 2016). Dutch treaties also tend to provide robust protection to investors. Though the Government of Uganda terminated the treaty in 2017, investments made prior to the notice of termination are protected for further 15 years under its "sunset clause."

Total, the French oil and gas multinational, invested in Uganda through an entity registered in the Netherlands. Routing the investment through the Netherlands allowed Total both beneficial tax treatment, as there are no tax treaties between Uganda and France, and to file an arbitration claim against the Government of Uganda in 2015 under the Netherlands-Uganda treaty of 2000 (International Centre for Settlement of Investment Disputes case No. ARB/15/11). The details of the filing have not been made public but the dispute reportedly concerned a disagreement over the application of stamp duty, which allegedly should have been waived under a confidential production-sharing agreement (Biryabarema, 2015). The dispute was discontinued in 2018 upon the joint request of the two parties, indicating that a settlement between the two disputing parties had been reached.

Evidence indicates that the Netherlands has become an important conduit for multinational corporations investing in Uganda. Consistent with the notion of treaty shopping, the direct investment position of the Netherlands in Uganda rose from $48 million in 2009 to a record of nearly $5 billion in 2014, before falling to $4 billion the following year, accounting for 44 per cent of all FDI stocks in Uganda in 2015 (International Monetary Fund, 2017). Using data available for 2012, Hearson and Kangave (2016) showed that, of the then-reported $3.7 billion of FDI stocks from the Netherlands, only $179 million was attributable to Dutch companies, with the remaining 95 per cent simply being channelled through the Netherlands. According to the same source, the double taxation treaty with the Netherlands costs Uganda in forgone tax revenue between $8 and $24 million, taking into consideration only lower withholding taxes on dividends and interest.

Tax treaties with the Netherlands have come under scrutiny in other African countries too. ActionAid (2015a), a non-governmental organization, has calculated that Paladin, an Australian uranium mine company, deprived Malawi of more than $27 million in tax revenue between 2009 and 2014 by employing aggressive tax optimization techniques enabled by the Malawi–Netherlands double taxation treaty. Overall, multinationals using the Netherlands as a circuit jurisdiction are estimated to be able to reduce their tax burden in developing countries by $100 billion annually (Oxfam Novib, 2016).

In the face of mounting criticism, the Government of the Netherlands launched renegotiations of its taxation treaties with a number of developing countries in 2014. Four years later, following a public consultation, it also presented a new model investment treaty based on which it intends to renegotiate its entire stock of as bilateral investment treaties (Government of the Netherlands, 2018; for assessment see Cummins and others, 2018; Sheehan and Wolfhagen, 2018; Verbeek and Knottnerus, 2018). By 2018, new bilateral tax treaties with Malawi and Zambia had been signed, among other treaties. The Netherlands currently registers 24 investment and 11 tax treaties with African countries (United Nations Conference on Trade and Development, 2019a; Ministry of Finance; 2019).

launch a treaty claim against a new public measure (Douglas, 2009).[50]

Investors active in the host economy may try to file several claims simultaneously under the same or different bilateral investment treaties, as well as resort to domestic courts in parallel, which can be used to place further pressure on the Government or to maximize the possibility of winning an award (Nikièma, 2012a; Van Harten, 2005, 2016; see box III). Host Governments can also find themselves challenged on spurious grounds or for purely opportunistic reasons by special-purpose vehicles and be forced to shoulder the financial burden of the proceedings. Even if the Government ultimately prevails, the letterbox company may lack funds to pay the costs of proceedings awarded by the tribunal (Schwebel, 2014).

5.2. Cherry-picking (bilateral investment treaties)

An investment treaty may be attractive to an investor primarily on account of its own provisions but also because it provides access to potentially even more favourable provisions in parallel bilateral investment treaties, which the host economy has concluded with other countries. In practice, investors do not often use the most-favoured-nation clause as the basis for a grievance based on discrimination vis-à-vis third party investors but rather as a vehicle to import more "investor-friendly" provisions from parallel treaties (United Nations Conference on Trade and Development, 2010, 2015b). By invoking a particularly broadly drafted most-favoured-nation clause, investors can try to import more convenient procedural rules and substantive provisions. Subject to a tribunal consideration, the investor may be allowed to enjoy protection standards beyond those contained in the base treaty to sidestep procedural requirements for gaining access to dispute-settlement mechanisms or to disregard performance requirements (Maupin, 2011; Nikièma, 2014). Current jurisprudence practice suggests that investors may import more favourable fair and equitable treatment clauses from parallel treaties if such a clause is absent in the base treaty (Dumberry, 2016), which can expand the investor's latitude in challenging state practice and increase uncertainty.

Although the most-favoured-nation clause may contribute to levelling standards of international investment agreements, unintended imports of clauses from other treaties heighten Governments' uncertainty regarding their obligations and substantive rights of investors (Faya Rodriguez, 2008; United Nations Conference on Trade and Development, 2015b). Broadly defined, most-favoured-nation clauses can effectively undercut other provisions in an otherwise carefully negotiated bilateral investment treaty.

5.3. Treaty-chaining (double taxation treaties)

Similar to forum-shopping, foreign companies can invest through a separate circuit entity, often letterbox companies in a different jurisdiction (or a set of entities in a number of jurisdictions) to obtain favourable tax treatment that would not be available to the company because the residence and source countries are not linked to either any or a less favourable double taxation treaty (Cooper, 2014). To minimize their overall financial exposure, companies can shift their profits through a number of entities in various jurisdictions. Round-tripping is a specific case of treaty-chaining that occurs when a domestic company channels its investment in the domestic economy through an entity registered in a foreign jurisdiction, with the intention of minimizing tax liabilities.

Tax treaties with offshore financial hubs enabling tax avoidance techniques can prove particularly harmful to the host country's tax income. Investors from third countries can be given incentives to restructure their operations to be covered by such a tax treaty, leading to the erosion of fiscal revenue. These risks have prompted IMF officials to issue a

[50] In June 2012, the tobacco company Philip Morris filed a treaty claim to UNCITRAL against a "plain packaging" legislation then newly introduced in Australia (Permanent Court of Arbitration Case No. 2012-12). In December 2015, the tribunal found that the claim constituted "an abuse of rights" (para. 588)as the company restructured shortly before launching the challenge in order to be covered under the 1993 Australia–Hong Kong bilateral investment treaty.

stark warning to developing countries that they "would be well-advised to sign treaties only with considerable caution" (Keen and others, 2014).

Approximately one quarter of cross-border investment stock in Africa has flown from offshore hubs (United Nations Conference on Trade and Development, 2015b). Multinationals located in developing and emerging countries, some of which rely on round-tripping, have been increasingly contributing to investment flows to offshore financial centres, which, in 2015, amounted to $72 billion (United Nations Conference on Trade and Development, 2016a). A negative correlation between the share of investment coming to developing countries through investment hubs and the rate of taxable profits on FDI is consistent with the notion of foreign companies using offshore centres to drive down tax liabilities.[51] Offshore financial hubs are suitable for tax avoidance and tax evasion operations because they are usually characterized by zero or very low tax rates, financial secrecy, a lack of information exchange mechanisms and no regulatory requirements to locate substantial economic activity (Organization for Economic Cooperation and Development, 1998a).

By shifting funds through a series of double taxation treaties in various jurisdictions, multinational corporations can lower their overall combined effective tax rate by 6 per cent, in addition to the 9 per cent already cut by the mere presence of tax treaties (van 't Riet and Lejour, 2014). For example, if a Chinese company places its investment in Mozambique through Mauritius, it can see its withholding taxes on outbound dividends fall from 20 per cent, which it would pay had it invested directly, to 8 per cent guaranteed by the Mozambique–Mauritius double taxation treaty (ActionAid, 2015b).

Since the world economic crisis, the challenge of tax avoidance has emerged as a global political priority. The policy agenda has, to date, been led by the OECD/Group of 20, with only limited input from developing regions (see Organization for Economic Cooperation and Development, 2015c, for details; Oguttu, 2016), the proposed approach to tackle tax avoidance does not entirely reflect the priorities and the level of resources available in many African countries (Peters, 2015). The choice of measures that can be implemented in African countries is constrained by institutional and administrative capacity and technical and economic means (Mosquera Valderama, 2015). Treaty-chaining may also entail wider negative fiscal externalities as host countries with agreements with low retention taxes can be compelled to lower these taxes across the board in the face of companies being able to use double taxation treaties as conduits (Arel-Bundock, 2017).

[51] On average, a 10 percentage point increase in inward investment through offshore hubs is associated with a 1 percentage point fall in the rate of return (United Nations Conference on Trade and Development, 2015b).

6. Conclusion and policy recommendations

Changes in the global economic and political landscape have opened up a window of opportunity for African countries to promote their development agendas in the international investment and tax regimes more forcefully. The possibly negative repercussions of investment and tax treaties and the potential for adverse combined effects can heighten the risk of exposing African countries to opportunistic behaviour on the part of investors, with potentially serious knock-on effects on policy space and tax mobilization.[52] For example, tax-related measures in contravention of double taxation treaty can be resolved through an arbitration process on the basis of protection under bilateral investment treaties. In extreme cases, host Governments may find themselves in the position of responding to legal challenges to their efforts to stem tax avoidance practices enabled by a poorly designed tax treaty in international arbitration under an investment treaty.

Considering that a large number of African investment treaties concluded in the 1990s/early 2000s have expired or are about to expire, now is an opportune moment for review and reform (Economic Commission for Africa, 2016). Investors' and host States' rights and obligations should be rebalanced to ensure that FDI translates into wider socioeconomic benefits for the society without endangering the investment attractiveness of the economy. The African Continental Free Trade Area, ongoing regional integration efforts and a shift in discourse and treaty practice provide African countries with an opportunity to reverse the past position of trend-takers. By articulating a common approach and engaging with the global community, they can remould the international investment regime so that it becomes more equitable and conducive to sustainable development. Inspiration for reform can be drawn from the UNCTAD 2015 Investment Policy Framework for Sustainable Development and following reports (see United Nations Conference on Trade and Development, 2016b, 2017, 2018a), which focus on five priority areas: the right to regulate, dispute settlement reform, the promotion and facilitation of investment, responsible investment and the promotion of systemic consistency.

Domestic resource mobilization through fiscal policy will be instrumental in meeting the developmental challenge. The 2019 flagship publication Economic Report on Africa 2019: Fiscal Policy for Financing Sustainable Development in Africa provides options to enhance national tax regimes as well as specific policy recommendations on tackling tax avoidance in the extractive sector. As with the global reforms of the international investment regime, African policymakers should not only take a leaf from but also contribute to global discussions on changes to the international tax system. African countries that wish to remain in the international tax regime need to set out relevant priorities and articulate and promote home-grown approaches and solutions. Possible strategies to address avoidance at the national, bilateral, regional and global levels can also be found in the 2018 report of the Economic Commission for Africa entitled Base Erosion and Profit Shifting in Africa: Reforms to facilitate improved taxation of multinational enterprises.

[52] The need for tax and investment treaty reform features prominently in public debate in Africa and was highlighted at the Africa Trade Forum, held in Addis Ababa in November 2016, hosted by the African Union and the Economic Commission for Africa.

7. Options for reform of the African investment and tax regimes

There are a number of options that African policymakers can consider at the national, regional, continental and international levels when developing a comprehensive approach to investment and tax treaties:

- **Tax and investment treaty review at the national level:** In the immediate term, African countries should re-examine their existing stock of investment and tax treaties. Older bilateral investment treaties, in particular, tend to contain broadly worded obligations, which may increase countries' potential exposure to disputes. Double taxation treaties giving away tax rights can have a significant adverse impact on revenue collection. Tax treaties should also contain clauses on exchange of information so that they can work as vectors of transparency (Economic Commission for Africa, 2019b). As part of this exercise, African countries are encouraged to undertake a review of their current stock of bilateral investment treaties and double taxation treaties, with a view to identifying possible links, overlaps and inconsistencies. It is increasingly common in treaty practice to guide the application of bilateral investment treaties, or their individual provisions, to taxation (Kolo 2009; Qureshi 2015). Domestic regulatory, policy and legal frameworks governing investors' behaviour, in particular in relation to taxation, as well as development and structural transformation visions, need to be taken into account. At the same time, countries need to be aware of links with other existing and related treaties and commitments beyond bilateral investment and double taxation treaties.

- **Articulation of a clear national investment policy direction:** An analysis of existing treaties should feed into the formulation of a national approach to bilateral investment treaties and double taxation treaties grounded in national visions or plans for development. In broad terms, the options include maintaining the status quo, the renegotiation of individual treaties, efforts to refashion the international investment regime and an outright withdrawal from the investment and tax treaties. By focusing on the existing stock of investment treaties, countries can choose from a wide menu of options, such as the issuance of joint interpretative provisions of terms in existing treaties, amendments, replacement of old treaties with "new generation" bilateral or multilateral treaties or termination. New or renegotiated bilateral investment treaties should contain carefully defined standards of treatment to guide interpretation by arbitrators and a preamble clearly referring to sustainable development objectives. Detailed bilateral investment treaties will provide more clarity and predictability to both investors and States that will be able to engage in policymaking without either breaching an existing treaty or failing to do so for fear of arbitration. In a similar vein, double taxation treaties have to be designed to respond to the resource mobilization needs of countries and be upgraded in line with, or even beyond, what is to be included in latest OECD and United Nations models.

- **Domestic institutional alignment on investment and tax treaties:** African Governments are advised to establish national and international institutional arrangements and platforms to ensure alignment between the two instruments, notably during the negotiations phase. At a minimum, African countries ought to eliminate opportunities for abuse of investment and tax treaties. Related to that, policymakers need to determine the extent to which bilateral investment treaties should apply to the matters of taxation. One of the strategies to minimize possible inconsistencies and take advantage of the expertise of the competent authorities is to refer tax matters exclusively to double taxation treaties. At the same time, resources need to be dedicated to build capacity in technical matters and international negotiations (Economic Commission for Africa, 2018).

- **Stakeholder engagement and transparency:** All relevant stakeholders, comprising civil society, domestic businesses, trade unions and academia, should be invited to participate in reviews of current and prospective bilateral investment treaties and double taxation treaties, as well as in efforts to build national, regional and continental-wide visions. Such reviews and negotiations should be conducted in an open, transparent and participative manner. Domestic and international partners, such as the African Tax Administration Forum, may also be consulted in formulating advanced approaches to tackle tax avoidance. The entire existing stock of existing treaties should be made easily accessible for public scrutiny (Maupin, 2013).

- **Strengthening of domestic institutions:** Domestic institutions and capacity-building must be prioritized, regardless of the national approach to bilateral investment treaties and double taxation treaties. Quality, inclusive and predictable institutional, regulatory, judiciary and administrative frameworks are a sine qua non for structural transformation and long-term economic development. Robust and dependable institutions are bound to decrease transaction costs associated with a lack of trust and reduce the risk of exposure to investment disputes, as well as tax avoidance and evasion. Strong institutional frameworks would, in the long run, allow African countries to lessen some of the trade-offs between having to offer investment guarantees and reducing their own policy space, in addition to facilitating a transition away from bilateral investment treaties that are in discord with their development objectives.

- **Making the most of the African Continental Free Trade Area:** The negotiations of the Phase II issues, which include investment policy alongside competition and intellectual property rights, shall commence in 2019. The African investment legal and regulatory landscape is to be reshaped by the prospective investment protocol. Guided by the overarching aim of establishing a new and more development-oriented equilibrium between investment protection and the right to regulate, the protocol should provide African countries with more regulatory space and establish a clearer relationship between investment protection and tax treaties. However, the legally binding document should replace the network of existing investment treaties lest the complexity and overlaps of the regime increase. African countries need to articulate a stronger common agenda to shape and fuel the global efforts to better align bilateral investment treaties and double taxation treaties with their developmental objectives (Economic Commission for Africa, 2016, 2018). The Pan-African Investment Code, which is expected to feed into the African Continental Free Trade Area Investment Protocol, contains a sharp focus on sustainable development objectives reflected in changes in formulation of substantive obligations and emphasis on investors' obligations (Mbengue and Schacherer, 2017). The Investment Protocol should establish a policy framework supporting investment activity but leave sufficient policy space, including in the area of taxation. Going forward, it should also serve as a template for future negotiations with external partners to ensure consistency (Economic Commission for Africa, 2019a). Taxation, and combating illicit financial flows in particular, may then present the next frontier in policy discussions at the continental level. The African Continental Free Trade Area could be used as a platform for a common approach on (selected) taxation issues, which could result in a model or a binding treaty that could also be further leveraged in negotiations with other countries and/or regions. Collective action may also allay fears, in particular among smaller countries, of negative repercussions created by unilateral changes to their treaties (Boone, 2011; United Nations Conference on Trade and Development, 2014). In a bid to buttress the global institutional set up on tax deliberations, African countries are also encouraged to advocate the establishment of a more representative global tax organ (Economic Commission for Africa, 2018). Finally, regional cooperation, coupled with peer reviews, technical assistance for capacity-building and regulatory convergence, can prove effective at reforming bilateral treaties and influencing the global agenda.

- **Leveraging regional and global models:** African countries seeking to recalibrate their bilateral investment treaties and double taxation treaties can draw inspiration from existing model tax and investment treaties and manuals. Numerous treaties and model developed at the regional level, including COMESA, the East African Community, ECOWAS and SADC, as well as the UNCTAD investment policy framework for sustainable development model, can also guide national, regional and continental reform efforts levels. In the area of taxation, a number of documents can serve as points of reference in setting negotiating positions, including the OECD and United Nations tax models and the 2016 United Nations manual for the negotiation of bilateral tax treaties between developed and developing countries, together with the more context-specific models promoted by the African Tax Administration Forum, as well as African regional protocols and model tax treaties, such as those of EAC and SADC, or models drawn up by countries in other regions.

- **Active participation in global debates on investment and tax regimes:** African countries should be active in global forums on investment and tax issues. A common position on many of the key themes and strategic alliances with countries beyond their region would further strengthen their ability to shape international discussions and shift the agenda towards their concerns and needs. African Governments are encouraged to advance a common vision for both investment and tax issues so as to speak with a single strong voice. Key elements that should inform this vision include the ongoing deliberations on the future of investor-State dispute settlement and efforts to stem aggressive tax optimization practices through international treaties, including those that foster illicit financial flows.

- **Consider how other countries have dealt with some of the problematic issues arising from the linkages between bilateral investment treaties and double taxation treaties:** Member States are also advised to see how other countries are dealing with some of the problematic issues raised earlier regarding existing agreements (see table 2, section 4). This exercise can be a learning opportunity in terms of appraising best practices. Some of these agreements may already exist with the same partners or source countries, easing opportunities for revision, reinterpretation, negotiation or renegotiation. Some examples of how interactions between investment treaties and tax treaties, or taxation more generally, could be addressed are provided in table 3.

Table 3: Selected examples of language in international investment agreements intended to safeguard policy space in the area of taxation

Clauses in bilateral investment treaty	Potentially problematic consequences	Possible changes	Example
Preamble	Treaty interpretation can be informed by a strong emphasis on States' responsibilities and investors' privileges	Reference to sustainable development	"Bearing in mind that the measures agreed upon shall contribute towards the realisation of the Common Market and the achievement of sustainable development in the region" Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area (2007)
		Promotion of a balance between rights and obligations of States and investors	"Seeking an overall balance of the rights and obligations among the State Parties, the investors, and the investments under this Agreement" Morocco–Nigeria bilateral investment treaty (2016)
		Recognition of the right to regulate	"Recognizing that this Agreement is designed to allow each Contracting Party to regulate, and to introduce new measures relating to, investments in its Area in order to meet national public policy objectives…" Japan–Kenya bilateral investment treaty (2016)
Definitions of investor and investment	An investor can be covered by bilateral investment treaties but still fall below the permanent residency threshold in double taxation treaties Too broad a definition of investor can result in forum-shopping if barriers in domestic legislation are low Open-ended definitions of investment may bring under treaty protection assets that are not from the point of view of the State essential to its structural transformation and create uncertainty about the host State's potential liability	Denial of benefits for "special purpose entities" and "letter-box companies"	"A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party and to its investments, if investors of a Non-Contracting Party own or control the first mentioned investor and that investor has no substantial business activity in the territory of the Contracting Party under whose law it is constituted or organized" Article 9 of the Austria–Libya bilateral investment treaty (2002)
		Clear list of covered assets	"[I]nvestment" means: 1. an enterprise; 2. a share, stock or other form of equity participation in an enterprise …" "But "investment" does not mean: a claim to money that arises solely from: 1. a commercial contract for the sale of a good or service by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, the extension of credit in connection with a commercial transaction, such as trade financing…" Article 1 of the Canada–Guinea bilateral investment treaty (2015)

Clauses in bilateral investment treaty	Potentially problematic consequences	Possible changes	Example
Scope of the treaty	Unless stated otherwise, bilateral investment treaties also apply to taxation matters	Taxation can be left out of the scope of the treaty completely	"This Agreement shall not apply to: a. any matters of taxation" Article 2 (3) of the 2014 Mauritius-Egypt bilateral investment treaty (2014)
		Taxation only applicable in some areas of treaty protection, such as expropriation	"This Agreement shall not apply to taxation measures except as provided for in paragraph 2 of this Article [conditions for applicability in expropriation claims]" Articles 23 (1) and (2) of the Investment Agreement for the COMESA Common Investment Area (2007)
		Parallel double taxation treaty takes precedence over bilateral investment treaty	"The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party. Such matters shall be governed by the Double Taxation Treaty between the two Contracting Parties and the domestic laws of each Contracting Party" Article 3 (5) of the China–Uganda bilateral investment treaty (2004)
National Treatment	Targeting tax incentives can prove problematic to support domestic industries The National Treatment principle would be violated if changes in tax legislation (e.g., more onerous reporting) were directed only at multinational corporations International investors could challenge anti-avoidance measures in court if targeted at foreign entities	National Treatment can be left out/limited	The National Treatment principle only explicitly applies to restrictions on the balance of payments Article 8.2 (e) of the Burkina Faso–Singapore bilateral investment treaty (2014)
		Taxation can be carved out from National Treatment	"The provisions of this article [on National Treatment and Most-favoured nation] do not apply to tax matters" Article 4 (4) of the Belgium–Luxembourg Economic Union-Togo bilateral investment treaty (2009; translated from the original French)
		Specific policy objectives can override national treatment	"The National Treatment principle does not apply: […] (b) to taxation measures aimed at ensuring the effective collection of taxes, except where this results in arbitrary discrimination" Article 6 (b) of the Pan-African Investment Code
		Exceptions for specific classes of nationals/policy objectives	"The Republic of South Africa shall in its territory accord to investments and returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments and returns of its own investors with the exception of any domestic legislation relating wholly or mainly to taxation or programmes and economic activities specifically aimed to promote, protect and advance persons and groups of persons that have been disadvantaged as a result of past discriminatory practices in the Republic of South Africa" Article 3 (3) of China–South Africa bilateral investment treaty
		National Treatment can apply only to specific classes of taxes	"Subject to paragraph 2, the provisions of Articles 4 [National Treatment] and 5 [Most-Favoured Nation Treatment] shall apply to all taxation measures, other than taxation measures on income, capital gains or on the taxable capital of corporations, except that nothing in those Articles shall apply…" Article 14 of the Canada–United Republic of Tanzania bilateral investment treaty 2013

Clauses in bilateral investment treaty	Potentially problematic consequences	Possible changes	Example
Most-favoured nation	Barriers to (tax-related) arbitration may be lowered by importing them from another bilateral investment treaty In principle, companies may seek to import more preferential tax treatment from double taxation treaties When a country changes its double taxation treaties with another party, this may potentially be negated by interaction with most-favoured-nation treatment in another bilateral investment treaty or double taxation treaty.	Most-favoured nation can be omitted	Recommended in the Southern African Development Community (SADC) Model Bilateral Investment Treaty Template with Commentary
		Taxation can be carved out from most-favoured nation	"The provisions of this article [on national treatment and most-favoured nation] do not apply to tax matters" Article 4 (4) of the Belgium-Luxembourg Economic Union-Togo bilateral investment treaty (2009; translated from the original French)
		Double taxation treaties can be carved out	"The treatment granted under this article [on national treatment and most-favoured nation] shall not include advantages provided by one Contracting State to investors from a third country by virtue of an agreement aiming at avoidance of double taxation or any other convention in the area of taxation" Mauritius–Madagascar bilateral investment treaty (2004; translated from the original French)

Clauses in bilateral investment treaty	Potentially problematic consequences	Possible changes	Example
Fair and equitable treatment	Vague definitions can increase uncertainty around the scope of the treatment Investors can try to legally challenge tax-related measures, including those aimed at tax avoidance	Fair and equitable treatment can be omitted	Intra-Southern Common Market Investment Facilitation Protocol (2017)
		Taxation as an obligation of effort	"With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party" Article XI of the United States of America–Democratic Republic of the Congo bilateral investment treaty (1984)
		Fair and equitable treatment equated with the customary minimum standard of treatment	"The concepts of 'fair and equitable treatment' and 'full protection and security' in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens" Article 6 of Canada–Côte d'Ivoire bilateral investment treaty (2014)
		Legitimate expectations do not equal the fair and equitable treatment standard	"For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result" Article 6 (4) of Hong Kong–Chile bilateral investment treaty (2016)
		Fair and equitable treatment is interpreted in the light of the level of development of the host State	"For greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time. Paragraphs 1 and 2 of this Article [on fair and equitable treatment] do not establish a single international standard in this context" Article 14 (3) of the Investment Agreement for the COMESA Common Investment Area (2007)
		Double taxation treaties can be carved out	"The treatment and protection as provided for in paragraphs 1 and 2 of this Article [on fair and equitable treatment and most-favoured nations] shall not include any preferential treatment accorded by the other Contracting Party to investments of investors of any other State based on customs union, free trade zone, economic union, agreement relating to avoidance of double taxation and any other matters of taxation or for facilitating frontier trade" China–Zimbabwe bilateral investment treaty (1996)
		Closed list of breaches of the fair and equitable treatment standard	"A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice […]; (b) fundamental breach of due process […] (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds […] (e) abusive treatment of investors […] or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties…" Article 8.10 (2) of the Comprehensive Trade and Economic Agreement between Canada and the European Union (2016)

Clauses in bilateral investment treaty	Potentially problematic consequences	Possible changes	Example
Expropriation	Investors may try to mount a legal challenge against tax-related measures, including those aimed at tax avoidance	Taxation carved out	"The preceding provision shall not, however, in any way impair the right of a Party to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties" Article 6 on the draft Norway model bilateral investment treaty (2007)
		Bona fide regulation protected	"Consistent with the right of states to regulate and the customary international law principle on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article [on expropriation]" Article 20 (8) of the Investment Agreement for the COMESA Common Investment Area (2007)
Umbrella clause	Umbrella clause can give investors further leverage in claims of expropriation and fair and equitable treatment	Umbrella clause left out	Chile–Tunisia bilateral investment treaty (2016)
		Limited to contractual obligations	"Each Contracting Party shall observe any contractual obligation which it may have entered into towards investors of the other Contracting Party with regard to investments approved by it in its own territory" Austria–Cabo Verde bilateral investment treaty (1991)
Investors' obligations		Investors' obligations can be made explicit in the preamble or a substantive clause	"Foreign investors shall abide by the laws, regulations, administrative guidelines and policies of the Host State" Article 10 of the SADC Protocol on Investment and Finance (2006)
		Reference to country's development ambitions	"In addition to the obligation to comply with: - all applicable laws and regulations of the host Member State, […] [w]here standards of corporate social responsibility increase, investors should endeavour to apply and achieve the higher level standards" Articles 16 (1) and (2) of the Economic Community of West African States Supplementary Act (2008)
		Investors can be compelled to comply with the tax laws of the country	"Investors and their investments shall comply with the provisions of law of the Parties concerning taxation, including timely payment of their tax liabilities" Article 11 (iii) of the Model Text for the Indian Bilateral Investment Treaty (2015)
		Host countries can request information on investor's corporate governance methods	"Host States have the right to seek information from a potential Investor or its home State about its corporate governance history and its practices as an Investor, including in its home State" Article 21 of Nigeria–Morocco bilateral investment treaty (2016)

Clauses in bilateral investment treaty	Potentially problematic consequences	Possible changes	Example
Dispute settlement	Investors may prefer investor-State dispute settlement to the mutual agreement procedure or use both simultaneously The two dispute mechanisms can be considering the same issue and yield different results Investor-State dispute settlement tribunals do not have a completely coherent approach to tax-related disputes, raising uncertainty for defending States	Measures aimed at increasing transparency	"The UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section" Article 8.36 of the Comprehensive Trade and Economic Agreement between Canada and the European Union (2016)
		Need to exhaust local remedies	"Disputes between an investor and a State Party […] which have not been amicably settled, and after exhausting local remedies shall [...] be submitted to international arbitration if either party to the dispute so wishes" Article 28 (1) of the SADC Protocol on Finance and Investment (2006)
		Tax-related investor-State dispute settlement can be made subject to joint vetoes	"An investor may not make a claim under paragraph 5 [tax-related claims] unless […] the taxation authorities of the Parties fail to reach a joint determination that, in the case of subparagraph 5(a), the measure does not contravene that agreement, or in the case of subparagraph 5(b), the measure in question is not an expropriation" Article 14 (6) of Canada–Mali bilateral investment treaty (2014)
		Tax-related investor-State dispute settlement can be replaced by a State-State dispute settlement	"If the dispute cannot be resolved, the Parties to the exclusion of the investors may resort to arbitration mechanisms between States, which are to be agreed upon by the Joint Committee, whenever the Parties find it appropriate" Article 13 (6) of Brazil–Malawi bilateral investment treaty (2015)
		Consent to claims and counter-claims submitted by States	"Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States…" Article 9 of Netherlands–Algeria bilateral investment treaty (2007; translated from the original French)
		Mechanisms in a parallel mutual agreement procedure are prioritized	"[T]he observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b) [on investment dispute], to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time" Article XI of the United States–Democratic Republic of the Congo bilateral investment treaty (1984)

Clauses in bilateral investment treaty	Potentially problematic consequences	Possible changes	Example
Right of State to regulate		A clause safeguarding the host State's right to regulate	"In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives. […] For greater certainly, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement" Article 23 (1), (2) and (3) of the Nigeria–Morocco bilateral investment treaty (2016)
Transfer of funds	A broadly worded repatriation of funds clause can hinder short-term macroeconomic stabilization policy The clause might also potentially limit a Government's ability to freely set domestic withholding rates of taxes	Special provisions for crisis macroeconomic policy management	"Where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties, each Contracting Party may temporarily restrict transfers, provided that such restrictions arc imposed on a non-discriminatory and in good faith basis" Article 8 (3) of Rwanda–Turkey bilateral investment treaty (2016)
		Withholding taxes explicitly recognized	"Notwithstanding the preceding paragraphs (on transfers), either Party may maintain laws and regulations: […] (c) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers" Article V3 (c) of the United States–Senegal bilateral investment treaty (1983)
		Making the clause subject to the host country laws and regulations	"A Member State shall apply restrictions on international transfers of funds and payments for current transactions relating to investments made in its territory in accordance with its taxation as well as financial laws and regulations" Article 16 of Pan-African Investment Code (2017)
Performance requirements	Fiscal incentives can further contribute to "aggressive tax planning" when performance requirements are prohibited	Countries should keep the right to introduce mandatory performance requirements	[performance requirements not mentioned] Congo–Namibia bilateral investment treaty (2007) "Member States may introduce performance requirements to promote domestic investments and local content…" Article 17.2 of the Pan-African Investment Code (2017)

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