

The OECD Multilateral Tax Instrument

Three Lessons for Reforming the International Investment Regime

Wolfgang Alschner, 23 April 2020



The International Tax Regime

Similarities to Investment Law

- Structure: 3000+ bilateral treaties to prevent double taxation
- Legitimacy Crisis: Treaties have facilitated corporate tax evasion ("Double *non*-taxation")

Reform

- Closing loopholes in tax treaties to prevent tax **b**ase **e**rosion and **p**rofit **s**hifting ("**BEPS** Reform Project")
 - 2013 OECD BEPS Action Plan#15: Efficient BEPS reform of bilateral tax treaties through a Multilateral Instrument (MLI)
- Outcome: **Multilateral Instrument (MLI)**
 - 2015-16 negotiations, signed 2017, entry into force 2018
 - signed by 98 states (incl. most G20), ratified by 43 states

Three Lessons from the Tax MLI

1. [Mechanics]

2. Scope

3. Design

Three Lessons from the Tax MLI

- 1. Mechanics:** Opt-in Convention to modify but not replace parallel treaties (similar to Mauritius Convention).

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- 2. Scope:** Updating of bilateral treaties to reflect today's best practices in both procedure and substance.

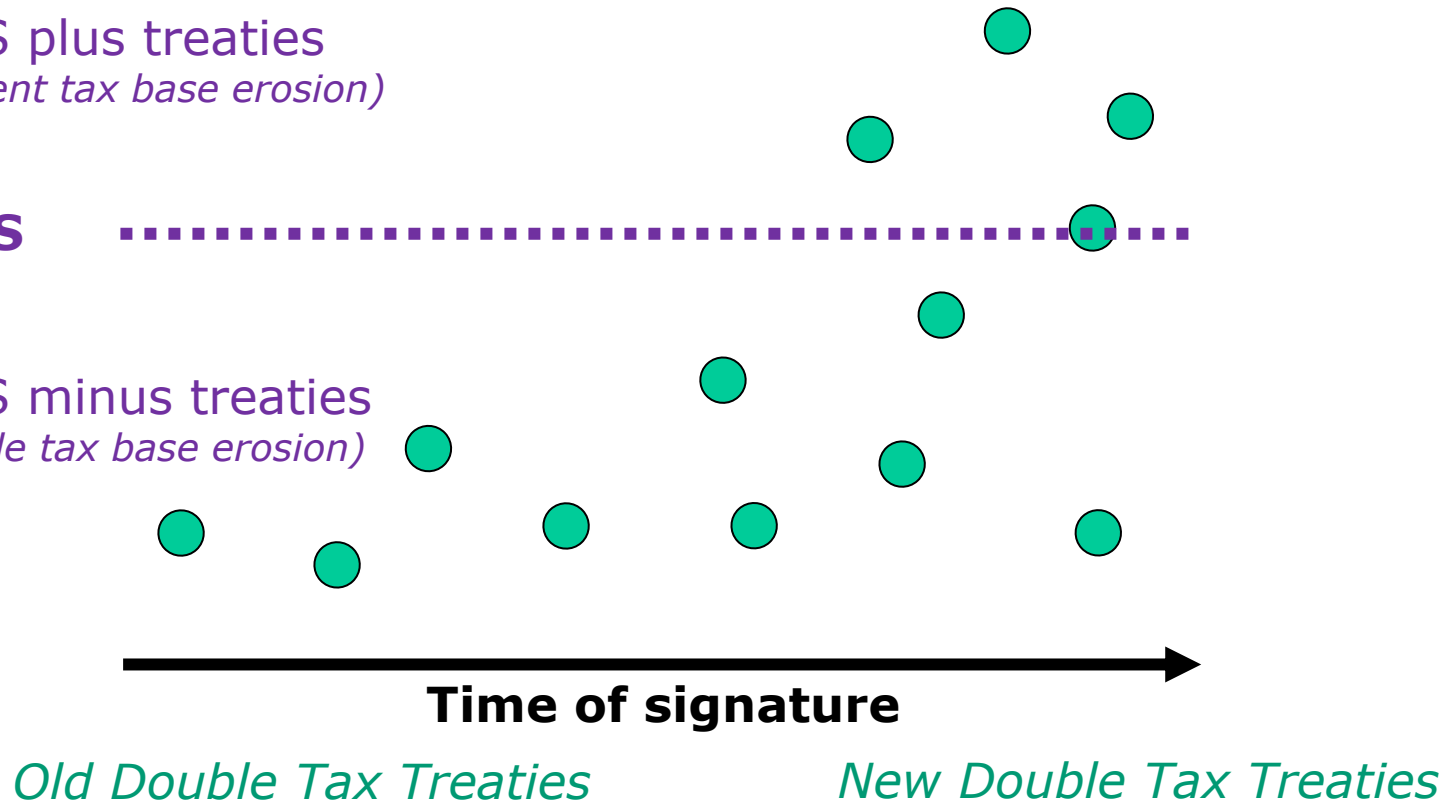
2. Scope of MLI

Before MLI

BEPS plus treaties
(prevent tax base erosion)

BEPS

BEPS minus treaties
(enable tax base erosion)



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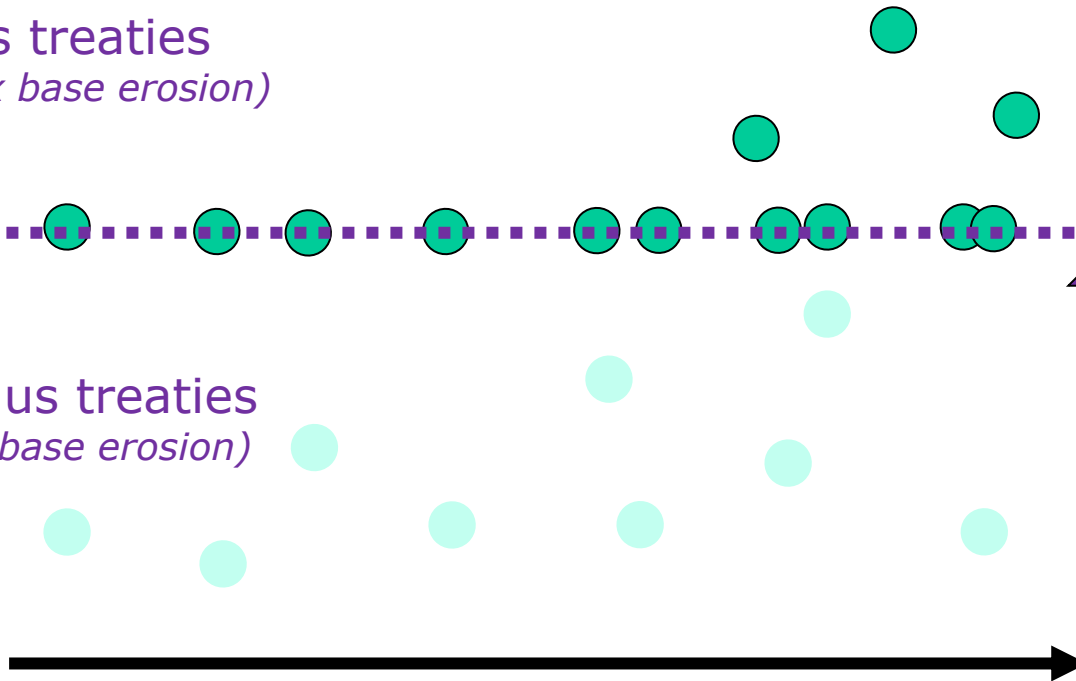
After MLI

BEPS plus treaties
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MLI Lifts up covered bilateral treaties to common minimum standards (both substantive & procedural)

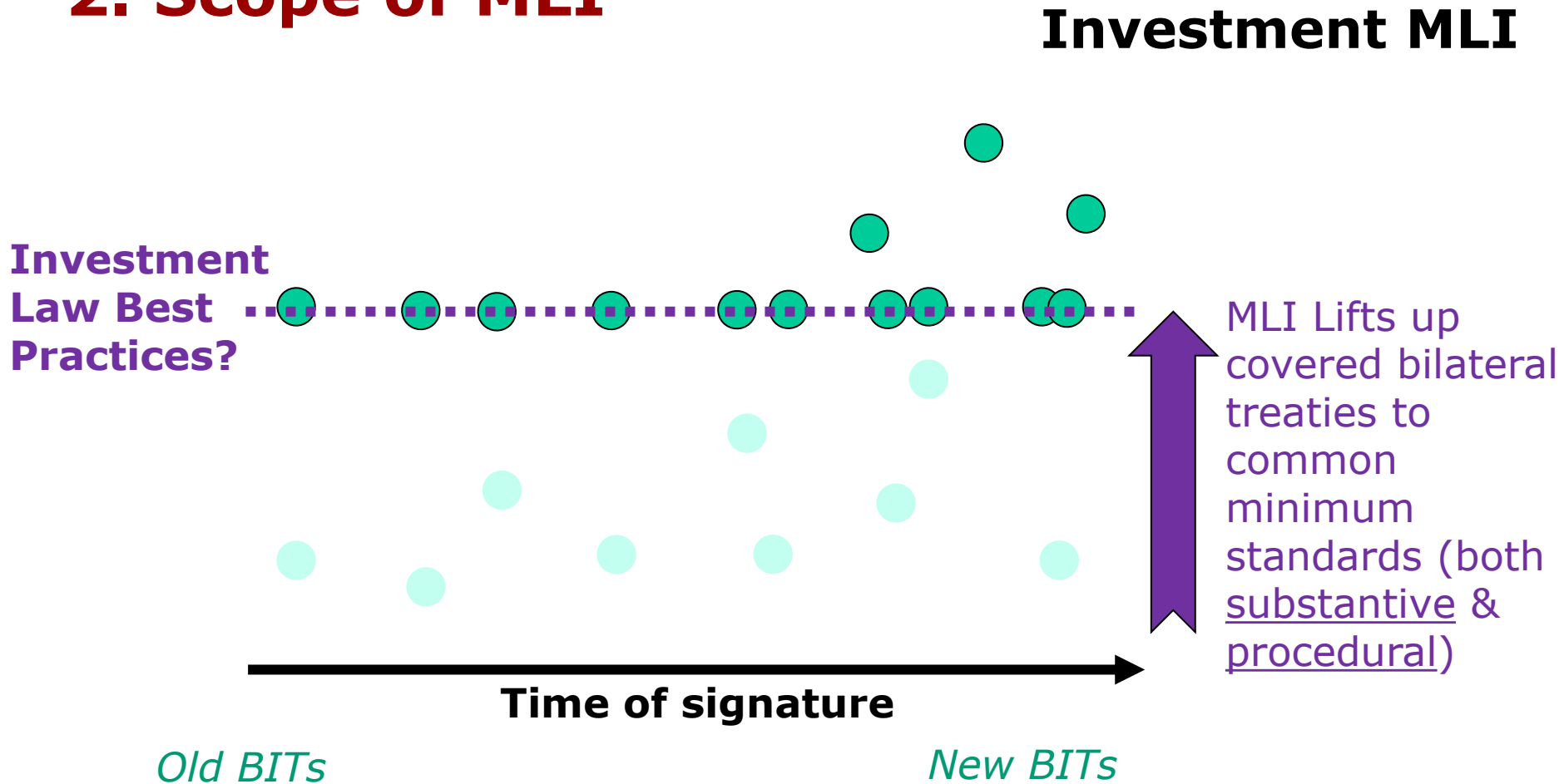


Time of signature

Old Double Tax Treaties

New Double Tax Treaties

2. Scope of MLI



Three Lessons from the Tax MLI

- 1. [Mechanics:** Opt-in Convention to modify but not replace parallel treaties (similar to Mauritius Convention).]
- 2. Scope:** Updating of bilateral treaties to reflect today's best practices in both procedure and substance.
- 3. Design:** Squaring universal minimum standards with flexibility, differentiation and customization.

3. MLI Design

Matrix of Reform Issues

Level of Int'l Consensus	Depth of Required Reform	
	<i>Shallow</i>	<i>Deep</i>
<i>Low</i>		
<i>High</i>		

3. MLI Design

International law default designs

Level of Int'l Consensus	Depth of Required Reform	
	<i>Shallow</i>	<i>Deep</i>
<i>Low</i>	“Side-Agreement” Bilateral e.g. CPTPP Side Letters	“Coalition of the Willing” Plurilateral e.g. WTO Gov't Procurement
<i>High</i>	“Low Hanging Fruit” Narrow Multilateral e.g. Mauritius Convention	“Grand Bargain” Broad Multilateral e.g. WTO

3. MLI Design

MLI unites designs under one treaty umbrella

Level of Int'l Consensus	Depth of Required Reform	
	<i>Shallow</i>	<i>Deep</i>
<i>Low</i>	<p>Hybrid Mismatches (MLI Part II) Flexibility: Opt-Out</p>	<p>Arbitration (MLI Part VI) Flexibility: Opt-In</p>
<i>High</i>	<p>Preamble Change (MLI Part III, Art. 6) Mandatory: Add-on</p>	<p>Denial of Benefits (MLI Part III, Art. 7) Mandatory: Choice</p>

3. MLI Design

International Investment Law?

		Depth of Required Reform	
		<i>Shallow</i>	<i>Deep</i>
Level of Int'l Consensus	<i>Low</i>	? Flexibility: Opt-Out	? Flexibility: Opt-In
	<i>High</i>	? Mandatory: Add-on	? Mandatory: Choice

Further Information

- Wolfgang Alschner, *The OECD Multilateral Tax Instrument: A Model for Reforming The International Investment Regime?*, 45 Brook. J. Int'l L. (2019).
<https://brooklynworks.brooklaw.edu/bjil/vol45/iss1/1>
- Wolfgang Alschner, *Squaring bilateralism with Multilateralism: What investment law reformers can learn from the international tax regime*, Columbia FDI Perspectives, February 24, 2020.
<http://ccsi.columbia.edu/files/2020/02/No-272-Alschner-FINAL.pdf>
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