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## **Tax Multilateralism in Regional Economic Communities**

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#### ABSTRACT

*The rise of economic globalization, the need to prevent unilateralism from impeding globalization, and the corresponding development of bilateral tax treaty networks in the early twentieth century have been responsible for the bilateralism that characterized the international tax law and policy of the past century. However, with the creation of the European Union and other regional economic communities (RECs) in the following decades, there has been a steady manifestation of multilateralism (in addition to bilateralism) in international tax policymaking—both in terms of multilateral tax treaties and multilateral tax directives. Despite resistance by various countries to multilateral tax policymaking for reasons of tax sovereignty, etc., the growth and development of this trend has seemed almost unavoidable. Bolstered by the financial crisis and the drive to replace century-old international tax policies built on bilateralism that have made harmful tax competition possible, the Organisation for Economic Cooperation and Development (OECD) has taken multilateralism in international tax policy even further with its work on the Inclusive Framework and development of a multilateral tax treaty to avoid base erosion and profit shifting (BEPS). It is becoming clearer that multilateralism, despite its limitations and the resistance toward it, is critical in redefining the international tax policy of the future. Yet arguments remain about the efficacy of multilateralism in international tax policymaking where countries have different growth agendas, sizes, and capacities. One area where this debate on tax multilateralism continues to exist is with respect to RECs where there is the need to ensure the free flow of capital and trade and prevent harmful tax competition between member states which could adversely affect revenue mobilization and tax harmonization/coordination. Thus, this paper assesses the challenges to tax multilateralism in RECs. In addition, this paper assesses the impact of tax multilateralism in RECs on revenue mobilization of the respective member states of the RECs as well as on the tax harmonization efforts of member states' tax policies.*

## I INTRODUCTION

The international tax regime of today is essentially a story of how two principles, “unilateralism” and “bilateralism,” have governed international tax law and policy for the past century. Before World War I, very few tax treaties existed; countries relied on national tax laws—that is, took unilateral action to resolve instances of double taxation when they occurred.<sup>1</sup> Countries generally believed that since unilateral action did not require time and cost commitment in negotiating with other countries, the unilateral system of resolving double taxation was perfect.<sup>2</sup> As cross-border trade caused capital and goods to cross borders at an unprecedented rate after World War I, the limitations of that unilateral system of resolving double taxation became glaring. The problem was well-defined: if cross-border trade was to continue and the gains to be enjoyed to their full potential, then countries had to design an efficient way to protect income from cross-border trade from being doubly taxed. Soon after this unprecedented global growth began, the League of Nations commenced a multilateral inquiry into double taxation and its impediments to cross-border trade. This inquiry led to an explosion in the number of bilateral tax treaties signed in the twentieth century, which led to the birth and expansion of bilateralism in international taxes without killing unilateralism (both systems operated together). The limitations of the unilateral tax system were brought to light—especially when it came to the division of the power of taxation and the prevention of double taxation.<sup>3</sup> In addition, states found that bilateralism fostered cross-border trade.<sup>4</sup>

Today, the world of international taxation is held together, in large part, by a network<sup>5</sup> of more than 3,000 bilateral tax treaties.<sup>6</sup> Developing double taxation treaties built and defined the international tax system of the past one hundred years. However, it is rarely recognized, even among international tax experts and scholars, that

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<sup>1</sup> For instance, the United States took unilateral action to resolve issues of double taxation in the early twentieth century by introducing the foreign tax credit. See Keigo Fuchi, *Unilateralism, Bilateralism, and Multilateralism in International Taxation*, 59 JAPANESE Y.B. INT’L L. 216, 216 (2016).

<sup>2</sup> See *id.*

<sup>3</sup> See generally JOHANNES BECKER ET AL., KLAUS VOGEL ON DOUBLE TAXATION CONVENTIONS (Ekkehart Reimer & Alexander Rust eds., 5th ed. 2022).

<sup>4</sup> *Id.* at 21.

<sup>5</sup> See Reuven S. Avi-Yonah, *Commentary (Response to Article by H. David Rosenbloom)*, 53 TAX L. REV. 167, 169 (2000).

<sup>6</sup> JOHANNES BECKER ET AL., *supra* note 3, at vii.

bilateralism was proposed as a second-best alternative to a multilateral system in the early days of the design of the current international tax system.<sup>7</sup> Consequently, multilateralism in tax law and policy has remained utopian.<sup>8</sup> Nonetheless, recent global efforts have begun to bring tax multilateralism within reach—yet, there is still a long way to go. The base erosion and profit shifting (BEPS) project by the Organization for Economic Cooperation and Development (OECD) has spearheaded recent efforts at tax multilateralism. The last time there was a multilateral tax effort of this scale and importance was in the 1920s<sup>9</sup> at the emergence of the international tax system, which followed the work of the League of Nations. Curiously, both instances were triggered by disaster, viz. economic ruins after World War I<sup>10</sup> and economic ruins after the global financial crisis of 2008,<sup>11</sup> respectively. Despite the impact of these economic triggers in fostering conversations about tax multilateralism between countries, neither effort has been entirely successful. This is mainly because of the general belief that a multilateral tax regime is impracticable.<sup>12</sup>

However, regional economic communities (RECs) have found some success with tax multilateralism. In these RECs, multilateral tax efforts are undertaken with the goal of preventing harmful tax competition

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<sup>7</sup> The first group of experts who had worked on designing the international tax system had argued that the ideal result for the international tax system would be the design of a multilateral tax treaty that carves up the world's peoples and resources, and subsequently assigns them to a single taxing authority. See Allison Christians, *Getting to Yes? Thoughts on a BATNA for International Tax*, 2013 WIS. L. REV. ONLINE 7, 13.

<sup>8</sup> Yariv Brauner, *An International Tax Regime in Crystallization*, 56 TAX L. REV. 259, 259 (2003).

<sup>9</sup> Jinyan Li et al., *BEPS and the Emerging Global Approach to Taxing Multinational Enterprises* 1, 31 n.9 (Feb. 8–9, 2019) (Osgoode Hall L. Sch. York Univ., Working Paper No. 5, 2019).

<sup>10</sup> The League of Nations project was happening against the backdrop of Europe recovering from the economic damage caused by World War I. As a result, European countries were trying to build back their economies and adopt cross-border trade without having the problems of double taxation stand in their way. See Lidija O. Zivkovic, *The Conference of the Parties: A Future for a More Profound Multilateralism in Tax Matters?*, 54 ZBORNIK RADOVA PRAVNOG FAKULTETA, NOVI SAD [PROC. FAC. L. NOVI SAD] 1123, 1124 (2020) (Serb.).

<sup>11</sup> *Id.* The 2008 financial crisis led countries to discover that they had very little public revenue to sustainably grow out of the recession. This drive for increased tax revenues led to a public outcry about how much multinational enterprises were paying in taxes to the jurisdictions they operate in. This would mark the start of the BEPS project.

<sup>12</sup> JUAN ZORNOZA PÉREZ, *Multilateralism in International Taxation: Is It Really the Future?*, in RESEARCH HANDBOOK ON INTERNATIONAL TAXATION 317, 317 (Yariv Brauner ed., 2020).

among member states in the REC,<sup>13</sup> fostering tax harmonization and coordination, and preventing double tax impediments to cross-border trade. Despite the homogeneity of countries in RECs and similar economic, geographical, and political interests, tax multilateralism has not enjoyed complete success either—both in terms of the adoption of multilateral tax treaties, and the harmonization of tax laws and policies of member states. This is despite the recognition that multilateralism, in the form of tax harmonization, tends to have several benefits for businesses operating within RECs, including the reduction of the risk of double taxation and a reduction in compliance costs (transfer pricing compliance requirements and costs).<sup>14</sup>

This Article seeks to answer why tax multilateralism is not completely successful in RECs and whether tax multilateralism has achieved its objectives in RECs—where the stakes may be lower—compared to the global tax regime. This Article does not seek to be the beginning and the end of the analysis on tax multilateralism in RECs. Nonetheless, it concludes by making two major contributions to the scholarship. First, a game theory analysis of the collective action theory is better suited to understanding how to cater to the preference for unilateralism or bilateralism among countries, despite the persistent drive for multilateralism by various actors in international tax law and policymaking. Further to this point, it reveals that the stag hunt game theory analysis may help us understand how to frame and build tax multilateralism in the future but calls for more research on the motivations of policymakers in refusing to commit to tax multilateralism in the 1920s, 2010s, and every other time in between. Second, by building on previous research, this Article concludes that tax multilateralism in RECs has not led to complete tax harmonization because of the challenges with the implementation of tax multilateralism in RECs. This Article, therefore, makes two important arguments in this regard: (1) there is a lack of clarity on the revenue implication impacts of tax multilateralism in RECs (i.e., lack of clarity on whether tax multilateralism leads to tax revenue loss or

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<sup>13</sup> The scope and meaning of the term “harmful tax competition” and how it differs from “tax competition” has been debated in international tax policy and scholarship. This research does not adopt any specific interpretation of the term other than in its broadest sense, unless specific reference is made to a specific type of tax competition. See Luis Calderon Gomez, *Transcending “Tax” Sovereignty and Tax Standardization: Three Questions*, 45 *YALE J. INT’L L.* 191, 191 n.1 (2020) (describing the vagueness of the distinction between both terms).

<sup>14</sup> Ruth Mason, *Common Markets, Common Tax Problems*, 8 *FLA. TAX REV.* 599, 615 (2007).

tax revenue gain for countries in an REC), and (2) an assessment of the impact of tax multilateralism in RECs reveals that the perceived threats to tax sovereignty lead to a lack of political will on the part of member states to commit to tax harmonization measures.

The methodology for this research is primarily qualitative, and reliance is placed on data published by various scholars and institutions. The research is, therefore, divided into five parts. This part introduces the background to the research. The second part analyzes the theoretical framework of multilateralism in international tax law and policy. The third part analyzes the scope of multilateralism in RECs. The fourth part assesses the impact of tax multilateralism in RECs. The fifth and final part concludes this research.

## II

### MULTILATERALISM IN INTERNATIONAL TAX LAW AND POLICY

#### *A. Nature and Scope of Tax Multilateralism*

Multilateralism, simply put, is the coming together of various states to create a system or framework for either addressing a cross-border problem or cooperating for unified action. On a more substantive level, multilateralism has been defined as collectively agreed-to rules, principles, and norms that regulate the behavior of various states in their dealings with one another.<sup>15</sup> Overall, when multilateralism is used in international law, it can be used to refer to either multilateral organizations, multilateral treaties, or a forum for multilateral negotiation and cooperation. There are certain defining features of multilateralism: (1) the establishment of norms and standards of conduct, (2) aggregation of costs and benefits, and (3) surrendering short-term benefit for long-term gains, among others.<sup>16</sup> The idea of multilateral frameworks, therefore, is shared cooperation for common long-term benefits. It is often viewed through the lens of reciprocity, cooperation, and indivisibility. Against this background, multilateralism in international tax policymaking refers to the efforts of technical experts, governments, national tax experts, etc., to design model conventions, tax treaties, multilateral tax cooperation, and so

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<sup>15</sup> Fen Osler Hampson & Paul Heinbecker, *The "New" Multilateralism of the Twenty-First Century*, 17 GLOB. GOVERNANCE 299, 300 (2011).

<sup>16</sup> Ricardo García Antón, *The 21st Century Multilateralism in International Taxation: The Emperor's New Clothes?*, 8 WORLD TAX J. 147, 149 (2016).

on.<sup>17</sup> The very obvious examples of this in the world today can be seen through the OECD model tax convention, multilateral cooperation being championed by the OECD to combat BEPS, global transparency and exchange of information efforts spearheaded by the OECD, and the tax directives and harmonization framework of regional blocs such as the EU, etc.<sup>18</sup> The objective of tax multilateral frameworks in RECs is simply to ensure that tax competition is reduced to create opportunities for harmonization, redistribution, and cooperation—all through tax cooperation.<sup>19</sup>

In addition, tax policymaking also takes place at the unilateral and bilateral levels: these are referred to as unilateralism and bilateralism. Unilateralism refers to countries taking singular action on matters that affect the interests of other countries. In practice, this usually takes the form of designing national laws and policies beyond domestic matters. In this respect, unilateralism is seen as not just acting alone, but as disrespecting other countries and their agreed-to norms.<sup>20</sup> Bilateralism, on the other hand, is when countries ratify an agreement or treaty in which they agree to cooperate on shared matters of importance. In the context of tax law and policy, unilateralism counters double taxation and addresses tax policy issues through *national laws and policies*, while bilateralism counters double taxation and addresses policy issues through *double tax treaties*.<sup>21</sup>

In international tax policymaking, efforts have been mostly unilateral and bilateral, even though there have been talks about the creation of a multilateral tax regime from the outset of the international tax system. The bilateral tax system has been possible due to the network of such treaties in force in the world today.<sup>22</sup> These bilateral tax treaties have, as their core objective, the avoidance of double taxation for residents of treaty member states. This is possible because

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<sup>17</sup> Thomas Rixen, *Bilateralism or Multilateralism? The Political Economy of Avoiding International Double Taxation*, 16 EUR. J. INT'L RELS. 589, 594 (2010).

<sup>18</sup> For an extensive discussion of the global efforts geared toward promoting tax multilateralism in the world today, see JULIANA CUBILLOS ET AL., *Multilateral Cooperation in International Tax Law*, in THE FUTURE OF MULTILATERALISM: GLOBAL COOPERATION AND INTERNATIONAL ORGANIZATIONS 235, 237–47 (Madeleine O. Hosli et al. eds., 2021).

<sup>19</sup> Iqra Bawany, *Don't Tax You, Don't Tax Me, Tax the Corporations Across the Sea: Examining the European Financial Transaction Tax as a Model for Tax Multilateralism*, 11 UCL J.L. & JURIS. 1, 4 (2022).

<sup>20</sup> Mindy Herzfeld, *US Tax Reform: A Multilateral Success*, 4 BRIT. TAX REV. 487, 505 (2019).

<sup>21</sup> Rixen, *supra* note 17.

<sup>22</sup> Yariv Brauner, *What the BEPS?*, 16 FLA. TAX REV. 55, 61 (2023).

each member state can coordinate their respective rules and reduce the chances of each country exercising their individual tax powers at the same time.<sup>23</sup> While the bilateral regime has enjoyed some success, the regime also appears (in a certain light) to be a compromise, due to the difficulty in establishing a multilateral tax regime. The question, therefore, is why is this the case? Why is it difficult to establish a multilateral regime in tax law, even though multilateral regimes appear to exist in other areas of international economic law (viz. international investment law and international trade law)?

Multiple reasons have been adduced for this state of affairs in international tax literature.<sup>24</sup> But Avi-Yonah sums it up by arguing that money is the main reason that it is difficult to establish a multilateral regime in international tax, as it has been in other areas of international economic law.<sup>25</sup> He argues that unlike the case with international trade law where tariffs are not a major source of revenue, in international tax law, governments rely heavily on tax revenues. Accordingly, since tax treaties ultimately involve countries ceding taxing powers in certain respects, it would be difficult for countries to agree to this multilaterally. In this sense, tax treaties tend to reduce revenues in a nonreciprocal manner. To contextualize this, while countries in trade treaties have most favored nation (MFN) clauses (in which they agree not to give more favorable benefits to other trading partners), countries are cautious to agree to the same provisions when it comes to tax treaties because, in the tax world, there may not always be economic justifications to agree to this.<sup>26</sup>

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<sup>23</sup> Adam H. Rosenzweig, *Thinking Outside the (Tax) Treaty Revisited*, 41 BROOK. J. INT'L L. 1229, 1231–32 (2016). In looking at the role of bilateral tax treaties, they also achieve the following objectives: (1) creating a tax regime for both countries that seeks to facilitate the free flow of trade, (2) creating an opportunity for taxpayers of either of the signatory countries to resolve their disputes, and (3) creating a regime of public good that is beneficial to all countries. For how this bilateral tax treaty model affects multilateral tax cooperation, see Adam H. Rosenzweig, *Thinking Outside the (Tax) Treaty*, 2012 WIS. L. REV. 717, 783–84 (2012).

<sup>24</sup> See Thomas Rixen & Ingo Rohlfing, *The Institutional Choice of Bilateralism and Multilateralism in International Trade and Taxation*, 12 INT'L NEGOT. 389, 397–409 (2007).

<sup>25</sup> Reuven S. Avi-Yonah, *Follow the Money: Why Is International Tax Bilateral* 5 (Mar. 26, 2023) (Univ. Mich. L. Sch. Working Paper), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4400284](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4400284) [<https://perma.cc/HFZ9-GXSC>].

<sup>26</sup> For instance, countries A and B have an MFN clause in their tax treaty where A concedes to a reduction in the dividend tax rate to fifteen percent. If country A seeks to enter into a treaty with country C, country A would be cautious about the rates and concessions it agrees to with country C because of the MFN clause with country B. This is so even if the economics of the situation (e.g., large inbound transactions from country C) would

Accordingly, the MFN clauses that appear in other areas of international economic law are not very agreeable for tax treaties and are therefore not very common in such treaties.<sup>27</sup> Tax multilateralism, in summary, raises concerns about countries losing revenue; these concerns are not as amplified in multilateral trade or investments. It is primarily for this reason, and for other reasons to be discussed in succeeding sections of this Article, that the international tax regime has been mostly unilateral and bilateral—even as other aspects of international economic law have successfully implemented multilateralism. Although, in recent times, there appears to be a move in these other areas of law and policy toward unilateralism—driven by feelings of nationalism and populism—and bilateralism.

Additionally, the distrust for cooperation at the international level (especially a distrust over the intentions of organizations such as the OECD) has made it difficult for multilateralism in tax policymaking to be effective.<sup>28</sup> Despite it being difficult for countries to establish a multilateral international tax policy, evidence of multilateralism can be found in various RECs such as the West African Economic Monetary Union (WAEMU) and the European Union (EU).<sup>29</sup> It is therefore clear that the multilateral tax regime is still evolving—in fits and starts, but with considerable progress being made in various RECs.<sup>30</sup> To properly

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ordinarily make higher rates with country C beneficial to country A. See Deepak Kapoor, *An Albatross Around the Neck of Developing Nations – MFN Clause in Tax Treaties*, 17 TAX COOP. POL'Y BRIEF 1, 3–7 (2021), <https://southcentre.int/wp-content/uploads/2021/07/Tax-PB-17-2.pdf> [<https://perma.cc/MM8U-NX7E>].

<sup>27</sup> Ines Hofbauer, *Most-Favoured-Nation Clauses in Double Taxation Conventions – A Worldwide Overview*, 33 INTERTAX 445 (2005). Nevertheless, MFN clauses are necessary for the proper functioning of the international trade system, as countries cannot forge strong trade partnerships without them. The MFN clause caters to an enforcement problem in international trade law because otherwise, countries will enter trade partnerships with third-party countries that will undermine the supposed benefits enjoyed by their trading partners.

<sup>28</sup> Yariv Brauner, *Treaties in the Aftermath of BEPS*, 41 BROOK. J. INT'L L. 973, 980 (2016).

<sup>29</sup> Even though this multilateral cooperation is happening at the regional level, it still qualifies as multilateralism and not regionalism. This is for two reasons. First, within the context of international tax policymaking, there is ample evidence referred to in Article that suggests that cooperation between more than two countries happens at the multilateral level, even if it is happening only in a specific region. Second, both terms are not mutually exclusive, and regionalism can be a building block for establishing the framework for multilateral cooperation. See generally L. Alan Winters, *Regionalism Versus Multilateralism*, 1, 53 (The World Bank, Working Paper No. 1687, 1996).

<sup>30</sup> At the REC level, efforts aimed at tax multilateralism appear to be simpler and easier. The REC's primary objective tends to be the promotion of cooperation and distribution at the expense of tax competition. See Bawany, *supra* note 19. In this regard, as the later parts

understand the framework for multilateralism in international tax law and policy, the next section will analyze the theoretical framework for multilateralism.

### ***B. Theoretical Framework for Analyzing Tax Multilateralism***

Various theories underpin the design and application of multilateralism in academic literature. Since the term cuts across multiple disciplines such as international relations, economics, and policy, the theoretical discussion of the concept tends to be multidisciplinary. Interestingly, the theories that operate at the foundation of academic thinking on multilateralism tend to be interrelated.

At the outset, it is important to note that while these theories have helped explain the framework for multilateralism, generally, their application to tax multilateralism, specifically, has been unhelpful. For instance, the cooperation theory can be used as a framework for framing and understanding multilateralism. The cooperation theory describes when an actor adjusts their actions or behavior to the anticipated or actual preference of others through policy coordination.<sup>31</sup> In this sense, “policy coordination” refers to states adjusting their policies to reduce the negative impact of their policies on other states.<sup>32</sup> An analysis of this position reveals that the framing of “cooperation” by this theory is characterized by the assumptions that every state is acting toward a particular goal and is acting rationally, that there are rewards for states, and that the rewards are mutual.<sup>33</sup>

Thus, this framing suggests that states in the international community cooperate (i.e., adjust their policies) only because they believe doing so will further their interest while also benefitting the other states. In this sense, states cooperate only for the common good if it works for *their* good. In the context of tax policy, this theory may be helpful to explain how tax multilateralism can be effective, although its utility is doubtful. Any theoretical explanation of tax multilateralism would be effective only where it accommodates or undertakes an analysis of how unilateralism and bilateralism continue to succeed despite multilateralism’s best efforts—which has clearly been how

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of this Article will show, tax multilateralism is not exactly easier, but it nevertheless tends to be effective in certain ways.

<sup>31</sup> Robert O. Keohane, *AFTER HEGEMONY* 51–52 (1984).

<sup>32</sup> Helen Milner, *International Theories of Cooperation Among Nations: Strengths and Weaknesses*, 44 *WORLD POLS.* 466, 467 (1992).

<sup>33</sup> *Id.* at 468.

international tax policy has been designed for about a century. Unfortunately, the cooperation theory is heavily and inherently biased toward multilateralism and does not accommodate the antipode to the concept of multilateralism.<sup>34</sup> For this reason, the cooperation theory has been criticized for unduly emphasizing policy adjustment for collective gain.<sup>35</sup>

The cooperation theory has also been substantiated by game theory—particularly the prisoner’s dilemma.<sup>36</sup> Game theory has helped hypothesize about the varying factors that propel countries to either cooperate multilaterally or act unilaterally.<sup>37</sup> Accordingly, the advantage that a game theory analysis of multilateralism has over the cooperation theory in international relations is that it is more robust and caters to the institutional form that most threatens multilateralism—namely, unilateralism. As such, game theory is a more helpful theoretical framework than cooperation theory for thinking about multilateralism, especially tax multilateralism. Game theory has been used extensively to analyze the motivations and influences of multilateralism and international tax policy.<sup>38</sup> It has also been used to analyze collective action (i.e., multiple states working together in a situation where cooperation is optimal) and the goal of such a system. A threat to collective action would be a situation where unilateral action seems to be a better approach for states, but the collective action never materializes.<sup>39</sup> An interesting game theory analysis of collective action and its implication on multilateralism is the prisoner’s dilemma.<sup>40</sup> In this hypothetical, prisoner 1 and prisoner 2 are threatened with a prison sentence unless either prisoner tells on the other.<sup>41</sup> If one prisoner reports the other, the reporting prisoner is free while the other goes to prison.<sup>42</sup> If neither prisoner confesses, both prisoners get a short jail

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<sup>34</sup> Rixen, *supra* note 17, at 590.

<sup>35</sup> Steven McGuire, *Cooperation in International Political Economy*, in AIRBUS INDUSTRIE 15, 15 (1997). In summary, the cooperation theory defines cooperation among states as states complying with international norms and agreements but desisting from taking unilateral action to address a problem that is collective.

<sup>36</sup> Milner, *supra* note 32, at 467. There has been a robust attempt in the literature to analyze international tax policies in the context of game theory.

<sup>37</sup> Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT’L L. & POL. 939, 950 (2000).

<sup>38</sup> Rosenzweig, *Thinking Outside the (Tax) Treaty*, *supra* note 23, at 731–36.

<sup>39</sup> See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 1–4 (1965).

<sup>40</sup> Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 214–15 (2009).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

sentence.<sup>43</sup> And if both prisoners confess, they both get long prison sentences.<sup>44</sup> This hypothetical shows how states are often faced with either cooperating for the “optimal” benefit of all, or acting unilaterally and in self-interest to the detriment of other states.

Another interesting hypothetical showing how unilateral action threatens collective action is the stag hunt game.<sup>45</sup> In this hypothesis, each player in the game is faced with the competing options of hunting for either a rabbit or a stag.<sup>46</sup> Hunting for a rabbit will provide food for just one day, whereas the stag provides food for one week.<sup>47</sup> But no player can catch the stag alone unless they work together.<sup>48</sup> Accordingly, the best-case scenario is for the players to hunt together and enjoy long-term benefits (as opposed to working alone for short-term benefits). This hypothesis highlights the “assurance game”—all players will work together where they are assured that the others will also work in the interest of the group. In other words, this situation aptly exemplifies the commitment required by parties in a multilateral framework to effectively act together. The stag hunt game also highlights one of the issues identified earlier<sup>49</sup>—that distrust makes it difficult for states to cooperate if they are not assured that the other members are acting in their interests. The game theory analysis of collective action is, therefore, instructive for multilateral action. The stag hunt and prisoner’s dilemma are useful hypotheticals for understanding how to design tax multilateralism.

A closely related hypothetical that helps to better understand threats to collective action is the idea that there are “payoffs” from the actions taken by the parties.<sup>50</sup> Hirshleifer is credited for highlighting how to calculate the payoffs; he uses the “weakest link” and “best shot” payoffs.<sup>51</sup> In this hypothetical, the reader imagines a city that is surrounded by a dike that prevents the city from being overtaken by flood, with each member of the city having an individual responsibility

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See Rosenzweig, *Thinking Outside the (Tax) Treaty*, *supra* note 23, at 732; see also Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. UNIV. L. REV. 907, 962 n.202 (2004).

<sup>46</sup> Rosenzweig, *Thinking Outside the (Tax) Treaty*, *supra* note 23.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Brauner, *supra* note 28.

<sup>50</sup> Rosenzweig, *Thinking Outside the (Tax) Treaty*, *supra* note 23, at 736.

<sup>51</sup> See Jack Hirshleifer, *From Weakest-Link to Best-Shot: The Voluntary Provision of Public Goods*, 41 PUB. CHOICE 371, 372–73 (1983).

to maintain the dike on their land.<sup>52</sup> Thus, for the city not to be overtaken by flood, each member of the city would have to play their part in maintaining the dike on their land. Where one party (i.e., the weakest link) fails to perform its responsibility, the city will be flooded. Thus, the payoff here is defined by the effort made by the member of the group that makes the least contribution (i.e., not maintaining a dike on their land).<sup>53</sup> On the flip side, the best shot analysis refers to an instance in which the most successful contributing member makes the contribution that saves the group. A useful hypothetical here is to imagine an armed group being chased by a wild animal, with the best shot of one member being able to kill the wild animal and save the group.<sup>54</sup> Within the context of international tax law, it is important for policymakers creating a multilateral framework to understand whether their system is faced with a weakest-link or best-shot scenario. States tend to design policies within the context of actions taken by other states in international politics.<sup>55</sup> Because of this, policymakers should identify the game or adopt a game theory analysis in any attempt at creating a multilateral tax policy. Game theory accurately identifies the objective of multilateralism: ensuring unity and coordinated efforts in the collective action of states.

To take this analysis one step further, a curious observation about the multilateral tax system identified earlier in this Article is that it seems to have almost always been disaster driven. This has been true at least during the periods of some major advancements in the system—such as during the widespread commencement of bilateralism in the 1920s and the coming together to combat tax avoidance in the 2010s. Thus, it is a curious situation that countries seem to always come together when they perceive the threat to be global and require a global solution. Like in the stag hunt analysis, countries soon realize that their long-term survival may lie in coming together to adopt a common front to address the problem. But, rather curiously, these threats do not seem to have been sufficient for countries to commit to adopting a

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<sup>52</sup> *Id.* at 371.

<sup>53</sup> Rosenzweig, *Thinking Outside the (Tax) Treaty*, *supra* note 23, at 736.

<sup>54</sup> *Id.* at 737.

<sup>55</sup> A helpful example is when Trump's government reacted (by threatening tariffs) to France's President Macron by imposing a digital services tax that the media deemed to be targeting U.S. multinational enterprises. This example is instructive of how international tax and trade policies tend to be influenced by the actions of states. See Doug Palmer, *Trump Vows to Retaliate Over France's Digital Services Tax*, POLITICO (July 26, 2019, 5:47 PM), <https://www.politico.com/story/2019/07/26/trump-france-digital-services-tax-1622435> [<https://perma.cc/F82T-SUZU>] (last visited Apr. 20, 2025).

multilateral tax system. In both the 1920s and 2010s, when the world came so close to adopting a truly multilateral system, they appeared to have done everything—except achieve tax multilateralism. What could be the cause of this? To properly analyze this outcome using game theory, it is important to understand the reason(s) why. Could it be because of money, as highlighted in the preceding section of this Article? Or could there be other threats to tax multilateralism that are not sufficiently addressed in tax scholarship?

While forthcoming parts of this Article examine other explanations for the failure of multilateralism in tax policy, we conclude this section by noting that game theory is a useful tool for analyzing multilateralism—or the lack of its pervasiveness when compared to other areas of international economic law—in tax law and politics. Even though multilateralism has not been pervasive in international tax law, there have been instances of it throughout the history of international tax law. The next section of this Article highlights the historical development of tax multilateralism.

### *C. History of Tax Multilateralism*

Multilateralism in tax law has had a brief history, mostly because the international tax regime has traditionally been bilateral. But the international tax regime did not start out this way. It started as an uncooperative system where states acted unilaterally and cooperated only when they believed doing so was in their best interest to facilitate cross-border trade. As a result, the first set of tax treaties between several European countries began to appear in the late eighteenth century.<sup>56</sup> As such, the earliest instances of cross-border cooperation on tax matters between states were for the purpose of avoiding double taxation. This view—that double taxation could threaten cross-border trade and globalization—resurfaced on a global scale in the 1920s with the work of the League of Nations. This was at the close of World War I, and there were fears among many nations that double taxation could hinder their efforts to rebuild their war-torn economies.<sup>57</sup> To address these fears, the League of Nations commissioned four economists to

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<sup>56</sup> See Andrey Savitskiy, *Tax in History: The First Tax Treaties: In Search of Origins*, 49 *INTERTAX* 569 (2021) (Neth.). Savitskiy contends that the earliest tax treaty recognized in the literature is the treaty ratified between Russia and France on December 31, 1786, followed by the treaty signed between Russia and Saxony on August 20, 1800.

<sup>57</sup> Arthur J. Cockfield, *Shaping International Tax Law and Policy in Challenging Times*, 54 *STAN. J. INT'L L.* 223, 226 (2018).

prepare a report<sup>58</sup> addressing double taxation. This report is deemed to have influenced the international tax regime that emerged after that,<sup>59</sup> as well as the designs of tax treaties in subsequent years.

Unfortunately, when the League of Nations was replaced by the United Nations (UN) after World War II, the UN did not take on the same global tax leadership role as the League of Nations.<sup>60</sup> Accordingly, this vacuum was filled by the OECD in the 1960s when it began designing the model tax conventions. These model tax conventions have influenced a large percentage of tax treaties still in force today. Around the same time, the UN also worked on and released its first model tax convention. Both organizations have revised their model tax conventions over the last fifty years to reflect development in international tax law. Since the emergence of the OECD on the global tax stage, it has also promoted other multilateral efforts directed at combatting harmful tax competition, encouraging the exchange of tax information, designing a framework for e-commerce taxation, and more.

The multilateral tax efforts of the OECD intensified after the 2008 global financial crisis.<sup>61</sup> In the years following the global financial crisis, governments were faced with reduced public revenues and were looking to improve tax revenues. This climate influenced the push for efforts to address issues of tax avoidance, tax evasion, etc.<sup>62</sup> The BEPS

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<sup>58</sup> See *Report on Double Taxation Submitted to the Financial Committee*, League of Nations Doc. E.F.S. 73 F.19 (1923), for the report prepared by the four economists.

<sup>59</sup> Daniel Olike, *The Tiebreaker Rule for Tax Residence of Companies Under the MLI: A Critique of the Tiebreaker Rule for Tax Residence of Companies Under the MLI*, 1 REV. TÉCNICA TRIBUTARIA 135, 141 n.11 (2023) (Spain).

<sup>60</sup> An interesting perspective to note is that at the end of the League of Nations era, the League of Nations had developed two model tax treaties which are referred to as the London model and the Mexico model. It was difficult for there to be an agreement on one model at the time, a problem the OECD was able to avoid. Both models emphasized various ways of avoiding double taxation, with the former emphasizing residence, and the latter emphasizing source. See Hampson & Heinbecker, *supra* note 15, at 603; see also *Why the United Nations Is the Only Place Where a Just Global Tax Reform Can Be Done*, GLOB. ALL. FOR TAX JUST. (July 24, 2023), <https://globaltaxjustice.org/news/why-the-united-nations-is-the-only-place-where-a-just-global-tax-reform-can-be-done/> [<https://perma.cc/9L2V-UXY6>] (last visited Sept. 18, 2024).

<sup>61</sup> Daniel Olike, *Assessing Effectiveness in International Tax Cooperation*, 116 TAX NOTES INT'L, 1547 (2024).

<sup>62</sup> This situation led to public debates across the world questioning why multinational enterprises had been allowed to avoid and evade taxes for so long. The natural response by these multinationals was that their actions were not illegal. The public and governments responded that it was nevertheless immoral. This led to the framing of the debate as morality versus illegality. Daniel Godson Olike, *Tax Morality: Examining the BEPS Debate*, *Work*

project identified fifteen action plans for states to collectively address tax avoidance and tax evasion.<sup>63</sup> At the time, this was the first tax project in nearly a century that had attracted the attention of states across the globe and garnered the interests of everyone.<sup>64</sup> For this same reason, the BEPS project was criticized for attempting to resolve a global tax problem without being inclusive.<sup>65</sup> This project fostered tax multilateralism and has been the closest the world has come to creating a truly multilateral tax regime since the 1920s. The BEPS project was able to achieve this feat of multilateralism through several frameworks and rules. One such framework was the country-by-country regime designed to facilitate the exchange of information—which has now been adopted by many countries across the world. There was also the inclusive framework, which sought to bring non-OECD members on board the BEPS project and encourage the participation of the global community to ensure that the recommendations proposed in the BEPS project enjoyed some legitimacy. Another framework was the multilateral tax instrument, which sought to amend the provisions of bilateral tax treaties in force in the world today (to save time and costs that would otherwise be spent in bilaterally negotiating tax treaties one after the other) to reflect the recommendations proposed in the BEPS project.

At the REC level, tax multilateralism also dates to the time when the OECD and the UN began issuing their model tax conventions. Around the same time in Europe, the European Economic Community (EEC) began working toward tax harmonization through the Neumark Committee in 1962.<sup>66</sup> Within a decade after the formation of the EU in 1993, the EEC designed its tax harmonization framework, which led to

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*of the OECD and Its Impact on Africa*, 11 PRETORIA STUDENT L. REV. 89, 91–94 (2017) (S. Afr.).

<sup>63</sup> See ORG. FOR ECON. COOP. & DEV., ADDRESSING BASE EROSION AND PROFIT SHIFTING 51–53 (2013).

<sup>64</sup> Prior to the commencement of the BEPS project, even though international tax policy issues related to tax avoidance and other harmful tax practices were discussed in the media and analyzed extensively by tax academics, issues related to international tax policy had never been addressed by any multilateral institution (excluding the League of Nation conversations and projects of the 1920s). See Yariv Brauner, *International Trade and Tax Agreements May Be Coordinated, but Not Reconciled*, 25 VA. TAX REV. 251, 255 (2005).

<sup>65</sup> See Yariv Brauner, *Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument*, 25 FLA. TAX REV. 489 (2022).

<sup>66</sup> Adina Trandafir, *Tax Harmonization Measures at EU Level in the Corporate Tax Field*, 5 CONTEMP. READINGS L. & SOC. JUST. 647, 648–50 (2013). See also Tracy Kaye, *European Community Tax Harmonization and the Implications for U.S. Tax Policy*, TAX FOUND. & ERNST & YOUNG 1, 5 (1995), <https://files.taxfoundation.org/legacy/docs/df7ca4756c706d053028a9b4dd2a23bd.pdf> [<https://perma.cc/KY7L-N7VJ>].

the issuance of directives attempting to harmonize the direct and indirect taxes in the EU.

Other RECs have also made efforts toward tax multilateralism. For example, the West African Economic and Monetary Union (WAEMU) has made similar efforts at tax harmonization of direct and indirect taxes. In addition to the tax harmonization efforts, there is also a multilateral tax treaty in the WAEMU. Other examples of multilateral tax treaties are the Caribbean Community (CARICOM) and the Nordic Multilateral Tax Treaty.

Some RECs have model tax treaties that drive their negotiations with nonmembers of their REC. The Association of Southeast Asian Nations (ASEAN), and the Common Market for Eastern and Southern Africa (COMESA) are examples of this. Tax multilateralism in RECs reveals that the multilateral tax framework tends to be primarily built with the objective of achieving tax harmonization and preventing tax competition. The objective is slightly different from the global efforts at a multilateral tax regime, which is directed at ensuring tax cooperation and avoiding double taxation. Notwithstanding, in certain cases (as the next part of this Article will show), there are multilateral tax treaties in these RECs that are designed for addressing double taxation issues.

Most of the RECs in the world today have a form of tax multilateralism in place. The next section of this Article will highlight existing tax multilateralism in RECs.

### III

#### TAX MULTILATERALISM IN REGIONAL ECONOMIC COMMUNITIES

##### *A. Regional Economic Communities*

Regional Economic Communities (RECs) are a perfect representation of multilateralism at work, and their evolution has represented success for trade multilateralism. RECs have existed as an umbrella for countries tied together by geographical, political, or economic interests. They help member states further their trade or monetary interests, as well as operate as a stronger group. RECs exist in almost every region of the world today and vary in their strength and scope of influence. The EU is the leading REC worldwide and is the poster child for trade multilateralism in the Western world.<sup>67</sup>

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<sup>67</sup> Antón, *supra* note 16, at 236.

To ensure the success of RECs and prevent tax issues from disincentivizing trade within RECs, RECs tend to pursue tax harmonization. This section will analyze the challenges of tax coordination in RECs and provides examples of tax multilateralism in RECs.

### ***B. Examples of Tax Multilateralism in Regional Economic Communities***

Efforts at tax multilateralism in RECs usually take the form of tax coordination and tax harmonization. For this reason, the most popular examples of tax multilateralism in RECs are usually with respect to the coordination of direct and indirect taxes. However, there are also examples of multilateral tax treaties that exist in RECs. Accordingly, this section shall address the following instances of tax multilateralism in RECs: (1) multilateral tax treaties and (2) tax harmonization and coordination.

#### *1. Multilateral Tax Treaties*

Multilateral tax treaties consist of three or more countries seeking to distribute taxation rights between one another, provide a template document for member states to negotiate treaties with nonmembers, and create a framework for multilateral cooperation on issues related to tax administration. From this definition, multilateral tax treaties in RECs usually take two major forms. First, they are tax treaties that seek to do no more than create a tax treaty policy framework and a draft model for member states.<sup>68</sup> Member states are to utilize the draft model in their negotiations with nonmembers of the REC. The second type of multilateral tax treaties popular in RECs are those that are binding among member states seeking to establish a tax treaty framework to avoid double taxation and coordinate tax policies of REC member states.<sup>69</sup> Despite these examples of the kinds of multilateral tax treaties that exist in the world today, multilateral tax treaties in the tax world

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<sup>68</sup> Kim Brooks, *The Potential of Multilateral Tax Treaties*, in TAX TREATIES: BLDG. BRIDGES BETWEEN L. ECONOMICS, 211, 219 (Michael Lang et al. eds., 2010). See also MARJAANA HELMINEN, THE NORDIC MULTILATERAL TAX TREATY AS A MODEL FOR A MULTILATERAL EU TAX TREATY 4 n.10 (2014).

<sup>69</sup> Within the context of the current international tax regime, the Multinational Convention on Mutual Administrative Assistance in Tax Matters is a good example of a tax treaty that just seeks to coordinate tax policies and facilitate tax cooperation between the signatories. See Vivien Morgan, *Mutual Administrative Assistance in Tax Matters*, 36 CAN. TAX J. 974, 980 (1988).

remain uncommon.<sup>70</sup> As subsequent paragraphs will demonstrate, there are many aspects of their design that policymakers find uncomfortable.<sup>71</sup>

For this reason, multilateral tax treaties tend to be more popular within RECs, primarily due to the similarity between the member states in terms of economy, language, geography, culture, etc. These are facts that are unique to an REC and may not apply within a random group of countries within a broader global tax system.<sup>72</sup> This is a factor that easily accounts for why the global international tax regime (not in RECs) may continue to find it difficult to ratify a “true” multilateral tax treaty, even as a certain degree of success in that regard has been experienced by RECs.<sup>73</sup>

Although the main substance and mechanism for avoiding double taxation in a multilateral tax treaty bears substantial similarities to that in a bilateral treaty, there are certain considerations and issues that make the multilateral tax treaty unique.<sup>74</sup> Tax scholars have been

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<sup>70</sup> Richard L. Reinhold, *Some Things That Multilateral Tax Treaties Might Usefully Do*, 57 TAX L. 661, 669 (2004). The situation is rare—as stated in earlier parts of this research—especially when one considers that other areas of international economic law have the distinctive reputation of being multilateral and tend to be effective only when they are multilateral. The numerous examples of regional trade and economic agreements in the world and the General Agreement on Trade and Tariffs are examples of this type of multilateralism. See Cockfield, *supra* note 57.

<sup>71</sup> Some scholars have argued that the problems that exist in the world today, regarding a multilateral tax treaty, are not logistic but are rather indicative of an absence of political will. Michael Lang & Josef Schuch, *Europe on Its Way to a Multilateral Tax Treaty*, 9 EC TAX REV. 39, 42 (2000).

<sup>72</sup> Christians, *supra* note 7, at 320.

<sup>73</sup> The word “true” is used here because although there is the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Sharing (BEPS MLI) at the global level—and although it is indeed a multilateral tax treaty—it is a treaty which seeks to amend the bilateral tax treaties of various countries and not one that seeks to be a standalone treaty for the purpose of distributing taxing rights between countries, and is at the same time binding on all signatories. This is also because states have discretion to express reservations of BEPS MLI and decide what provisions they want to adopt. The ability to do so is not very common with most tax treaties in the world today. See Nathalie Bravo, *Is the Multilateral Instrument Really Multilateral?*, in MULTILATERAL CONVENTION FOR TAX – FROM THEORY TO IMPLEMENTATION 89, 112–13 (S.A. Roche & A. Christians eds., 2021) who argues that the bilateral nature of the obligations in the MLI does not affect the multilateral nature of the MLI.

<sup>74</sup> Nils Mattson, *Multilateral Tax Treaties – A Model for the Future*, 28 INTERTAX 301, 304 (2000). One area of difference between bilateral and multilateral tax treaties is with respect to how both types of treaties approach the elimination of double taxation. In this context, it is believed that multilateral tax treaties may provide numerous articles on the approach to take in resolving double taxation and may offer no particular benefit when compared to the bilateral tax treaty. *Id.* at 305.

fascinated with the idea of a multilateral tax treaty for a long time.<sup>75</sup> One of the reasons the idea has not enjoyed much success, however, (both outside the RECs and even within all the RECs), is due—beyond the problems experienced with multilateralism in tax discussed earlier—to differences in economic status between states and the extreme difficulty of fair allocation of taxing rights between source and residence countries.<sup>76</sup> Today, the UN and OECD models evince how difficult it is for countries to agree on the fair allocation of taxing rights. The idea of a single multilateral treaty that appears to settle this position for countries (either in a world tax system or REC) is a difficult pill for policymakers to swallow and may further complicate the tax architecture. This is especially true given that the reality of global trade may not completely convince potential signatories to agree to these tax provisions.

There are also concerns about the balancing and coordination of multilateral tax treaties within the context of a country's network of bilateral tax treaties.<sup>77</sup> This is because a lack of coordination could easily create room for tax arbitrage, especially for taxpayers who are keen on planning their economic affairs solely for tax purposes. Another problem is the fact that, like in the EU, member states may be at very different levels in their development and the state of their economy—a situation that could easily create divergent interests and serve as an impediment to the design and implementation of a multilateral tax treaty.<sup>78</sup>

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<sup>75</sup> The academic literature has covered discussions of various kinds of multilateral tax treaties, from one between all the nations of the world that creates a world tax order, to one between all the developed nations of the world, to one organized around an issue, and many more. See Victor Thuronyi, *International Tax Cooperation and a Multilateral Treaty*, 26 BROOK. J. INT'L L. 1641, 1641–42 (2001); Diane M. Ring, *Prospects for a Multilateral Tax Treaty*, 26 BROOK. J. INT'L L. 1699 (2000); and Jeffrey Dunlop, *Taxing the International Athlete: Working Toward Free Trade in the Americas Through a Multilateral Tax Treaty*, 27 NW. J. INT'L L. & BUS. 227, 247 (2006).

<sup>76</sup> Antón, *supra* note 16.

<sup>77</sup> See Michael Lang, *The Concept of a Multilateral Tax Treaty*, in MULTILATERAL TAX TREATIES: NEW DEVELOPMENTS IN INTERNATIONAL TAX LAW 189, 192 (Michael Lang et al. eds., 1997). In addition, where member states have a weak administrative capacity, a multilateral tax treaty within an REC could inadvertently make it easier for countries to lose revenue due to issues related to base erosion and profit shifting. Kiyoshi Nakayama, *How to Design a Regional Tax Treaty and Tax Treaty Policy Framework in a Developing Country*, IMF FISCAL AFFS. DEP'T, Note 21/03 (2021). Notwithstanding these concerns, the proponents for multilateral tax treaties have argued that a multilateral tax treaty has the potential to be very effective in preventing treaty abuse and treaty shopping. PÉREZ, *supra* note 12, at 621.

<sup>78</sup> Ruth Mason, *U.S. Tax Treaty Policy and the European Court of Justice*, 59 TAX L. REV. 65, 123 (2005).

Notwithstanding these problems and concerns, there are a few advantages that have been identified in the academic literature for multilateral treaties. For one, multilateral tax treaties have been identified as being more effective for addressing triangular cases when compared to bilateral tax treaties. The economic activities of a multinational or individual could spread across more than two countries, and the absence of an effective treaty network between the member states could create an opportunity for tax avoidance in such triangular cases. Another advantage of multilateral tax treaties is that they can make the administration of tax treaties within an REC more convenient. This is because compared to numerous bilateral tax treaties that could exist between REC member states potentially leading to conflicting regimes,<sup>79</sup> the multilateral tax treaty is bound to have a uniform approach to administration, interpretation, and implementation.<sup>80</sup> In addition, multilateral tax treaties can be helpful for addressing tax avoidance. This is because a multilateral tax treaty can ease the exchange of information between the signatories, therefore making it easier for the signatories to address tax evasion and ensure multilateral cooperation.<sup>81</sup> Additionally, multilateral treaties could enable REC member states to embark on treaty reforms that they are grappling with but for which they may lack the technical capacity to do on their own.<sup>82</sup> It is also worth noting that where member states of an REC intend to provide tax benefits to members in their dealings with one another and foster trade (in the sense of not allowing tax issues acting as a disincentive to cross-border trade), the multilateral tax treaty, which creates a network between the members of the REC, may be a good way to go about this.<sup>83</sup>

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<sup>79</sup> In a multilateral tax treaty, there is a uniform approach to the interpretation of the treaty, and the interpretation of a provision would affect the implementation of that provision of the treaty with respect to other signatories of the multilateral tax treaty. Brooks, *supra* note 68.

<sup>80</sup> Thuronyi, *supra* note 75, at 1644–45, 1656–58.

<sup>81</sup> This also has the advantage of empowering countries to deal with technical international tax issues that cannot be dealt with unilaterally or within a bilateral tax framework. Issues such as tax treatment of interest deductibility, as well as cross-border mergers and acquisitions, conflicts in the approach to tax treatment of depreciation, etc. have been identified as examples in the literature. Brooks, *supra* note 68, at 222.

<sup>82</sup> Thuronyi, *supra* note 75, at 1650.

<sup>83</sup> Should policymakers be cynical about signing a multilateral tax treaty for concerns related to international tax arbitrage because of weak revenue systems of member states, a network of bilateral tax treaties with major trading partners may also be a viable option to consider. Daniel Olika, *Rethinking Tax Treaty Policy in Africa Post-AfCFTA*, FUTURE AFR. F. (Oct. 8, 2020), <https://futureafricaforum.org/rethinking-tax-treaty-policy-in-africa-post-afcfta/> [<https://perma.cc/FL4R-73UZ>].

Given the relative advantages and disadvantages that apply to multilateral tax treaties, there are some salient policy issues that ought to be considered by member states of RECs before signing a multilateral tax treaty. First, states ought to consider the relative costs and benefits that a multilateral tax treaty would have on the intra-community cross-border trade and investment objectives of the REC—notably, whether harmonization can be an effective substitute to a regional tax treaty,<sup>84</sup> whether investment income will be a huge source of revenue, the nature of the limit to be imposed on the taxpayers, and a clear assessment of whether REC member states have concluded bilateral tax treaties with low tax jurisdictions.<sup>85</sup> Such treaties may provide an opportunity for taxpayers outside the REC to exploit the multilateral tax treaty for their benefit and at the expense of all the member states of the REC.<sup>86</sup>

There are some good examples of countries that have signed multilateral tax treaties, even in the developing world. The WAEMU is a good example of an REC that has a multilateral tax treaty.<sup>87</sup> It ratified it in 2009. The scope of the treaty is expansive. It caters to income and inheritance taxes, as well as other taxes collected at both the central and subnational levels of government. The treaty's objective is to distribute taxing rights between members states with respect to intra-community investment. It also caters to other issues of tax cooperation such as mutual assistance for the purpose of tax administration and for the purpose of exchanging information.<sup>88</sup> The WAEMU distributes taxation rights to the source state but caps investment income at fifteen percent for interest, dividends, and royalties, and at ten percent for the withholding tax rate.<sup>89</sup> The Andean Community is also another example of an REC with a multilateral tax treaty. The multilateral tax

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<sup>84</sup> RECs, like the EU, have focused principally on harmonization for direct corporate taxation. See Christiana HJI Panayi, *Corporate Tax Reform in the European Union: Are the Stars Finally Aligned?*, 42 Y.B. EUR. L. 232, 260 (2023).

<sup>85</sup> Nakayama, *supra* note 77, at 2.

<sup>86</sup> *Id.*

<sup>87</sup> The multilateral tax treaty was adopted pursuant to Directive 08/2008/CM/UEMOA of the WAEMU. Directive N° 01/2008/Cm/Uemoa Portant Harmonisation Des Modalites De Determination Du Resultat Imposable Des Personnes Morales Au Sein De L'uemoa [Directive No. 01/2008/Cm/Uemoa On Harmonisation of Modalities for Determining the Taxable Income of Legal Entities Within the UEMOA].

<sup>88</sup> Mario Mansour & Grégoire Rota-Graziosi, *Tax Coordination, Tax Competition, and Revenue Mobilization in the West African Economic and Monetary Union* 19 (IMF, Working Paper, WP/13/163, 2013), <https://www.imf.org/external/pubs/ft/wp/2013/wp13163.pdf> [<https://perma.cc/4C3J-JQRY>].

<sup>89</sup> Nakayama, *supra* note 77, at 6.

treaty of the Andean community is unique in that it distributes taxation rights to source countries on interest but leaves the domestic states to decide how they want to implement withholding taxes.<sup>90</sup> The Caribbean Community (CARICOM) has had a multilateral tax treaty since 1994; this treaty distributes taxation rights to source countries with respect to investment income and imposes a ceiling rate of zero percent for source states' dividends—which makes dividends tax free within the CARICOM.<sup>91</sup> Furthermore, the Central African Economic and Monetary Union (CEMAC) also has a multilateral tax treaty that distributes taxation rights to the source state and does not place a limit on the taxation of investment income and the withholding tax rates.<sup>92</sup>

In addition to multilateral tax treaties, tax multilateralism can also exist in RECs in the form of tax harmonization and coordination. The next section of this Article will address this.

## 2. *Tax Harmonization and Coordination*

Tax harmonization and coordination in RECs are usually designed and implemented with the objective of preventing harmful tax competition among member states that may be detrimental to the central objective of facilitating intra-community trade and establishing a common market. Tax harmonization essentially refers to the process of ensuring an alignment in the tax rate and tax base of different states.<sup>93</sup> The objective is usually to ensure that there is some uniformity in the tax regime between the jurisdictions concerned, that opportunities for harmful tax competition in the tax regimes of both jurisdictions are significantly reduced, and that—in cases where the tax harmonization is happening in an REC—the tax regime does not disincentivize the implementation of cross-border trade. Coordination, on the other hand, is the process through which member states can control their policies and law.<sup>94</sup> Accordingly, while coordination tends

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<sup>90</sup> Nakayama, *supra* note 77, at 5.

<sup>91</sup> *Id.* at 4.

<sup>92</sup> *Id.* at 5–6.

<sup>93</sup> Puseletso Letete, *Between Tax Competition and Tax Harmonisation: Coordination of Value Added Taxes in SADC Member States*, 16 L. DEMOCRACY & DEV. 119, 121 (2012). In economic integration scholarship, tax harmonization has been acknowledged for its efficiency benefits. It essentially involves a high degree of cooperation among countries.

<sup>94</sup> Ludek Kouba et al., *Policy Autonomy, Coordination or Harmonization in the Persistently Heterogenous European Union*, 7 DANUBE L. & ECON. REV. 53, 57 (2016). In this sense, tax coordination does not mean uniformity in the tax systems of members, or similarity in the taxes that apply. Rather it refers to some form of gradation that starts at unbridled tax competition (total absence of tax coordination) and ramps up to total

to allow states to control their laws and policies, harmonization leads to a complete alignment of these policies.<sup>95</sup> Unsurprisingly, there are some scholars who view the idea of tax harmonization as harmful to the national interests and sovereignty of the countries involved.<sup>96</sup> Tax coordination and tax harmonization tend to happen in two major ways, viz. direct tax coordination and indirect tax coordination. In the succeeding paragraphs, this section of the Article will highlight the tax coordination and harmonization framework in various RECs.

In the EU, there is a framework for the coordination of direct and indirect taxes. This coordination has been achieved through the issuance of directives for a standing harmonization order, e.g., the adoption of provisions for excise taxes and indirect taxes,<sup>97</sup> the prohibition of discrimination,<sup>98</sup> and the coordination of rules relating to the customs union.<sup>99</sup> With respect to the coordination of direct taxation in the EU, article 115 of the Treaty on the Function of the European Union provides the framework for the general harmonization of the internal market.<sup>100</sup> Despite the creation of the general framework, the EU has not experienced much success in the design of tax harmonization for direct taxes, although it has designed a tax coordination framework for direct taxes such as the Parent-Subsidiary Directive<sup>101</sup> which provides for the harmonization of tax withholdings, and the Interest Royalty Directive<sup>102</sup> for the harmonization of

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tax harmonization (total lack of tax competition). Anthony C. Infanti, *Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the U.S. International Tax Regime*, 35 VAND. J. TRANSNAT'L L. 1105, 1129 (2002).

<sup>95</sup> Chisa Onyejekwe, *Development of AU Law: Tax Harmonization and Regional Integration Towards Achieving Social Structures in Africa*, in THE EMERGENT AFRICAN UNION LAW: CONCEPTUALIZATION, DELIMITATION, AND APPLICATION 269, 282 (Olufemi Amao, Michèle Olivier & Konstantinos D. Magliveras eds., 2021). Onyejekwe believes that there has been stagnation in the formulation and design of tax policy because harmonization (in the RECs where there is a framework for harmonization) has suffered varying degrees of setbacks. *Id.* at 285.

<sup>96</sup> See Askoldas Podvezko et al., *Tax Competitiveness of the New EU Member States*, 12 J. RISK & FIN. MGMT. 34 (2019).

<sup>97</sup> See Consolidated Version of the Treaty on the Functioning of the European Union art. 113, Oct. 26, 2012, 2012 O.J. (C 326).

<sup>98</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 110, Oct. 26, 2012, 2012 O.J. C (326).

<sup>99</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 28, Oct. 26, 2012, 2012 O.J. C (326).

<sup>100</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 115, Oct. 26, 2012, 2012 O.J. C (326).

<sup>101</sup> Council Directive 2011/96, 2011 O.J. (L 345) (EU). There has been a proposal for amendment COM (2011) 714 (11 Nov. 2011).

<sup>102</sup> Interest-Royalties Directive, Directive 2003/49/EC, 2003 O.J. (L 157) (EU).

investment income taxation within the EU. Notwithstanding, there has been harmonization of the tax framework for various aspects of tax administration such as the Pillar Two Directives,<sup>103</sup> Anti-Tax Avoidance Directive,<sup>104</sup> and Dispute Resolution Directive,<sup>105</sup> among others.

The tax harmonization and tax coordination framework in the EU has the unique reputation of being one of the most advanced in the world. However, one multilateral tax framework that, at least on paper goes further than the EU, is the tax harmonization and coordination framework in the WAEMU. The WAEMU adopted most of the tax harmonization strategies of the EU,<sup>106</sup> and its design is reflective of tax policies that should be harmonized in so far as necessary to ensure the proper functioning of the WAEMU common market.<sup>107</sup> The WAEMU has been able to achieve tax harmonization within the REC through the issuance of directives, like in the case of the EU. Notwithstanding the seemingly elegant design<sup>108</sup> of these policies, there is a lack of political will on the part of the member states, which has affected the success of its implementation. This has led to some differences between what is on paper and the practical realities of tax coordination in the REC. This raises the question as to whether the lack of political will is the cause of the lack of operational efficiency of the policies of tax coordination in the WAEMU, or whether the problem is one that arises because the WAEMU tax coordination design may have in fact pushed the envelope too far. In terms of indirect tax harmonization in the WAEMU, the scope of coordination extends to customs tariffs,<sup>109</sup>

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<sup>103</sup> Council Directive 2022/2523, 2022 O.J. (L 328) (EU).

<sup>104</sup> Council Directive 2016/1164, 2016 O.J. (L 193) (EU).

<sup>105</sup> Council Directive 2017/1852, 2017 O.J. (L 265) (EU).

<sup>106</sup> The WAEMU has borrowed tax harmonization strategies such as: limits on inflation, primary budget balances, and debt-to-GDP ratio, etc. It also has the “transition fiscal” (tax transition) which, among others, mandates the convergence of the structure for tax revenue, and a convergence of the tax-to-GDP ratio. The transition fiscal initiatives are to assist the member states of the REC to transition from reliance on trade revenues to tax revenues.

<sup>107</sup> This objective is captured by article 4 of the WAEMU Treaty. *See* Treaty on the West African Economic and Monetary Union, art. 4, Jan. 10, 1996.

<sup>108</sup> Mansour & Rota-Graziosi, *supra* note 88, at 7.

<sup>109</sup> The regime has been able to see to the lifting of quantitative restrictions on intra-regional trade and managed to achieve a significant reduction of both external and internal tariffs in the region. *Id.* at 8.

value-added tax,<sup>110</sup> excise taxes,<sup>111</sup> and indirect taxes in petroleum products.<sup>112</sup> In addition to the indirect tax coordination in the WAEMU, there is also coordination of direct taxes. In the WAEMU, this usually takes the form of coordination on the taxation of business profits and investment income. In relation to the coordination of the corporate income tax, the directives issued by the WAEMU seek to harmonize the rate by providing that states should impose a corporate income tax between twenty-five to thirty percent.<sup>113</sup> It also has a directive that defines the scope of the corporate tax base.<sup>114</sup> With respect to taxation of investment income, the directive<sup>115</sup> seeks to achieve this harmonization by regulating the applicable rate and types of taxes that are applicable to investment income.

In the Economic Community of West African States (ECOWAS), tax multilateralism has not been very successful.<sup>116</sup> Although directives have been issued, the regime continues to struggle with the design of tax harmonization of indirect taxes. Thus, there are varying rates and

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<sup>110</sup> The Directive on VAT was introduced in the late 90s and sought to harmonize the VAT regime in the REC and position it to be a source of revenue for the REC. For some countries, such as Benin, it is believed that this regime led to the increase in tax-to-GDP ratio. See LIAM P. EBRILL ET AL., *THE MODERN VAT* 70 (2001).

<sup>111</sup> The excise taxes were also introduced in the late 90s and created a regime for the taxation (*ad valorem*) of tobacco products, alcoholic beverages, and other specifically identified items. See Directive No. 3/98/CM/UEMOA (harmonizing the excise duty legislation of the Member States).

<sup>112</sup> The multilateral tax regime created in the WAEMU also creates a framework for the taxation of petroleum products. It did not seek to harmonize the rate but required taxation based on the weight of the products. See Directive No. 6/2001/CM/UEMOA (harmonizing the intra-WAEMU taxation of petroleum products).

<sup>113</sup> Directive 08/2008/CM/UEMOA of the WAEMU, *supra* note 87.

<sup>114</sup> See 01/2008/CM/UEMOA (defining the corporate tax base to include commercial and industrial profits while excluding profits from artisans and professionals).

<sup>115</sup> Directive 02/2010/CM/UEMOA.

<sup>116</sup> One area where the ECOWAS seems to have been able to design a tax harmonization framework is with respect to excise taxes on tobacco through the ECOWAS Tobacco Tax Directive which seeks to increase the *ad valorem* rate on excise taxes, and ECOWAS member states were required to comply not later than three years from January 1, 2018, in order to ensure that the new measures are implemented. The objective is to reduce consumption of tobacco for health purposes and to improve the revenue of member states in the REC. The directive is Directive C/Dir. 2.06.09 on the Harmonization of ECOWAS Member States Legislations on Excise Duties. The latest version of the Directive is Directive C/Dir.3/7/23 on the Harmonization of the Legislations of ECOWAS Member States on Excise Duties. See also Jean Tesche & Corne van Walbeek, *Measuring the Effects of the New ECOWAS and WAEMU Tobacco Excise Tax Directives*, 30 *TOBACCO CONTROL* 668 (2021).

regimes for indirect taxes such as VAT in the REC.<sup>117</sup> Furthermore, the CEMAC has experienced some harmonization of consumption taxes applicable in the REC, except for petroleum taxes, which member states in the REC have discretion to regulate. The aim of these taxes has been to both improve governmental revenues from the various REC member states and to prevent countries from taking actions that are protectionist and have the potential to entrench a harmful tax competition regime.<sup>118</sup> The value-added tax regime in the REC is imposed on the basis of the destination principle. It also sets guidelines for the exemptions that are applicable to the value-added tax regime. The tax harmonization regime in the CEMAC also harmonizes base rates (by giving members the discretion to choose the rate that applies) and the administration of the excise tax.<sup>119</sup>

Other RECs such as the East African Community (EAC) have been able to implement multilateralism in relation to trade through the coordination of fiscal policies on customs. But the EAC has not been able to successfully harmonize its indirect or direct tax regimes. Accordingly, it is possible to see various rates applied by the members in the REC and to see these rates administered by the member states in a conflicting way, i.e., some states apply it as a specific rate while others apply the rates *ad valorem*.<sup>120</sup> The South African Development Community (SADC), on the other hand, has published a guideline which seeks to harmonize the regime for excise taxes and value-added taxes.<sup>121</sup> However, there appears to be no progress on the tax coordination of direct taxes and investment incentives within the SADC.<sup>122</sup> As is the case in the EAC and ECOWAS, the Common Market for Eastern and Southern Africa (COMESA), the largest REC in Africa, has made no clear effort to harmonize the direct and indirect regime. Multilateralism in COMESA is limited to trade multilateralism.

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<sup>117</sup> This is because despite having a VAT framework that has the objective of harmonizing the VAT regime in the REC, there is no common legislation in place. Evert-Jan Quak, *Tax Coordination and Tax Harmonisation Within the Regional Economic Communities in Africa*, INST. DEV. STUD. (May 4, 2018), <https://www.ids.ac.uk/publications/tax-coordination-and-tax-harmonisation-within-the-regional-economic-communities-in-africa/> [<https://perma.cc/U9KE-5QVM>].

<sup>118</sup> Lubin Doe, *Harmonization of Domestic Consumption Taxes in Central and Western African Countries* 8 (IMF, Working Paper WP/06/8, 2006).

<sup>119</sup> *Id.* at 13.

<sup>120</sup> Directive No. 3/98/CM/UEMOA, *supra* note 111, at 13.

<sup>121</sup> *Id.* at 15.

<sup>122</sup> *Id.*

The analysis in this section reiterates a fact already established earlier in this Article: that countries are more likely to commit to trade multilateralism than tax multilateralism. This remains true even in RECs. Worse still, even where a clear framework for tax harmonization is created, as is the case in the WAEMU, it is more likely for the trade, investment, and monetary unions to succeed than for the tax multilateral framework to be successful. While this research has established (from the academic literature) that money is the principal reason,<sup>123</sup> there are other reasons that appear to make it difficult for RECs to design and implement tax multilateralism in RECs. The next section of this Article will undertake an analysis of these issues.

### ***C. Challenges with the Implementation of Tax Multilateralism in Regional Economic Communities***

This section seeks to examine the policy, administrative, and legal challenges posed to the successful implementation of a multilateral tax regime (that is built on tax coordination and tax harmonization) in RECs. From our analysis of the scope of multilateralism in RECs in the preceding sections, we can already tell what some of these challenges are. This section of the research shall address these challenges under the following heads: (1) tax sovereignty, (2) strength of REC institutions, (3) special tax regimes and tax incentives, (4) dispute resolution, (5) conflicting membership of different RECs, and (6) differences in economic status.

#### *1. Tax Sovereignty*

One reason that countries tend to oppose tax harmonization, even in RECs, is the fact that tax harmonization restricts the tax sovereignty of countries involved in a multilateral tax system. One can easily see why this is the case since a country's power to design and implement its tax laws and fiscal policies may be restricted by the rules and policies agreed to in a multilateral tax framework. However, scholars have argued that tax harmonization does not affect the tax sovereignty of countries since the goal of the international tax system is to allocate income among countries.<sup>124</sup> On the contrary, the reality is that it is a

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<sup>123</sup> Avi-Yonah, *supra* note 25, at 5.

<sup>124</sup> See Brauner, *supra* note 8, at 309–10. (The position canvassed by Brauner is:

It is well established that the goal of the international tax rules is to divide income among competing countries with taxation claims for such income. One may say that these rules have achieved their purpose if all items of income are fully taxed once

valid concern for countries. The goal of an international tax system can sometimes go beyond the resolution of double taxation and allocation of income. In RECs, sometimes, a tax coordination and harmonization policy may impose ceiling rates for certain indirect taxes. This policy will serve as a restriction on the power of various domestic governments to impose taxes at a particular rate that conflicts with the prescribed ceiling rate, even when it may be politically expedient for the government to do so. Measures like this are not geared toward allocating capital or resolving double taxation. In some cases, it may not even be in the best interest of a particular government to impose a particular type of tax, but the tax coordination framework may require the government to impose that tax on its citizens.

Second, the concern about tax sovereignty is at the root of the lack of political will on the part of most governments to continue with a tax harmonization framework, even when it may have agreed to do so at the level of the REC. For instance, in RECs like the ECOWAS and the Southern African Development Community (SADC), despite the commitment at the REC level to coordinate indirect taxes, the lack of political will has hindered the attainment of a tax harmonization framework.

Therefore, concerns about tax sovereignty in submitting to a tax harmonization framework are valid. In this light, since countries will be amenable to cooperating only where they believe that doing so does not affect their autonomy to design their tax and fiscal policies, the game theory analysis may be useful in addressing this concern. For the concern to be properly analyzed under game theory, it is important for the objective of harmonization to be clear. Is the opportunity cost of protecting a state's tax sovereignty a stronger internal market? Is it improved revenues? Or is it something else? Should the benefits of harmonization for member states and the REC not outweigh the need to protect a state's individual tax sovereignty, it may be prudent for the country to insist on protecting its tax sovereignty.

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and only once. Ideally, no item of income should avoid any country's claim for taxation, and no item of income should be subject to taxation at a level (rate) higher than that of either of the competing countries (what is commonly called "double taxation"). Generally, it does not mean that the international rules determine that only one country will have a taxation claim over each item of income, blocking all competing claims, direct or indirect. . . . The argument that such a regime interferes with the domestic tax systems is therefore futile because the interference is inevitable, arising from the new reality of an open (global) economy).

## 2. *Strength of REC Institutions*

Tax coordination and tax harmonization projects are usually costly and require a great deal of political commitment on the part of member states for them to be successful. For the overall objective of the tax harmonization policy to be achieved, it needs to be monitored and managed by strong, effective institutions. The lack of strong REC institutions has been recognized in the literature as a reason for the failure of tax harmonization projects of many RECs in Africa,<sup>125</sup> and it remains the practical reality of the situation. In addition, the inability of member states of RECs to finance, build, and maintain the institution responsible for tax coordination can operate as a clog in the wheels of progress of tax coordination.<sup>126</sup>

This problem manifests itself in two ways. First, RECs may not have the technical capacity to be able to deliver on the technical aspects of tax coordination and promptly deal with issues that may threaten the spirit of the framework. Second, RECs may not be strong enough to effectively monitor the implementation of the tax coordination framework, or in extreme cases, sanction countries for failing to implement the tax coordination policies within the REC. This has been the case with ECOWAS. With respect to the Tobacco Directive, it was able to successfully design. Yet two years after the implementation deadline, most countries in the REC have yet to implement the directive.<sup>127</sup>

Additionally, weak REC institutions rob members of the level of technical support a strong REC can provide to member states during the negotiations and implementation of global tax problems. For instance, while the EU has been active in providing support and designing frameworks to respond to BEPS and other global tax challenges, the sixteen RECs in Africa have not been as active or helpful to their member states in navigating the technical issues arising from global tax developments.

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<sup>125</sup> Annet Wanyana Oguttu, *International Tax Competition, Harmful Tax Practices and the 'Race to the Bottom': Special Focus on Unstrategic Tax Incentives in Africa*, 51 COMPAR. & INT'L L.J. S. AFR. 293, 318 (2018).

<sup>126</sup> Panayi, *supra* note 84, at 284.

<sup>127</sup> See Mohamed Ane, *Evaluation of the New ECOWAS Directive on Tobacco Taxation*, RSCH. SQUARE (Preliminary Report) (May 17, 2021), <https://assets-eu.researchsquare.com/files/rs-513473/v1/6248aa86-8677-42b1-a956-4f137558656e.pdf?c=1631882800> [<https://perma.cc/94WV-C9YY>].

### 3. *Special Tax Regimes and Tax Incentives*

Tax incentives are a curious fiscal policy tool in the hands of policymakers in any country. These incentives are deployed by member states of the RECs to avoid the restrictions imposed through tax harmonization efforts (e.g., in restrictions imposed in regional tax directives).<sup>128</sup> These tax incentives are usually designed by member states in their tax legislation or investment code to provide a favorable environment for the country to be able to attract foreign direct investment (FDI) for the purpose of improving the economy and creating jobs.<sup>129</sup> Tax incentives create special tax regimes and usually take the form of tax holidays.

Oguttu captured this dilemma perfectly when she noted that countries are usually at a crossroads in deciding whether to impose taxes for the purpose of raising revenue to finance development or removing them for the purpose of attracting capital for development.<sup>130</sup> Oguttu further argues that tax incentives are not necessarily a bad thing, and where countries grant them strategically, they may improve their economies.<sup>131</sup> This process of choosing strategic tax incentives may be easier and less expensive for one country acting alone. However, where the country belongs to an REC it may create multiple problems, such as the questioning of the credibility of the tax harmonization process, failure to comply with the tax coordination framework, and the creation of a harmful tax competition regime that has the potential to disrupt the tax coordination framework of the REC, etc.<sup>132</sup>

To take this point by Oguttu further, this process of considering the opportunity cost of imposing a tax incentive or creating a special tax

<sup>128</sup> Mansour & Rota-Graziosi, *supra* note 88, at 26.

<sup>129</sup> Tax scholars continue to argue that tax incentives can be costly (in the sense that countries lose a lot of money by foregoing revenue to grant them), and that they do not necessarily attract a lot of economic benefits for the government either (the very reason the government decided to forego the revenue in the first place). See Michael Daly, *Harmonization of Corporate Taxes in a Single European Market: Recent Developments and Prospects*, 40 CAN. TAX J. 1051, 1078 (1992).

<sup>130</sup> Oguttu, *supra* note 125, at 305. Oguttu argues that tax incentives are either strategic or unstrategic. She argues that states have the responsibility to ensure that the benefits to be gained from implementing a tax incentive far outweigh the demerits of their imposition. This argument rests on the idea that these tax incentives may not provide any real benefit to the countries imposing them and should be implemented cautiously.

<sup>131</sup> *Id.*

<sup>132</sup> In addition, the tax law and policy scholarship recognizes that where this tax competition is unbridled and left to operate without regulation, it could be harmful and lead to a destructive “race to the bottom” that hampers the ability of states to raise revenue. Mason, *supra* note 14, at 624.

regime may also be implemented at the level of the REC. However, as has been pointed out in the literature, the tax coordination regime (especially in Africa) tends to allow special tax regimes, thereby fostering their development by various countries.<sup>133</sup> This speaks to the point made earlier about the strength of REC institutions being critical to the success of the tax coordination framework. This is because in RECs with strong institutions like the EU, the situation is very different. The EU has issued guidelines for curtailing harmful tax competition and “member states have agreed to refrain from” enacting those measures in the future.<sup>134</sup>

Therefore, despite how harmful special tax regimes can be to the market of the REC, they may be beneficial to a particular country. It would be helpful for the tax harmonization framework to provide rules and regulations that may allow states to design special tax regimes, in limited instances, that would not be deemed harmful to the economy of the REC.<sup>135</sup>

#### 4. *Dispute Resolution*

As is the case in every human endeavor, disputes are bound to arise. In the context of tax multilateralism and tax coordination, these disputes tend to be costly, complicated, and require a great deal of expertise. These concerns take us back to the need for strong institutions—mentioned earlier—because multilateral tax disputes within the context of RECs are typically resolved by the court established by the REC. This is the case within the EU and WAEMU, where tax disputes arising from the tax harmonization framework have cropped up. The need for a strong court manned by experts in international tax law is critical to the efficient resolution of these multilateral tax disputes. This accounts for why—even though the Court of Justice has been established in the WAEMU—the WAEMU

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<sup>133</sup> Mansour & Rota-Graziosi, *supra* note 88, at 26.

<sup>134</sup> *Code of Conduct Group (Business Taxation): What Is the EU Code of Conduct?*, COUNCIL EUR. UNION & EUR. COUNCIL (last visited Aug. 27, 2024), <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/#:~:text=Under%20the%20Code%2C%20EU%20member,such%20measures%20in%20the%20future> [https://perma.cc/LR9P-VCZC]. See also Maria Flavia Ambrosanio & Maria Serena Caroppo, *Eliminating Harmful Tax Practices in Tax Havens: Defensive Measures by Major EU Countries and Tax Haven Reforms*, 53 CANADIAN TAX J. 685, 687 (2005). The EU is also notorious for its state aid directive, which prohibits countries from granting any form of aid that conflicts with the function of the market.

<sup>135</sup> To ensure their proper regulation, the framework for coordination should also provide robust rules for tax incentives or special tax regimes which are implemented based on transparency and necessity.

Court of Justice has yet to hear a tax case<sup>136</sup> compared to the Court of Justice of the EU, which has been playing a key role in the determination of tax-related disputes arising in the EU.

Furthermore, it is worth noting that besides building the capacity of the multilateral court of the REC and waiting for cases to be heard by it, the various dispute avoidance strategies that have been accepted under international tax law, namely advanced pricing arrangements, safe harbors, etc.<sup>137</sup> can be utilized for an efficient tax dispute resolution system within the REC. In addition, concerted efforts should be made to incorporate mandatory binding arbitration into the dispute settlement procedure for the efficient resolution of international tax disputes, especially in RECs.<sup>138</sup>

### 5. *Conflicting Membership of Different RECs*

One of the many problems militating against the success of RECs in the developing world, particularly Africa, is conflicting membership of different RECs.<sup>139</sup> Countries in Africa tend to be members of more than one trade, economic, or monetary union, and sometimes each of these organizations may be trying to harmonize member states' tax laws and policies—with each REC having its own distinct agenda for tax harmonization. This can make tax coordination and harmonization difficult, especially where the tax harmonization agenda of the various RECs and monetary unions are not aligned. This can also make the process confusing for the countries involved.

### 6. *Differences in Economic Status*

One of the objectives behind most tax harmonization frameworks is the prevention of harmful tax competition between states that could result in a “race to the bottom” and disrupt the ability of most countries to sustainably raise tax revenue. But it is worth noting that it might be

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<sup>136</sup> Mansour & Rota-Graziosi, *supra* note 88, at 21.

<sup>137</sup> Daniel Olike & Ilemobade Olateru-Olagbegi, *Assessing the Transfer Pricing Disputes Framework in Nigeria*, 43 *BUS. L. REV.* 65, 75–76 (2022); Daniel Olike & Rahman Apalara, *The Unsafeness of the Safe Harbour Provisions Under the Nigerian Transfer Pricing Regime*, 11 *THE GRAVITAS REV. BUS. & PROP. L.* 88 (2020).

<sup>138</sup> Yariv Brauner, *International Tax Treaty Dispute Resolution, the Mutual Agreement Procedure, and the Promise of Mandatory Binding Arbitration for Developing Countries*, in *RESEARCH HANDBOOK ON INTERNATIONAL TAXATION* 191, 213–14 (Yariv Brauner ed., 2020).

<sup>139</sup> This has been recognized in the literature. See Amos Saurombe, *Regional Integration Agenda for SADC “Caught in the Winds of Change” Problems and Prospects*, 4 *J. INT'L COM. L. & TECH.* 100 (2009).

in the interest of some countries, as argued by Oguttu, to pursue policies that foster strategic tax competition, not tax harmonization. This decision can be made because the country is at a different level of economic development when compared to other countries within the tax harmonization framework. Thus, this difference in the economic status of the different members of the REC can cause some countries not to be interested in a tax harmonization framework because it is simply not in their best economic interest to do so.

#### IV IMPACT OF TAX MULTILATERALISM IN REGIONAL ECONOMIC COMMUNITIES

Having analyzed the scope and challenges of multilateral tax regimes in RECs in the preceding part of this research, this part of the Article will assess the perceived impact of tax multilateralism in RECs based on available evidence in legal, policy, and development scholarship. The primary objective of these multilateral tax regimes is usually to foster tax harmonization. But beyond that, for an international or multilateral tax regime to be effective, it ought not to have negative effects, such as lower revenues for member states. Thus, it is also important to assess the impact of tax multilateralism in RECs from the perspective of their revenue mobilization efforts of the respective member states. Accordingly, this part of the Article will assess the impact of tax multilateralism in RECs from the perspective of (1) revenue mobilization and (2) tax harmonization.

##### *A. Revenue Mobilization*

Every government wishes to raise revenue through taxation because it remains the most sustainable means for revenue generation. It is therefore not surprising that its fiscal policy framework will be reflective of how serious it is about attaining such an objective. Tax scholarship has well-documented evidence about the impact of tax multilateralism in raising revenues across various RECs.

The first, and perhaps most important, thing to note about the impact of tax multilateralism on revenue mobilization efforts in RECs is that the evidence is mixed.<sup>140</sup> There is no universally recognized position on the impact of economic integration on the revenue of member

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<sup>140</sup> Milton Ayoki, *Estimating the Revenue Impacts of Tax Harmonisation* 26 (Inst. of Pol'y Rsch. & Analysis Working Paper No. 59, Dec. 31, 2017).

states.<sup>141</sup> Additionally, the difference in the degree of implementation of trade liberalization among member states also makes it difficult to calculate revenue loss arising from the implementation of trade liberalization in RECs.<sup>142</sup> Notwithstanding the difficulty in estimating revenue loss or the unavailability of a clear position on the impact of tax multilateralism on revenue mobilization, the results of some studies conducted—particularly on RECs in Africa—reveal that there has been an overall increase in the tax-to-GDP ratio<sup>143</sup> following the implementation of tax harmonization policies. The implementation has also led to a general increase in foreign direct investment.<sup>144</sup> In addition, various policies set to be implemented have also been expected to have a positive impact on general tax revenues of various member states in the REC.<sup>145</sup>

On a final note, implementing fiscal policies that do not have a net positive on governmental revenue is not smart government policy. As such, it is critical to the future of RECs for harmonization and coordination policies to lead to greater revenues for REC member states. Also, from a game theory perspective, revenue mobilization is a useful incentive for states to consider tax policy harmonization. Catering to concerns about improving revenue mobilization for member states is therefore critical to the success of any multilateral tax regime because the possibility of revenue loss from tax multilateralism (as stated in earlier parts of this Article) remains a threat to the implementation of tax multilateralism in the global tax regime. This

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<sup>141</sup> Nonetheless, some scholars have also argued that the result of an econometric analysis leads to the conclusion that tax and tariff coordination leads to an improved revenue mobilization, and consequently an increase in the tax-to-GDP ratio of countries in the WAEMU region. Mario Mansour & Grégoire Rota-Graziosi, *Tax Coordination and Competition in the West African Economic and Monetary Union*, 74 TAX NOTES INT'L 183, 199 (2014).

<sup>142</sup> Teshome Mulat, *Trade Liberalization and Government Tax Revenue Loss in Africa*, 31 J. WORLD TRADE 161, 166 (1997). There have also been cases of countries like Jamaica and Colombia experiencing an increase in government revenue because of economic integration. *Id.* at 172.

<sup>143</sup> There is also the expectation that the situation will mitigate leakages of corporate taxes and lead to an overall consolidation of revenue for countries in the SADC region. Michael Ade et al., *The Effect of Tax Harmonization in the Southern African Development Community on Foreign Direct Investment*, 55 J. DEVELOPING AREAS 55, 64 (2021).

<sup>144</sup> Studies conducted as of 2010 revealed that indirect tax coordination in the WAEMU led to an increase in tax-to-GDP ratio in Togo, Benin, Côte d'Ivoire, Burkina Faso, etc. Quak, *supra* note 117, at 9.

<sup>145</sup> For instance, a full implementation of the Tobacco Tax Directive in ECOWAS is expected to lead to an increase in excise tax revenue by an incredible 373%. Tesche & van Walbeek, *supra* note 116, at 672.

threat to tax multilateralism is worsened by factors such as the well-established concerns of the loss of tax sovereignty.

### ***B. Tax Harmonization***

The evidence adduced and discussed in the preceding parts of this research reveals that no single REC in the world has been able to achieve complete tax harmonization. The most that any REC has been able to achieve is the tax harmonization of indirect taxation. Thus, although RECs like the EU have been talking about direct tax harmonization for more than three decades, not much has been achieved in that regard.<sup>146</sup> In addition, RECs have not been very successful in designing and implementing multilateral tax treaties. These tell us that despite concerted efforts to promote multilateralism in RECs and achieve harmonization and coordination, countries tend to retreat when the slightest threat to tax sovereignty is perceived.<sup>147</sup>

In addition to threats posed by tax sovereignty, the absence of political will among countries tends to frustrate efforts toward tax multilateralism. Even when RECs establish a tax harmonization/coordination framework, the absence of political will makes it difficult for the framework to be implemented, as has been seen in the case in the ECOWAS with respect to the ECOWAS Tobacco Directive, which is yet to be fully implemented by member states.<sup>148</sup> Thus, supporters for an international law solution (harmonization and coordination) have argued that buy-in or consent is required of member states (despite the claims to tax sovereignty by the states) and is justified on the basis that there are greater economic gains that can be achieved by resolving the issue of coordination.<sup>149</sup>

Furthermore, the failure of the tax harmonization framework to provide directives that address special tax regimes tends to result in the

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<sup>146</sup> It has long been recognized that even at its best, the EU has been able to achieve only a partial form of harmonization with the tax harmonization framework it proposed to achieve. See H. Onno Ruding, *The David R. Tillinghast Lecture Tax Harmonization in Europe: The Pros and Cons*, 54 TAX L. REV. 101 (2000).

<sup>147</sup> This is notwithstanding the fact that members of these RECs may be successful in cooperating on other issues of economic significance, yet multilateral cooperation for tax purposes remains difficult. Salman Shaheen, *The Future for BRICS Tax Policy Coordination*, 23 INT'L TAX REV. 25, 26 (2012).

<sup>148</sup> Tax Justice Network Africa, *West African States Challenged to Develop Effective Policies and Tools for Implementing Health Tax Directives*, TAX JUST. NETWORK AFR. (Oct. 31, 2024), <https://taxjusticeafrica.net/resources/news/west-african-states-challenged-develop-effective-policies-and-tools-implementing> [<https://perma.cc/874E-CTMZ>].

<sup>149</sup> Gomez, *supra* note 13, at 224.

creation of special tax regimes that threaten the integrity of the tax coordination framework. For instance, in RECs like the WAEMU, in the absence of special tax regime directives issued by RECs, the tax harmonization or coordination framework tends to provide opportunities for policy fragmentation at the domestic level, and it also incentivizes the creation of harmful tax incentives by member states.<sup>150</sup>

## V CONCLUSION

This Article sought to examine the framework for tax multilateralism in RECs with the aid of established theories for analyzing tax multilateralism in tax scholarship. The most notable finding is that despite some achievements with respect to tax multilateralism on the global stage in the last two decades, tax multilateralism in RECs still has an uncertain future.<sup>151</sup> This continues to happen in the face of multilateral cooperation in other areas of international economic law. This is because concerns about tax sovereignty continue to affect the political will of states to cooperate on tax issues in a multilateral manner. Political concerns continue to be heightened by feelings of nationalism that are being expressed even in the EU. This is also worsened by the uncertainty of the impact of tax multilateralism on tax revenues, and certain negative impact on trade revenues arising from trade liberalization.

Overall, despite trade liberalization having doubtful economic benefits for the economies of member states,<sup>152</sup> RECs continue to spring up across the world (e.g., the decision by African states to establish the African Continental Free Trade Area). Despite concerns about tax sovereignty and uncertain revenue mobilization, if an REC is to have any chance at succeeding and positively influencing the economies of member states, then tax multilateralism in the form of tax coordination or harmonization is the best way for RECs to prevent harmful tax competition.<sup>153</sup> This would ensure that the tax regime does

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<sup>150</sup> See Quak, *supra* note 117, at 10–11.

<sup>151</sup> See Juan Zornoza Pérez, *Multilateralism in International Taxation: Is It Really the Future?*, in RESEARCH HANDBOOK ON INTERNATIONAL TAXATION 317, 340 (Yariv Brauner ed., 2020).

<sup>152</sup> See Elizabeth M. Moore et al., *The Effects of Trade Integration on Formal and Informal Entrepreneurship: The Moderating Role of Economic Development*, 52 J. INT'L BUS. STUD. 746–72 (2021).

<sup>153</sup> As noted at the outset of this research, harmful tax competition is used broadly, in the sense that it is recognized in tax scholarship as a threat to tax harmonization. The

not negatively affect the efficacy of the single market created by the REC. Beyond the uncertain impact on revenue mobilization, concerns about the possibility of tax losses—and by implication revenue losses—further worsen the political indifference toward adopting multilateral tax structures in RECs.

These issues underscore the need for caution to be exercised in the design of tax harmonization frameworks and multilateral tax treaties. Tax sovereignty and revenue mobilization concerns of member states must be catered to before commencing the design and implementation of tax multilateral frameworks. This is to ensure that the tax multilateral frameworks enjoy support in the form of political commitment, and consequently, the development of strong REC institutions. For an analysis of these issues, a theoretical framework helps put them into perspective. A game theory analysis of the collective action theory appears to be better suited for such an analysis compared to the international relations theory of cooperation. This theory will be helpful for future research.

Accordingly, the adoption of the theoretical framework for an analysis of the motivations of the international tax regime should therefore form the basis of future research. This is primarily because although game theory has been used to understand multilateralism in tax scholarship for decades, the curious relationship between disaster and the coming together of countries in a multilateral system to resolve issues (as was the case after World War I and after the 2008 global financial crisis) is a rather peculiar situation. As a preliminary conclusion on the matter, the situation bears a close resemblance to the stag hunt game where the participants realize that alone they can survive only for so long, but together, they have a greater chance of long-term survival. Accordingly, while disaster and common purpose seem to tie the interests of countries together, it is important to understand what goes wrong and always brings countries short of creating a truly multilateral tax system. This Article argues that every grand attempt at multilateralism has failed because of (1) perceived threats to tax sovereignty and (2) a lack of clarity of revenue implications. This is true of both RECs and of the larger global economy.

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broadest sense of the term is used because of the lack of unanimity in the international tax regime on the definition and scope of harmful tax competition and what constitutes harmful tax competition. See Monica Victor & Yariv Brauner, *International Taxation and International Trade: Common Objectives, Different Paths, and Inevitable Clash*, in RESEARCH HANDBOOK ON INTERNATIONAL TAXATION 239, 256 (Yariv Brauner ed., 2020).

Furthermore, to ensure that tax multilateral frameworks in RECs are more effective, the adoption of robust tax dispute resolution and prevention mechanisms will be critical to the development and success of such a regime. This is also important because RECs cannot build strong institutions without efficient dispute resolution systems. Furthermore, the technical capacity to ensure that proper directives are designed to cater to special tax regimes, which can threaten the impact of the multilateral tax regime within RECs, is also important. This technical capacity is also required to ensure that in regions where member states are members of multiple RECs, the RECs can design a system of efficient tax coordination with minimal to nonexistent areas of conflict between the multiple RECs (i.e., tax coordination at the national and regional level). Obviously, tax multilateralism would require the best international tax experts to be successful—which can happen only if states show it the political support that it deserves.

As a final word, concerns about tax sovereignty remains a threat to the continued existence of tax multilateralism in RECs, and the doubtful nature of revenue mobilization implications in a multilateral tax regime in an REC do not help the case of tax multilateralism in RECs. It is therefore critical that multilateral tax frameworks are approached cautiously—by attempting to cater to the concerns and unique fiscal systems of REC member states—to have a shot at being successful.

