

# Main Act or Side Show? Model Agreements by International Institutions and Their Reuse in Investment Treaty Texts

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## ABSTRACT

Scholars and negotiators often assert that model treaty texts published by international institutions (IIs) shape investment treaty design. This paper empirically investigates the reuse of international institutions' treaty templates. It tracks the imprint of six international institution templates on the text of negotiated international investment agreements (IIAs) using the Electronic Database of Investment Treaties. We find that the overall impact of international institution models has been low. No international investment agreement in our dataset was copied from an international institution's model wholesale. On average, annual similarity between model texts and negotiated investment treaties is lower than 40% and significantly lower than the influence of international institutions' models in the structurally similar international tax treaty regime. However, we do find evidence of an impact of international institutions' language on specific salient clauses. For example, the text of key investment protection clauses in the 1967 Draft Convention of the Organization of Economic Cooperation and Development was reproduced in hundreds of international investment agreements and novel clauses on investor responsibility first introduced in the 2006 International Institute for Sustainable Development model have subsequently been copied verbatim into negotiated international investment agreements. Our work concludes by discussing explanations for the comparatively low imprint of international institutions, notes other pathways for these institutions to influence treaty design, and sketches out an agenda for future research.

## I. INTRODUCTION

States are international law's primary treaty-makers. Yet, international institutions (IIs) can play an important, and sometimes decisive, background role in shaping the design of international agreements concluded between states. Across fields of international law, IIs have drafted model texts that countries can use as blueprints for their treaty-making.<sup>1</sup> Well-known examples

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<sup>1</sup> Following the practice established in the international relations literature, our definition of IIs includes both intergovernmental organizations (IGOs) (multilateral, regional or functional) as well as international non-governmental organizations (INGOs).

include the United Nation's (UN) model treaty on extradition adopted by the General Assembly in 1990,<sup>2</sup> or the Organization of Economic Cooperation and Development's (OECD) model double taxation convention, first released in 1963, and its 'competitor', the UN model double taxation convention, both of which are continuously updated.<sup>3</sup> Templating by IIs raises intriguing questions. How much of such model text makes it into negotiated treaties by states? How do competing treaty models fare in practice? Do we witness differences between governmental and non-governmental IIs? And how do international law regimes differ when it comes to the importance of IIs as sources of drafting?

This article explores the role played by public model treaties of IIs in the international investment regime and relates its findings to the scholarship on IIs' influence on decentralized international economic law generally. The imprint of model texts of IIs in the investment regime is occasionally discussed. Scholars and former negotiators, for example, have noted that the model texts of the OECD and other IIs influenced the design of early investment treaty programs of Western states.<sup>4</sup> However, the diffusion of such II models has, to the best of our knowledge, not been systematically and comprehensively investigated. While scholars have conducted case studies on specific IIs and their role in shaping investment treaty design,<sup>5</sup> this article is the first to quantitatively assess and compare the imprint of II model texts on negotiated IIAs.

By investigating how much of the language proposed through II model texts ends up in negotiated IIAs, this article contributes to four important scholarly lines of inquiries. First, it helps situate the role IIs play in international investment law and contrast it to other regimes. In the international trade and tax regimes, empirical research has shown that IIs have left considerable imprint on treaty design.<sup>6</sup> In these fields, prior agreed legal rules establishing an II or subsequent II templates have shaped intergovernmental treaty practice by serving as benchmarks or focal points. How does the investment law regime compare? Second, this article adds to a growing literature on boilerplating in international law. Recently, scholars have pushed back on the notion that most bilateral agreements are bespoke deals and have empirically shown the widespread practice of common form treaties.<sup>7</sup> Third, it shows that both intergovernmental organizations (IGOs) and international non-governmental organizations (INGOs) put forward model treaties and provides new insight about competition across IGOs as well as between IGOs and INGOs. Fourth, the article adds to the computational international law literature by

<sup>2</sup> Model Treaty on Extradition (1990), Adopted by General Assembly resolution 45/116, subsequently amended by General Assembly resolution 52/88, [https://www.unodc.org/pdf/model\\_treaty\\_extradition.pdf](https://www.unodc.org/pdf/model_treaty_extradition.pdf) (visited 20 October 2022).

<sup>3</sup> OECD Model Convention with respect to taxes on income and capital (2017), <https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf> (visited 20 October 2022); UN Model Double Taxation Convention (2017), [https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT\\_2017.pdf](https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf) (visited 20 October 2022). For background, see John F. Avery Jones, 'Understanding the OECD Model Tax Convention: The Lesson of History', 10 Florida Tax Review 1 (2009).

<sup>4</sup> Eileen Denza and Shelagh Brooks, 'Investment Protection Treaties: United Kingdom Experience', 36 The International and Comparative Law Quarterly 908 (1987), at 910-911; Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge, New York: Cambridge Univ Press, 2009), 39; Eileen Denza and Lauge N. Skovgaard Poulsen, 'The Euro-Arab Investment Treaty That Nearly Was', 69 International & Comparative Law Quarterly 267 (2020), at 275.

<sup>5</sup> See for example, Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge, New York: Cambridge University Press, 2015) (exploring the role of the UN as well as other IOs in the regime's formation); Taylor St. John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (New York: Oxford University Press, 2018) (investigating the role of the International Centre for Settlement of Investment Disputes).

<sup>6</sup> Todd Allee, Manfred Elsig and Andrew Lugg, 'The Ties between the World Trade Organization and Preferential Trade Agreements: A Textual Analysis', 20 Journal of International Economic Law 333 (2017); Elliott Ash and Omri Y. Marian, 'The Making of International Tax Law: Empirical Evidence from Natural Language Processing' (2019) University of California Irvine Legal Studies Research Paper Series 23.

<sup>7</sup> Todd Allee, Manfred Elsig, 'Are the Contents of International Treaties Copied and Pasted? Evidence from Preferential Trade Agreements', 63 International Studies Quarterly 603 (2019); Claire Peacock, Karolina Milewicz and Duncan Snidal, 'Boilerplate in International Trade Agreements', 63 International Studies Quarterly 923 (2019); Lauge Poulsen and Michael Waibel, 'Boilerplate in International Economic Law', 115 AJIL Unbound 253 (2021).

discussing challenges and solutions for quantitatively measuring the imprint of II language on negotiated treaties.<sup>8</sup>

The article finds mixed evidence for a substantial role of IIs as influencers of treaty texts in the investment regime. On the one hand, the overall textual imprint of II models is relatively low. Compared to the international tax regime where bilateral treaties routinely copy 70% or more of their text from II templates, states have so far not used II models as substantive blueprints for their IIAs. Even targeted model clauses, like those published by the International Centre for Settlement of Investment Disputes (ICSID) to promote the inclusion of investor-state dispute settlement (ISDS) clauses into IIAs, have been largely ignored. We also do not detect a significant difference between intergovernmental or non-governmental institutions. On the other hand, II models have shaped specific salient features in IIA design. The wording of key investment protection norms, for example, on ‘fair and equitable treatment’ in the 1967 OECD Draft Convention on the Protection of Foreign Property, has proliferated widely. A 2006 model published by the International Institute for Sustainable Development (IISD), a non-governmental II, coined new language on investor responsibility that was later copied verbatim into several negotiated texts. Additionally, references to ISDS under ICSID, albeit in a different textual guise than its model clauses, have become quasi-ubiquitous in IIAs. In short, whereas the overall direct imprint of II models is modest at best, their templates did shape salient features.

The article is structured as follows. Section two provides a brief background on the role of IIs in IIA drafting and the state of research. Section three introduces the role of IIs in shaping states’ treaty drafting choices and discusses II models intended to influence IIA design. Section four describes the dataset and methodology. Section five demonstrates that II templates had an overall low impact on IIA design while section six highlights salient features that were shaped by II templating. Finally, section seven formulates key take away messages from this study and identifies areas for future research.

## II. IIS’ INFLUENCE OVER TREATY DRAFTING

IIs can influence the design of agreements signed by states in different ways. In international relations, there is a rich literature rooted in social constructivist research traditions on the way IIs, both IGOs and INGOs, can help create and diffuse international norms through defining and categorizing themes and topics.<sup>9</sup> Liberal research programs have also turned their attention to subtle ways by which IIs attempt to pursue II-specific interests through collaboration and engagement with governments and other stakeholders. These indirect ways of governance by IGOs have been called ‘orchestration.’<sup>10</sup> Other contributions have mapped how transnational actors, such as INGOs, have come to influence global governance.<sup>11</sup> Both liberal and social constructivist research programs have led to the development of a range of arguments about the ways in which II activities can impact states in the treaty-making process. These include setting of agendas, defining shared aspirations, convening meetings with stakeholders, providing technical assistance and informal support, issuing research reports and background papers, and providing ideational support for certain positions. IIs can, in these views, shape states’ treaty-making indirectly and without actively proposing specific wording.

<sup>8</sup> Wolfgang Alschner, ‘The Computational Analysis of International Law’, in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law: A Handbook* (Cheltenham, Northampton: Edward Elgar, 2021), 203–227.

<sup>9</sup> Michael N. Barnett, and Martha Finnemore, ‘The Politics, Power, and Pathologies of International Organizations’, 53 *International Organization* 699 (1999); Deborah D. Avant, Martha Finnemore and Susan Sell (eds), *Who Governs the Globe?* (New York: Cambridge University Press, 2010).

<sup>10</sup> Kenneth W. Abbott and others (eds), *International Organizations as Orchestrators* (Cambridge: Cambridge University Press, 2015).

<sup>11</sup> Jonas Tallberg, and Christer Jönsson, *Transnational Actors in Global Governance: Patterns, Explanations and Implications* (New York: Springer, 2010).

In the investment regime, Poulsen, for example, has documented how the UN Conference on Trade and Development (UNCTAD) organized collective treaty signing rounds in the 1990s that resulted in the conclusion of relatively similar bilateral investment treaties (BITs).<sup>12</sup> Similarly, St. John has shown how instrumental ICSID and its Secretary-General, Aaron Broches, were for the proliferation of ISDS clauses in BITs by holding meetings around the world to promote the inclusion of consent to the ICSID in IIAs.<sup>13</sup> Perrone, in turn, has focused on non-governmental IIs to trace how, in the 1950s and 60s, international business organizations such as the International Chamber of Commerce promoted core investment protection principles that would form the bedrock of the international investment regime.<sup>14</sup>

This article, however, focuses on a more direct way in which IIs can shape IIA design: the publication of model texts for reuse in the process of negotiating IIAs. As noted above, templating by IIs and copying from such templates by states are relatively common across different areas of international law. This, in turn, allows comparing the influence of IIs on IIAs to findings from neighboring regimes. The comparison of the investment with the tax regime is particularly interesting because both systems are based on thousands of bilateral treaties and lack a multi-lateral umbrella organization.<sup>15</sup> Furthermore, some of the same IIs are active in both fields. The OECD produced a Draft Double Taxation Convention on Income and Capital in 1963 followed by a Draft Convention on the Protection of Foreign Property published in 1967.<sup>16</sup> Moreover, existing research on the influence of IIs in the tax sphere facilitates comparison. In an analogous study of the imprint of II tax templates on bilateral tax treaties, Ash and Marian found that the OECD model tax treaty influenced bilateral tax treaties extensively: on a yearly average, double tax treaties borrowed 70% of their text from the OECD template.<sup>17</sup> Similarly, the competing UN model template also inspired copying in negotiated texts but was less successful than the OECD model with copying 60% on a yearly average.<sup>18</sup> In short, the similarities with the tax regime and the latter's empirical scholarship provide useful benchmarks to situate a study on the templating of IIs in the investment regime.

In addition, recent empirical scholarship has found that boilerplating is a standard feature in negotiating international trade and investment agreements.<sup>19</sup> In part, this may be due to the presence of a single II. In their work, Allee et al. show that the World Trade Organization (WTO) Agreements act as a *de facto* template leaving a significant mark on the text of Preferential Trade Agreements.<sup>20</sup> In the investment regime, prior empirical research has shown that templating is common practice but in relation to national models.<sup>21</sup> The imprint of II templates on IIAs, however, has remained unexplored. Since leading developed states saw IIAs as 'focal points' for

<sup>12</sup> Poulsen (n 5).

<sup>13</sup> St. John (n 5).

<sup>14</sup> Nicolás M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules* (New York: Oxford University Press, 2021).

<sup>15</sup> Thomas Rixen, 'Bilateralism or Multilateralism? The Political Economy of Avoiding International Double Taxation', 16 *European Journal of International Relations* 589 (2010); Pierre Sauvé, 'Multilateral Rules on Investment: Is Forward Movement Possible?', 9 *Journal of International Economic Law* 325 (2006).

<sup>16</sup> See M. J. Van Emde Boas, 'The O.E.C.D. Draft Convention on the Protection of Foreign Property', 1 *Common Market Law Review* 265 (1963); see generally Adrian A. Krage, 'Double Income Taxation Treaties: The OECD Draft', 52 *California Law Review* 306 (1964).

<sup>17</sup> Ash and Marian (n 6). See also Vincent Arel-Bundock and Lisa Lechner, 'The Power of Boilerplate: Decentralized Multilateralism and the International Tax Regime'. Working Paper on file with the authors.

<sup>18</sup> Ash and Marian (n 6); on the UN model, see also Jan de Goede and Wim Wijnen, 'The UN Model in Practice 1997–2013', 68 *Bulletin for international taxation* 118 (2014). Note that the UN model text was in turn inspired by the OECD template. Hence, similarity to the UN text in part reflects a latent similarity to the OECD template.

<sup>19</sup> Allee and Elsig (n 10); Peacock, Milewicz and Snidal (n 7); Todd Allee and Manfred Elsig, 'Are the Contents of International Treaties Copied and Pasted? Evidence from Preferential Trade Agreements', 63 *International Studies Quarterly* 603 (2019); Poulsen and Waibel (n 7).

<sup>20</sup> Allee, Elsig and Lugg (n 6).

<sup>21</sup> Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements', 19 *Journal of International Economic Law* 561 (2016); Tarald Laudal Berge and Øyvind Stiansen, 'Negotiating BITs with Models. The Power of Expertise' (2016) PluriCourts Research Paper No. 16–13.

internationally shoring up Western-style property protections,<sup>22</sup> one would expect IIs to play some role in either reinforcing or challenging such global standard setting ambitions. In addition, the existence of INGOs also engaging in publicly advocating for their own templates makes the investment regime a fertile ground for investigating II competition.

Finally, our article is motivated by advances in automated text analyses that allow for tracing textual overlaps or text reuse across large legal corpora in order to reveal policy influence.<sup>23</sup> IIs' templating, if successful, leaves a detectable trace through a comparison of IIA texts with II proposed model texts. Our analysis assumes that longer verbatim passages are unlikely to occur randomly. Textual overlap therefore signals that a later IIA text was influenced by an earlier model text, either directly or via other texts. In contrast, indirect means of II influence, such as through meetings or research reports, rarely leave explicit textual traces and can only be revealed through interview- or archival-based analyses that go beyond the scope of this article and are restricted to individual treaty cases.<sup>24</sup> In short, while we are cognizant of the different pathways in which IIs may affect IIA texts, the article's focus lies on the imprint of templating.

### III. II TEMPLATING IN THE INVESTMENT REGIME

Over 3000 IIAs to protect foreign capital against political risks abroad have been signed since the conclusion of the first BIT between Germany and Pakistan in 1959.<sup>25</sup> In the following section, we map existing efforts by six IIs, both governmental and non-governmental, to shape such treaty-making by proposing treaty language through model treaties. We group this descriptive overview into three consecutive periods, which we term (i) regime emergence (1959–80), (ii) contestation and affirmation (1980–95), and (iii) rebalancing (1995–today), to account for the shifting demands on and context of the investment regime over time.

#### A. 1959–80: regime emergence

The post-war Bretton Woods international economic order left foreign direct investment unregulated. As a result of this void, investment law in the post-war era was an area where different organizations could leave their imprint. In April 1959, the German businessman Abs and the British barrister and politician Lord Shawcross were the first to propose a 'Draft Convention on Investments Abroad'.<sup>26</sup> A year later, the Council of the OECD asked the organization to pick up the idea and started work on a multilateral investment protection convention, yet negotiations ultimately failed due to a lack of support by the USA and opposition from Southern European states.<sup>27</sup>

However, the OECD Council did publish a 'Draft Convention on the Protection of Foreign Property' in 1967. The Draft focused on the substantive protection of foreign investment through standards of treatment such as the fair and equitable treatment of foreign property and full market value compensation for expropriation. In a resolution, the OECD Council affirmed the commitment of OECD members to the principles of the Draft Convention and called upon

<sup>22</sup> Lauge N. Skovgaard Poulsen, 'Beyond Credible Commitments: (Investment) Treaties as Focal Points', 64 *International Studies Quarterly* 26 (2020).

<sup>23</sup> John Wilkerson, David Smith and Nicholas Stramp, 'Tracing the Flow of Policy Ideas in Legislatures: A Text Reuse Approach', 59 *American Journal of Political Science* 943 (2015); James P. Cross and Henrik Hermansson, 'Legislative Amendments and Informal Politics in the European Union: A Text Reuse Approach', 18 *European Union Politics* 4 (2017).

<sup>24</sup> For an example of a rich interview- and archive-based project illuminating the role regional IOs played in orchestrating investment treaty-making, see Denza and Poulsen (n 4).

<sup>25</sup> Wolfgang Alschner, Manfred Elsig and Rodrigo Polanco, 'Introducing the Electronic Database of Investment Treaties (EDIT): The Genesis of a New Database and Its Use', 20 *World Trade Review* 73 (2021).

<sup>26</sup> Hermann Abs and Hartley Shawcross, 'The Proposed Convention to Protect Private Foreign Investment—Introduction', 9 *Journal of Public Law* 115 (1960), at 119.

<sup>27</sup> Poulsen (n 5) 51–55.

them to use the text as model for 'the preparation of agreements on the protection of foreign property.'<sup>28</sup>

While the 1967 Draft Convention dealt mostly with substantive investment protection and only included rudimentary dispute settlement provisions, ICSID, created in 1965, provided a new venue and focal point for investor-state arbitration. In 1969, the ICSID Secretariat published a set of 'Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment Agreements.'<sup>29</sup> These clauses were aimed at encouraging states to refer investment disputes to ICSID in BITs and were actively promoted by ICSID staff during visits to developed and developing states.<sup>30</sup> Hence, in the early IIA regime, states could tap into both II-created procedural and substantive model language when negotiating their IIAs.

### B. 1980–95: contestation and reaffirmation

Opposition to the emerging IIA regime came from capital-importing states which sought to strengthen the control of host states over foreign investors. In a series of UN General Assembly resolutions, capital-importing states used their majority in the UN to advance a 'New International Economic Order.'<sup>31</sup> The 1974 'Charter of Economic Rights and Duties of States' affirmed the principle of 'permanent sovereignty' of states over their resources and rejected the standard of full market value compensation for expropriation enshrined in the OECD 1967 Draft Convention. Instead, the Charter set forth the standard of 'appropriate compensation,' which takes into account 'all circumstances that the State considers pertinent' and is thus likely to be lower than the full market value of an asset.<sup>32</sup> While the Charter was not meant to be a model for treaty-making, it did inspire templating by the Asian-African Legal Consultative Committee (AALC).

The AALC was a regional, intergovernmental II that had grown out of the 1955 Bandung Conference and had exclusively developing country membership. In 1984, it crafted a set of BIT models aimed at providing templates for BITs concluded among AALC members (South-South BITs), but that could also be used in North-South negotiations.<sup>33</sup> The AALC Secretariat decided to draft multiple BIT models to account for diverse policy orientations of the AALC membership as well as the divergent BITs some states had already signed with developed states.<sup>34</sup> Models A and (the very similar) C presented 'a more liberal standard in the matter of protection of investments,' mirroring the language and standards enshrined in the OECD Draft Convention and the BITs concluded by capital-exporting states at the time.<sup>35</sup> Model B, in contrast, was 'more restrictive in the matter of protection of investments.'<sup>36</sup> To this end, it incorporated some of the language of the New International Economic Order such as an 'appropriate' rather than full compensation standard for expropriation. It further provided model language that would channel investment disputes to domestic courts rather than ISDS before ICSID. As a result, developing states could rely on a diverse set of model texts with very different policy orientations to draft their BITs.

<sup>28</sup> OECD Council, 'Resolution on Draft Convention on the Protection of Foreign Property', (adopted 12 October 1967) <http://www.oecd.org/daf/inv/internationalinvestmentagreements/39286571.pdf> (visited 31 March 2021).

<sup>29</sup> ICSID Model Clauses (1969) 8 I.L.M. 6, 1341–1352.

<sup>30</sup> St. John (n 5) 195–198.

<sup>31</sup> Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 38 *Virginia Journal of International Law* 639 (1997).

<sup>32</sup> Charter of Economic Rights and Duties, A/RES/29/3281, Article 2.

<sup>33</sup> Model Bilateral Agreements on Promotion and Protection of Investments (1984) 23 I.L.M., 237–268.

<sup>34</sup> *Id.*, 238.

<sup>35</sup> *Id.*, 239–241. Since Models A and C are very similar and demonstrate a similar imprint on subsequent IIAs, we only report our findings on Model A below.

<sup>36</sup> *Id.*, 239.

By the late 1980s, however, the New International Economic Order agenda began to wane and developing countries started to embrace economic liberalism instead.<sup>37</sup> This new consensus around liberal economic policies created impetus for the 1992 World Bank ‘Guidelines on the Treatment of Foreign Direct Investment.’<sup>38</sup> Even though the document was framed as guidelines, it set out specific legal standards of investment protection to be used in subsequent treaties and had the explicit ambition to ‘influence the development of international law in this area.’<sup>39</sup> For that reason, we consider it as a template. Whereas the World Bank had shied away from taking sides on substantive investment protection norms in previous decades, the Guidelines focused on promoting substantive protection obligations similar to the 1967 OECD Draft Convention relating to the treatment of investors and compensation for expropriation based on fair market value. They thus embodied a reaffirmation of investment protection principles following contestation of the New International Economic Order.

### C. 1995–today: rebalancing investment protection with regulatory policy space

The second half of the 1990s marked a shift as ISDS clauses, long dormant in IIAs, started to be used in practice. Rising ISDS claims, especially under Chapter 11 of the North American Free Trade Agreement, that began targeting general public policy measures enacted by developed states, such as bans on environmentally harmful substances, triggered a policy debate on how to balance investment protection and host state regulatory policy space.<sup>40</sup> In response, two INGOs proposed model language to align foreign property protection with non-economic development goals and to better safeguard the regulatory prerogatives of the host state.

First, the Consumer Unity and Trust Society (CUTS) produced its own investment agreement template in 1998. The model sought to provide ‘an equitable alternative international agreement on investment’ that would promote ‘social justice, equity, transparency, predictability, and accountability.’<sup>41</sup> Aside from covering traditional investment obligations, the draft included language preserving a country’s right to regulate and clauses on human rights and consumer protection.

Second, the IISD drafted a ‘Model International Agreement on Investment for Sustainable Development’ in 2006. Like the CUTS model, the IISD template, while including traditional obligations to protect foreign investment, sought to embody ‘a new approach to international investment negotiations.’<sup>42</sup> This new approach aimed at recognizing and developing ‘a comprehensive, consistent view of the linkages between investment and sustainable development.’<sup>43</sup> States could thus choose from templates that differed markedly from earlier models and covered new issues including the responsibilities of investors (rather than just of host states).

Table 1 summarizes the different templates. While early models were tabled by governmental IIs, more recent ones have been published exclusively by non-governmental IIs. Moreover, the policy orientation has changed from predominantly pro-investor (focusing on investment

<sup>37</sup> Kenneth J. Vandeveld, ‘Of Politics and Markets: The Shifting Ideology of the BITs’, 11 *Int’l Tax & Bus Law* 159 (1993).

<sup>38</sup> Guidelines on the Treatment of Foreign Direct Investment, (1992), <https://documents1.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf> (visited 20 October 2022).

<sup>39</sup> *Id.*, Introductory Note to the Guidelines, 6.

<sup>40</sup> Weiler Todd, ‘The Ethyl Arbitration: First of Its Kind and a Harbinger of Things to Come’, 11 *American Journal of International Arbitration* 187 (2001); Guillermo Aguilar Alvarez and William W Park, ‘The New Face of Investment Arbitration: NAFTA Chapter 11’, 28 *Yale Journal of International Law* 365 (2003); Michael Waibel (ed), *The Backlash Against Investment Arbitration: Perceptions and Reality* (New York: Wolters Kluwer Law & Business, 2010).

<sup>41</sup> CUTS, International Agreement on Investment, in: UNCTAD, *International Investment Instruments: A Compendium*, Volume V, Non-Governmental Instruments, UNCTAD/DITE/2 (Vol. V), (2000), [https://unctad.org/system/files/official-document/dite2vol5\\_en.pdf](https://unctad.org/system/files/official-document/dite2vol5_en.pdf) (visited 20 October 2022).

<sup>42</sup> IISD Model International Agreement on Investment for Sustainable Development (2006), xi, [https://www.iisd.org/system/files/publications/investment\\_model\\_int\\_handbook.pdf](https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf) (visited 20 October 2022).

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

**Table 1.** Model Language on Investment Protection Produced by IIs

Name	Organization	Organization type	Year of release	Policy orientation	Document type
Draft Convention on the Protection of Foreign Property	OECD	Club IGO	1962/1967	Pro-investor	Draft Convention
Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment Agreements	ICSID	Multilateral IGO	1968	Pro-investor	Model Clauses
BIT Models A, B, and C	AALC	Regional IGO	1984	Pro-investor (Model A, C)/ Pro-state (Model B)	Model Treaty
Guidelines on the Treatment of Foreign Direct Investment	World Bank	Multilateral IGO	1992	Pro-investor	Guidelines
International Agreement on Investment	CUTS	INGO	1998	Pro-state	Model Treaty
Model International Agreement on IISD	IISD	INGO	2006	Pro-state	Model Treaty

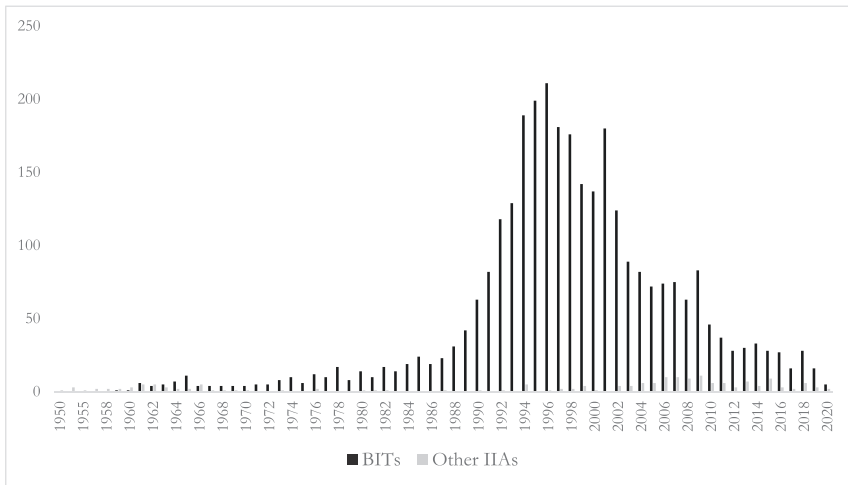
protection) to pro-state (focusing on regulatory space and investor responsibility). Noteworthy is also the absence of templating over the last 15 years—an issue we will return to in the concluding discussion.

#### IV. DATASET AND METHODOLOGY

To assess the imprint of these models, we systematically compare the II texts to IIA full texts in the Electronic Database of Investment Treaties (EDIT).<sup>44</sup> EDIT is the most comprehensive dataset of IIA full texts comprising 96% of all-known BITs in force. Non-English texts have been translated into English, and each treaty is saved in extensible markup language (xml) format to retain the text's structural information. As a result, we can compare not only entire treaties with each other but also individual articles within these treaties. We extracted from EDIT the full text of 3112 BITs signed between 1959 and 2020. In addition, we extracted the texts of 175 other IIAs from 1950 to 2020, which comprises Friendship, Commerce and Navigation (FCN) treaties (a precursor to BITs), plurilateral investment treaties like the Energy Charter Treaty, and Preferential Trade Agreements with investment chapters. For these other IIAs, we focused our analysis on the text of the investment chapters or sections only. Figure 1 depicts the number of agreements signed per year. Note that most IIAs have been concluded in the 1990s and early 2000s.

<sup>44</sup> Alschner, Elsig and Polanco (n 25).





**Figure 1.** Count of BITs and other IIAs by year of signature (Source: EDIT).

The advent of computational research methods allows to scale the comparison of legal texts.<sup>45</sup> This is done by quantifying the similarity of texts. Various techniques can be used to calculate intertext similarity.<sup>46</sup> What they have in common is that text is broken down into text token, which can take the form of character strings, words, or word vectors, and which are then compared through a distance measure. We work with the simplest implementation of such text comparisons. We calculate the share of words two documents have in common, which is also known as word-based Jaccard distance.<sup>47</sup>

What makes computational text comparison methodologically challenging is that distance measures are sensitive to document length. Imagine a fictional IIA that is constructed by combining two II model texts one after the other. The resulting IIA text will be quantitatively dissimilar to both texts although it extensively copies from each. An alternative approach looks at maximum text alignment between document pairs rather than word overlaps and is implemented, for example, through the Smith–Waterman local alignment algorithm.<sup>48</sup> While the approach more easily allows spotting similar text in documents of different lengths, it is computationally intensive.<sup>49</sup> For that reason and to make our results comparable with prior work on tax treaties, we focus on distance measures but compare not only full texts but also individual articles and salient text snippets from II models. The latter two strategies allow us to identify instances where negotiators selectively copy from templates.

Computational text comparison also comes with conceptual limits and challenges. The similarity of two texts does not mean that one text influenced the other. Some similarity may occur

<sup>45</sup> See generally, Wolfgang Alschner, ‘Sense and Similarity: Automating Legal Text Comparison’, in Ryan Whalen (ed), *Computational Legal Studies* (Cheltenham, Northampton: Edward Elgar Publishing, 2020).

<sup>46</sup> See, for example, cosine similarity of word vectors: Ash and Marian (n 6); text reuse: Allee, Elsig and Lugg (n 6); Jaccard distance of character-grams: Alschner and Skougarevskiy (n 21).

<sup>47</sup> For more background on the method (although applied to character-grams rather than unigrams), see Alschner and Skougarevskiy (n 21).

<sup>48</sup> Matthew Burgess and others, ‘The Legislative Influence Detector: Finding Text Reuse in State Legislation’, *Proceedings of the 22nd ACM SIGKDD International Conference on Knowledge Discovery and Data Mining* (ACM Press, 2016); Wilkerson, Smith and Stamp (n 23); Cross and Hermansson (n 23).

<sup>49</sup> We experimented with the Smith–Waterman algorithm as implemented in the R package ‘Text Alignment’. Results mirrored those obtained from article-based distance measures. However, text alignment appeared particularly useful for spotting selective verbatim copying within larger articles.

randomly given that models and negotiated IIAs address the same issues. At the same time, like in plagiarism detection, high similarity and, in particular, verbatim text reproduction are persuasive indicators of intentional copying, which is why text similarity and reuse have been used to measure influence over policy documents.<sup>50</sup> However, text reuse still does not mean that negotiators, in fact, copied from a model text. The text similarity could result from the influence of a third text with the ultimate adopter being unaware of the II text. Fortunately, the EDIT dataset is extremely comprehensive. We can thus detect when specific word choices were first used in the IIA universe. While this still leaves the question on the path of diffusion open (directly from the model or indirectly via third texts), it allows us to find text that originated in II models. Furthermore, to disentangling influence from similarity, we adduce additional contextual evidence where possible.

## V. LITTLE OVERALL IMPACT: II TEMPLATES' IMPRINT ON IIA TEXTS

This section tracks the imprint of II templates generally. We first compare the similarity of II model full texts with the full texts of negotiated IIAs. We then turn to the imprint of all articles in II models on all IIA articles to account for the fact that states may selectively borrow from specific II-created articles rather than copy text in bulk.

To meaningfully evaluate the relative reproduction of IIA text, we benchmark intertreaty similarity both outside of and within the IIA regime. Outside the IIA regime, we take the tax regime as a point of comparison. Using a slightly different, but conceptually analogous similarity analysis, researchers found that the OECD tax model reached similarities between 50% and 70% on an average with annually concluded bilateral tax treaties.<sup>51</sup> Moreover, the study found that the entire stock of tax treaties was similar to the tax models published by the UN and the OECD in the range of 40% in the 1960s to around 60% in the 2000s. They thus concluded that IIs had a significant impact on the design of tax treaties and contributed to their normative convergence.

Inside the investment regime, previous research has found that IIAs are comparatively more diverse. Treaty design is marked by a rule-maker and rule-taker dynamic whereby developed states sign highly similar treaties based on national model texts with diverse developing country treaty partners.<sup>52</sup> As a result, treaty similarity within developed states' treaty networks is very high, exceeding at times 95% of textual similarity, whereas similarity of treaties across all states can be low. In rare cases, some treaty pairs have as little as 5% of text in common. The overall word-based similarity of all BIT texts in EDIT is 32%. Given that the IIA universe appears more dissimilar than the tax regime and the existence of multiple organizations that have put forward models, the similarity of II templates with negotiated texts is likely lower than that of II models in tax.

### A. Comparison of models with IIA full texts

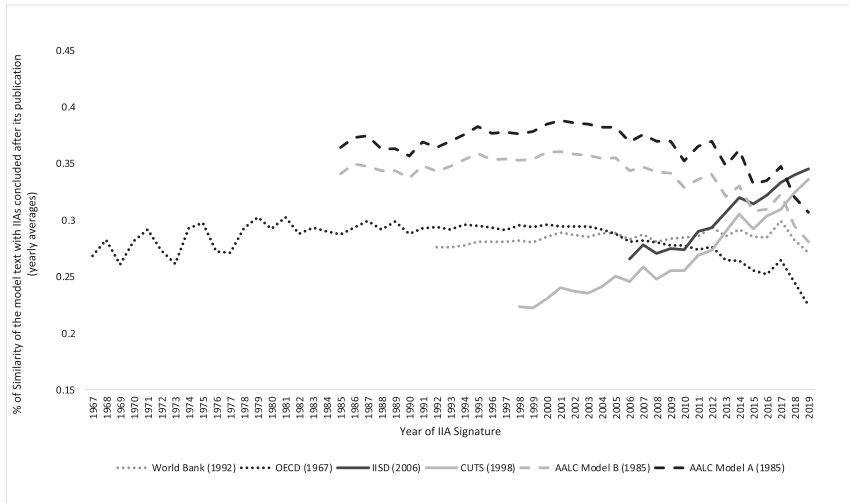
Our empirical analysis corroborates this expectation and finds that II templates, on an average, bear relatively moderate similarity with annually negotiated IIAs. [Figure 2](#) displays the average textual similarity (mean inverse Jaccard distance) of a given model with the negotiated IIAs concluded each year after the publication of the relevant model. We omitted ICSID model clauses, since a comparison with full IIA texts would not be meaningful and, for visual clarity, only plot the investor-friendly Model A and the state-friendly Model B of the three broadly similar AALC draft texts.<sup>53</sup> The similarity data for each model start in the year in which the model was published. The average similarity of II models with concluded IIAs ranges from a high of 37%

<sup>50</sup> See n 48.

<sup>51</sup> Ash and Marian (n 6).

<sup>52</sup> Alschner and Skougarevskiy (n 21).

<sup>53</sup> The AALC Model C is very similar to Model A and displays a similar pattern when compared to negotiated texts.



**Figure 2.** Average similarity between model texts and negotiated IIAs.

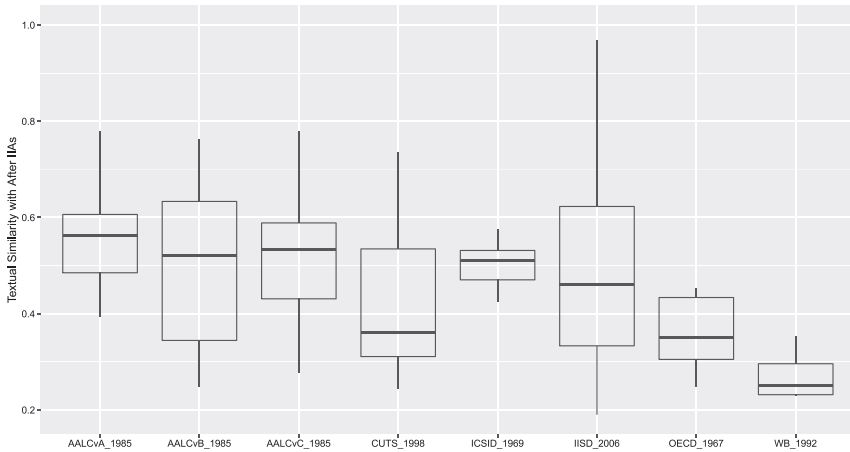
similarity (AALC Model A) to a low of 22% similarity (CUTS), with an overall average of 30%. This is lower than the average similarity of all BITs.

Moreover, in contrast to national model BITs that have often inspired verbatim copying in negotiated IIAs,<sup>54</sup> no signed IIAs seemed to have been explicitly crafted around an II model. The overall most similar IIA text to a model is the ECOWAS Supplementary Act on Investments (2008), which is 55% similar to the IISD model. The most similar BIT to a template is the Hungary–Kuwait BIT (1989) with 47% of textual similarity to the AALC Model A. In contrast, the 1967 OECD Draft Convention bears at most a 35% similarity, in this case, with the Netherlands–Oman BIT (1987). The overall similarity of models to negotiated IIAs is thus relatively modest compared to the tax regime.

Furthermore, the models display relatively stable rates of similarity over time, which contrasts with the tax and trade regimes where scholars have found an increasing uptake in similarity over time. As we discuss below, the modest uptake of II templates in comparison to other regimes might be due to the high number of and competition among II models as well as the changing authorities of these IIs. In our data, noticeable changes only appear during the last decade where intergovernmental models have become less similar to negotiated IIAs (OECD Draft, AALC, and World Bank Guidelines), while non-governmental II models (CUTS and IISD) have become more similar to contemporary treaty practice. This shift appears to coincide with a general reorientation of IIA design variably termed as a ‘backlash against arbitration’ or a ‘quest for policy space’, as states back away from first-generation treaties in light of rising investment arbitration claims and start to conclude more sovereignty preserving language in new-generation IIAs.<sup>55</sup> The figure suggests that INGO drafts foreshadowed at least some of these developments and, as we argue below, may have even influenced some design paths later taken by state negotiators.

<sup>54</sup> Alschner and Skougarevskiy (n 21).

<sup>55</sup> Tarald Laudal Berge, ‘Dispute by Design? Legalization, Backlash, and the Drafting of Investment Agreements’, 64 *International Studies Quarterly* 919 (2020); SA Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’, 13 *Journal of International Economic Law* 1037 (2010); Lauge Poulsen and Emma Aisbett, ‘When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning’, 65 *World Politics* 273 (2013); Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes*, (New York: Oxford University Press, 2022).



**Figure 3.** Highest similarity of most similar IIA articles compared to each template article signed after II model.

### B. Comparison of model articles with IIA articles

Although IIs failed to inspire wholesale imitation, these templates could have shaped specific clauses in subsequent IIAs. Indeed, the AALC Models provide states with alternative formulations of some clauses requiring some adaptation of the model. Similarly, the purpose of the ICSID model clauses was to inform drafting practice relating to ISDS, not investment protection treaties generally. In addition, even where IIs proposed models that could be copied with little or no adaptation, it must have been anticipated, if not intended, that states would selectively incorporate parts of such models rather than reproduce the entire text. In that vein, scholars have noted, for example, that the 1967 OECD model's procedural provisions generated little imitation whereas its substantive clauses inspired future treaty terms.<sup>56</sup>

We therefore investigate how individual articles of the II templates compare to the more than 50,000 individual IIA articles in EDIT. For each template, we only consider IIAs negotiated after the II model was published. We calculate the similarity of each article in an II template with all IIA clauses negotiated after its publication. We then record the highest similarity scores detected in order to match each II template article with its most similar article in a negotiated IIA. The result is a table of the highest matched similarities between model articles and IIA clauses, which is displayed as a boxplot in Fig. 3. Each data point in the boxplot visualizes this similarity of the most similar IIA article for each article in a template. For example, the most similar BIT clause to Article 3 of the 1967 OECD Draft Convention is Article 7 of the Indonesia–Netherlands FCN treaty (1968) with a word-based similarity of 68%.<sup>57</sup>

The models differ starkly in how much similarity they display with subsequent treaty clauses. The text of the World Bank Guidelines has been incorporated the least, whereas the AALC drafts produced the overall most similar matched clauses in subsequent IIAs. This does not mean that the impact of the AALC draft is larger than that of other models. In fact, when the same analysis was performed in relation to preceding IIAs, the AALC models already looked more similar to

<sup>56</sup> Skovgaard Poulsen (n 22) 27 ('[the OECD] produced a draft investment convention with ISDS at its core. But rather than following this model, Western states decided to rely on interstate dispute provisions akin to those in trade agreements'); this stands in contrast with the substantive influence the draft is said to have over OECD states' subsequent practice Schill (n 4) 39; Denza and Poulsen (n 4) 275.

<sup>57</sup> Importantly, scoring high in Figure 3 does not mean that a model has high similarity with all BITs (as displayed in Figure 2); only the most similar article is identified and outputted.

existing agreements than all other models to begin with. Differently put, the AALC drafts were strongly influenced by the BITs of their day, while other drafts departed more strongly from the mainstream practice at the time of their elaboration. Another noteworthy finding is that, within templates, clauses differed widely in popularity. This is most pronounced for the IISD model (note the long whiskers in Fig. 3). It contains not only some of the most closely copied model clauses but also the most dissimilar language compared to negotiated texts.

Overall, however, even if measured by the similarity to its closest match, the imprint of II models has been modest at best. The median similarity consistently remains below 60%. Yet, it would be misleading to discount the influence of II templates on IIA texts altogether. The boxplots also reveal that some II model articles were copied to 60% or more with some reaching verbatim territory. We systematically reviewed those high-similarity tail provisions to determine whether there has been copying on salient treaty features. The next section summarizes instances where II templates left such an imprint.

## VI. WHERE II TEMPLATES MATTERED: SHAPING SALIENT TREATY FEATURES

In contrast to the tax regime, IIs taken by themselves have not provided definite blueprints for subsequent negotiated treaties. Yet, II templates have shaped salient features in negotiated IIAs. In this section, we illustrate their impact following the same three-period chronology as above.

### A. Regime formation

II templates shaped selected salient treaty features at the point of regime formation. While the above analysis suggests that the 1967 OECD Draft Convention's imprint on IIA design was small—which is surprising given the claims of influence in scholarship—the OECD template

**Table 2.** Recurrence of specific OECD 1967 article substrings in BITs (emphasis added by the authors)

#### Article 1 Treatment of Foreign Property

- (a) Each Party shall at all times ensure *fair and equitable treatment* to the property of the nationals of the other Parties. It shall accord within its territory the most *constant protection and security* to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by *unreasonable or discriminatory measures*. The fact that certain nationals of any State are accorded treatment more favorable than that provided for in this Convention shall not be regarded as discriminatory against nationals of a Party by reason only of the fact that such treatment is not accorded to the latter.
- (b) The provisions of this Convention shall not affect the right of any Party to allow or prohibit the acquisition of property or the investment of capital within its territory by nationals of another Party.

Search term	Number of treaties	First year mentioned <sup>a</sup>	Last year mentioned
'shall at all times ensure fair and equitable treatment'	107	1978	2014
'fair and equitable treatment'	2744	1950	2021
'most constant protection and security'	43	1950	2003
'protection and security'	1911	1950	2021
'by unreasonable or discriminatory measures'	760	1971	2019

<sup>a</sup>This count includes FCN agreements from the EDIT database to illustrate the pre-BIT origin of some treaty wording.

**Table 3.** Comparison ICSID Clause (1969) and Portugal–Tunisia BIT (1992) (emphasis added by the authors)

ICSID Clause (1969)	Portugal–Tunisia BIT (1992)
Consent to Jurisdiction Version 5 Each Contracting Party hereby <i>agrees to submit any legal dispute</i> arising out of an investment made by a national of the other Party to the jurisdiction of the ICSID for settlement by arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.	Article 8: Submission to the ICSID Each Contracting Party <i>agrees to submit to the ICSID for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States</i> , opened for signature at Washington on 18 March 1965, any legal dispute between the Contracting Party and a national of the other Contracting Party relating to an investment made by that national in the territory of the first Contracting Party concerned.

still helped shape subsequent IIA design. Consider its Article 1 reproduced in Table 2. Based on similarity metrics, the Article hardly left an imprint. Its most similar clause with only 45% similarity is Article 4 of the Switzerland–Thailand BIT (1997). Yet, that relatively low similarity has to do with the fact that the long third sentence of Article 1a as well as paragraph b has not commonly been incorporated in subsequent IIA practice. In contrast, the first two sentences of Article 1a have been reproduced extensively.

Table 2 shows the result of perfect text matches with selected strings in the first two sentences of Article 1a of the OECD 1967 model. Although the OECD Draft did not invent the language—as can be seen from the first year mentioned some of its language was borrowed from earlier FCN treaties concluded in the 1950s—it may have played an important role in consolidating IIA design. Early IIA practice varied significantly both across and within states. The first BIT between Germany and Pakistan (1959), for example, did not contain a clause on ‘fair and equitable treatment,’ which has since become ubiquitous. While the OECD’s investment draft may thus have left less of a mark on subsequent IIAs than its sister draft in the tax domain, it still codified core investment protection terms that continue to be inserted into even the most recent investment agreements.

Similarly, ICSID’s imprint was small when one measures the textual similarity of subsequent treaties with its model clauses. The closest match we could find with an ICSID model clause was 58% of similarity in Article 8 of the Portugal–Tunisia BIT (1992) (Table 3). By other metrics, however, ICSID has been a resounding success. The first BIT to include consent to ISDS under ICSID was Article 11 of the Netherlands–Indonesia BIT (1968), followed by Article 7 of the Chad–Italy BIT (1969). Hence, by the time the ICSID clauses were drafted in 1969, most IIAs did not provide for ISDS before international arbitration.<sup>58</sup> Although contracting states made little use of the model clauses proposed by ICSID, references to ICSID arbitration proliferated significantly in their aftermath. In our corpus, 2373 IIAs refer to ICSID ISDS. ICSID has thus been extremely successful in promoting its services even if its model clauses have inspired few followers.

### B. Failed contestation and successful affirmation

As noted above, the 1960s to 1980s saw developing states contesting core normative pillars of the emerging BIT regime. Controversial issues concerned the appropriate venue for dispute settlement between investors and host states and the standard of compensation for expropriation.

<sup>58</sup> See generally, Jarrod Hepburn and others, ‘Investment Law before Arbitration,’ 23 *Journal of International Economic Law* 929 (2020).

While AALC Models A and C enshrined existing practice, Model B codified alternatives based on the New International Economic Order into draft language.

First, AALC Model B provided an alternative to ISDS. While Models A and C incorporated model language for ISDS before ICSID, Model B stipulated in Article 9 that investor-state disputes must be settled exclusively before domestic courts. Second, the liberal Model A refers to ‘prompt, adequate, and effective compensation’ in cases of an expropriation, understood to represent the full market value of an investment. In contrast, the more restrictive Model B refers to ‘appropriate compensation’—the term used in the ‘New Economic Order’ resolution to denote a lower, more discretionary standard of compensation.

Importantly, these efforts in Model B to displace dominant language were unsuccessful. We did not find any IIA that took up the language of AALC Model B Article 9’s use of exclusive domestic remedies for ISDS although one treaty came close. The negotiators of the South Korea–Turkey BIT (1991) apparently looked closely to the AALC templates when designing the BIT. The treaty has seven articles that are the closest match in our database to the AALC models, and it is the only IIA in our corpus that has a provision entitled ‘Access to courts and tribunals’ that copies extensively from the AALC Model A (Table 4). However, the BIT does not mandate an exclusive recourse to domestic courts as contemplated in Model B and instead provides for international investment arbitration. In general, developing states, including in agreements among themselves, referred to ISDS and ICSID instead of using the language of Model B.

The AALC Model B was similarly unsuccessful in displacing the standard of compensation. While 73 BITs refer to ‘appropriate compensation’ in our dataset, the term changed its original ‘New International Economic Order’ meaning and morphed into another way to express the full market value standard. The France–China BIT (1984), which is the first BIT to use that language, illustrates this shift. It speaks of ‘appropriate compensation’ in Article 2(2) while adding that the ‘formula for calculating the compensation payment and the specific methods shall be formulated in the Annex.’ The Annex, in turn, states unambiguously that the ‘amount of compensation mentioned in Article 4 (2) shall be equivalent to the real value of the relevant investment.’

**Table 4.** Comparison AALC A Model (1985) and South Korea–Turkey BIT (1991) (emphasis added by the authors)

AALC Model A (1985)	South Korea–Turkey BIT (1991)
Article 9: Access to courts and tribunals	Article 9: Access to courts and tribunals
The nationals, companies or State entities of one Contracting Party shall have the right of access to the courts, tribunals both judicial and administrative, and other authorities competent under the laws of the other Contracting Party for redress of his or its grievances in relation to any matter concerning any investment including judicial review of measures relating to expropriation or nationalization, determination of compensation in the event of expropriation or nationalization, or losses suffered and any restrictions imposed on repatriation of capital or returns.	The nationals or companies of one Contracting Party shall have the right to access to the courts, tribunals, both judicial and administrative, and other competent authorities under the laws of the other Contracting Party.

**Table 5.** Comparison IISD Model (2006) and Morocco–Nigeria BIT (2016)

IISD Model (2006)	Morocco–Nigeria BIT (2016)
<p>Article 17: Investor liability</p> <p>Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.</p>	<p>Article 20: Investor liability</p> <p>Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.</p>

The 1992 World Bank Guidelines completed the coopting of the term. Article IV in the relevant parts states that (emphasis added by the authors):

1. A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of *appropriate compensation*.
2. Compensation for a specific investment taken by the State will, according to the details provided below, be *deemed 'appropriate' if it is adequate, effective and prompt*.
3. Compensation will be *deemed 'adequate' if it is based on the fair market value* of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known.

This highlights then yet another way IIs may influence IIA design. They can enshrine a particular interpretation of an established term in order to displace or affirm a particular meaning.

### C. Regime reorientation

Whereas the legacy of the 'New International Economic Order' thus left no discernible mark on IIA texts, contestation efforts by non-governmental organizations in the 2000s seem to have born more fruit in reorienting the regime. As noted above, negotiated IIAs have become progressively more similar to the CUTS and the IISD models. While we did not find any evidence of direct copying from salient features of the CUTS text,<sup>59</sup> the IISD template inspired subsequent copying on innovative issues not addressed in earlier IIAs.

This is most obvious when it comes to investor responsibility. No such provision existed in IIAs prior to the 2006 IISD model. The article on investor responsibility in the IISD draft is identical to the article of the same name in the Morocco–Nigeria BIT (2016) (see Table 5). Other sovereignty-oriented clauses of the Morocco–Nigeria BIT with no equivalents in pre-2006 IIAs also show a high similarity to the IISD template, such as its article on corporate social responsibility (76% similarity), corporate governance and practices (54%), and the state's right to regulate (54%). The IISD template therefore seems to have influenced the drafting of the Morocco–Nigeria BIT. The IISD model also appears to have inspired verbatim copying in other IIAs. The ECOWAS Supplementary Act on Investments (2008) copied extensively from the IISD draft (55% overall similarity) and includes a carbon copy of articles on investor liability

<sup>59</sup> In case of the CUTS, the highest matched article on 'applicable law' is a standard clause that predates the model and that can be found in the India–Kyrgyzstan BIT (1997).



(ECOWAS Article 17), the maintenance of environmental standards (ECOWAS Article 20), and investor liability in the home state (ECOWAS Article 31).

Since IISD is active in providing technical assistance to developing countries on investment law, it is conceivable that the NGO helped draft parts of the ECOWAS Supplementary Act and Morocco–Nigeria BIT. In any event, given the extensive verbatim text reproduction, it is evident that the IISD text shaped salient parts of subsequent IIA texts and introduced new features hitherto absent in the regime.

## VII. DISCUSSION

This article has studied the imprint of II treaty models on negotiated IIAs. We have found that states generally have not used entire II templates as blueprints for their own treaty-making. Compared to other regimes, and especially the structurally similar tax regime where II templates are extensively copied in negotiated agreements, the textual imprint in the investment universe is relatively low. However, this article also shows that on specific salient features and novel clauses, the imprint of IIs is noticeable. Of all the models investigated, the IISD model has inspired the most comprehensive copying of entire clauses (on investor obligations and liability as well as corporate social responsibility), although the number of treaties that have taken up that language remains small. Conversely, hundreds of IIAs copied from the 1967 OECD Draft Convention but only borrowed few snippets from its text—but those snippets concern core investment treaty obligations, such as fair and equitable treatment, that have since been litigated extensively in ISDS practice. Again, not only other templates, such as the CUTS Draft or the World Bank Guidelines, but also efforts to introduce New International Economic Order language through the AALC Model B had no discernible imprint on treaty practice.

In this concluding section, we reflect on these findings by exploring potential explanations for the modest impact on the level of entire model treaties, discuss the fact that in recent years IIs have abstained from offering new models, and identify specific areas for future research.

First, what could explain the modest impact of II investment treaty models on the aggregate level compared to neighboring regimes, such as tax or trade? One observation is that the number and importance of IIs within these regimes differ. It is not surprising that the OECD has been called the ‘informal World Tax Organization,’<sup>60</sup> because it serves as a focal point for international tax governance. Tax officials meet regularly, exchange views on best practices, and update the OECD tax model. This influence is so pronounced that even rival templates, such as the UN tax model, closely follow the OECD tax model.<sup>61</sup> A similar preeminence of the WTO (and its fore-runner organization, the General Agreement on Tariffs and Trade (GATT)) in the trade regime explains in part why the WTO Agreements heavily influence the text of Preferential Trade Agreements. It is the only multilateral organization that is tasked to develop trade rules and has been backed up for a long time by a dispute settlement system that provides additional authority to GATT and WTO rules.

In contrast, no single II has been able to rise to similar prominence in the investment regime. Instead, we observe competition among IIs across several axes: procedural (ICSID) versus substantive (OECD); developing (AALC) versus developed (OECD); pro-investor (World Bank and OECD) versus pro-state (CUTS and IISD). In addition, we see both governmental and non-governmental organizations that strategically engage in promoting different types of treaty models. This pronounced competition makes it more challenging for any single II to dominate.

<sup>60</sup> Arthur J. Cockfield, ‘The Rise of the OECD as Informal World Tax Organization through National Responses to E-Commerce Tax Challenges’, 8 *Yale Journal of Law & Technology* 136 (2006).

<sup>61</sup> Philipp Genschel and Thomas Rixen, ‘Settling and Unsettling the Transnational Legal Order of International Taxation’, in Terence C. Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (New York: Cambridge University Press, 2015) 161.

A second observation is that while the last decade has seen unprecedented activities in relation to IIA reform, no new II templates have been developed. States have denounced IIAs, renegotiated them, issued new national model treaties, and launched major regional and multi-lateral negotiations and reform efforts.<sup>62</sup> So where have IIs been? Have states been looking out for model inspirations? What could explain this puzzling absence? One potential explanation could be that it has become more difficult for IGOs to agree internally about the ‘right’ model. This likely has to do with the fact that templating is risky. It involves taking a policy stance at a time when the IIA practices by individual states diverge, potentially upsetting key stakeholders. At the same time, this could provide opportunities for INGOs where politicization and states’ influence are less pronounced and veto players within IIs are less powerful.

IIs have nonetheless not been absent when it comes to positioning themselves on IIA reform. Instead of formulating preferred templates, however, they seem to increasingly rely on orchestration efforts. UNCTAD’s investment policy work over the past decade illustrates this strategy well. In 2012, UNCTAD published its Investment Policy Framework for Sustainable Development (IPFSD).<sup>63</sup> The document outlined a set of core principles to align IIAs with sustainable development goals. These principles are kept vague and include items such as ‘balanced rights and obligations’ or ‘right to regulate.’ Instead of proposing model language to flesh out these principles, the document offers a table of general policy options broken down by IIA clause that states can choose from. These options range from pro-investor to pro-state and are thus only loosely connected to the core principles described earlier.

The IPFSD explicitly refrains from telling states what treaty language to choose. As the document states ‘[t]his table [of policy options] is not meant to identify preferred options for IIA negotiators or to go so far as to suggest a model IIA.’<sup>64</sup> Compared to a model, this approach allowed UNCTAD to have its cake and eat it too. On the one hand, it ensured that the framework did not upset any state that may disagree with a more investor- or state-friendly option. On the other hand, it allowed UNCTAD to assert substantial influence over treaty design. In its 2019 World Investment Report, the organization, for example, claimed that ‘UNCTAD reform tools are shaping modern treaty-making’<sup>65</sup> because states were incorporating some of the options identified in the framework.

UNCTAD’s IPFSD may well have encouraged subsequent negotiators to consider sustainable development objectives more explicitly. However, given the document’s vagueness and breadth of options from pro-investor to pro-state, the impact is difficult to measure empirically. The episode, however, underscores the advantages for IIs to prefer indirect forms of orchestration over direct templating and helps explain the absence of II model treaties in recent years.

Finally, turning to future research, two inter-related issues warrant further study. First, there is a need to develop a better theoretical understanding of why IIs table treaty models in the first place. Are there universal explanations that can explain the strategic behavior of both IGOs and INGOs or do we need to distinguish between different types of IIs? In other words, what is the purpose of promoting II-specific models and do they differ between governmental and non-governmental IIs? Further research could unpack the conditions under which IIs issue templates. Existing strategies may range from trying to consolidate very different and contradicting rules addressing problems of regime complexity, to being a trend-setter with novel models

<sup>62</sup> Sergio Puig and Gregory Shaffer, ‘Imperfect Alternatives: Institutional Choice and Investment Law Reform’, 112 *American Journal of International Law* 361 (2018).

<sup>63</sup> UNCTAD, ‘Investment Policy Framework for Sustainable Development (IPFSD)’, (2012), [https://unctad.org/system/files/official-document/diaepcb2012d5\\_en.pdf](https://unctad.org/system/files/official-document/diaepcb2012d5_en.pdf) (visited 24 October 2022).

<sup>64</sup> Wolfgang Alschner, ‘Sense and Similarity: Automating Legal Text Comparison’, in Ryan Whalen (ed), *Computational Legal Studies* (Edward Elgar Publishing, 2020), 44.

<sup>65</sup> UNCTAD, ‘World Investment Report 2019: Special Economic Zones’, 105, [https://unctad.org/system/files/official-document/wir2019\\_en.pdf](https://unctad.org/system/files/official-document/wir2019_en.pdf) (visited 24 October 2022).

to position the II as an innovator, or to simply repackage the 'model' interests of the dominating stakeholders within an II.<sup>66</sup> Focusing more on internal II politics (both within INGOs and IGOs) will allow to better understand how models emerge and what role power, bureaucratic culture, internal organization, or epistemically-developed norms play in the definition of II models. Does it make a difference whether an IGO, like the OECD, needs endorsement by its member states or whether an IGO, like the World Bank, relies on fairly autonomous staffers of the organization to produce guidelines? Empirically, the focus would then also turn to the determinants of IIs templates to assess how much II templates are a result of existing treaties, templates by states, or templates by other IIs.

The second issue relates to the determinants of success of II templates. Why are some model clauses copied verbatim whereas others are never picked up by future negotiators? A related question is how to define and then measure success in the first place? Verbatim copying when it is extensive enough is fairly easy to measure and allows making convincing inferences of an II imprint. However, that may set the bar unduly high. In addition, when attempting to establish a causal relationship to II templates, it is important to control for the number and design of existing treaties and templates that are a result of the past state treaty practice. IIs source some of their templates from the past IIAs and potentially existing national model IIAs. The later an II proposes treaty language, the more it can theoretically source from these models or existing treaties. Related to controlling for what influence the past IIAs and models have on II model treaties is the question of how to disentangle direct from indirect textual imprint effects. If countries use models, they might focus on practice by other countries they deem appropriate, therefore importing II language without deliberately deciding to do so. Similarly, they might import II models that are partially copy-pasted from earlier state-to-state practice not knowingly adopting other states' models. Finally, states may copy-paste II language into their national model texts but are ultimately unsuccessful in convincing their counterparty to agree to the same language resulting in a lacking imprint on negotiated texts, although the II successfully shaped state preferences.

In sum, understanding and exploring the motives of different IIs, exploring determinants of success and failure, and working on establishing causality in textual imprint are natural next research steps resulting from our study.

<sup>66</sup> The concept of 'laundering' as described by Abbott and Snidal falls in the last category. In other words, the IGO is doing the 'dirty work' for a powerful or set of influential members, see Abbott, Kenneth, and Duncan Snidal. 'Why States Act through Formal International Organizations' 42 *Journal of Conflict Resolution* 3 (1998).