# INTERNATIONAL INVESTMENT AND MULTILATERAL AGREEMENT ON INVESTMENT RELATED WITH OECD- A CRITICAL ANALYSIS

## INTRODUCTION

The Organization for Economic Co-operation and Development (OECD) members secretly negotiated a draft of the Multilateral Agreement on Investment (MAI) between 1995 and 1998[1]. With no regard for local laws or citizen rights, it aimed to create a new set of universal investment regulations that would provide companies unrestricted access to global financial activities. In the draft, businesses were given the ability to sue governments if national laws protecting the environment, labour, or health jeopardised their interests. Civil society organisations and developing nations vigorously opposed the agreement when its draft was made public in 1997, especially because of the potential that it would make it challenging to regulate foreign investment. The host country France indicated in October 1998 that it would not support the agreement, essentially delaying its ratification as a result of the OECD's consensus procedures. This came after the treaty's detractors launched a fierce international campaign against the MAI.

## LITERATURE REVIEW

The paper titled "The development implication of the Multilateral Agreement on Investigation" authored by E.V.K. FitzGerald, R- Cubero Brealey and A. Lehmann have taken into consideration that a global investment agreement's membership will benefit developing nations. This is the ideal strategy to promote long-term, productive capital generation by domestic and international businesses in a global economy that will support sustainable development..

The paper titled "Multilateral Agreement on Investment: Lesson for the WTO from the failed OECD negotiations" written by Eric Neumayer has taken into account the incisive criticism from NGOs and the more thorough criticism from legislative inquiries. It makes the case that both parties have a variety of false impressions about the effects the MAI would have actually had.

The paper titled "The rise and fall of Multilateral Agreement on Investment: Where Now?" authored by Peter T. Muchlinski has taken into consideration a new set of regulatory concerns

[1] Forum, James Paul - Global Policy. "Multilateral Agreement on Investment". www.globalpolicy.org. (Dec 2, 2022, 5:30 a.m.)

which has emerged as a result of the growing integration of global business through both international commerce and foreign direct investment, which are mostly carried out by multinational corporations.

The paper titled “The Multilateral Agreement on Investigation” written by Stephen J. Canner has taken into account the goal of the negotiations which was to create global investment regulations, akin to the trade regulations found in the GATT and WTO. Specific investment regulations and the easing of limitations would boost market competitiveness and economic efficiency, promote a more widespread distribution of money and technology, and promote economic growth and a higher quality of living globally.

The paper titled “Move away from BITs framework: a need for multilateral investment treaty” authored by Malebakeng Agnes Forere has taken into consideration to assess the merits of a multilateral treaty that will consider the needs of both developed and developing nations, as developed countries seek to protect their international investments, while developing countries seek to attract investment, be able to regulate, and most importantly, limit access to international arbitration.

## RESEARCH OBJECTIVE

- To study and analyse the Multilateral Agreement on Investment and their relation with Organisation for Economic Cooperation Development (OECD)
- The aim is to understand the relation of Multilateral Agreement and Bilateral Agreement and their influence on international investment

## RESEARCH QUESTIONS

- What are Multilateral Agreement on Investment and its background?
- What is the purpose and provision of OECD?

## HYPOTHESIS

In the light of research objective and research questions the hypothesis formed is:

Wheather Multilateral Agreement and its negotiation with OECD affect International Investment?

# METHODOLOGY

This paper is the outcome of exclusively doctrinal research. The study of doctrine involves theoretical research, which makes use of journals, articles, newspapers, websites, books, and other sources to demonstrate the methodology of the study.

The reason this technique of study is chosen is that it is less time-consuming, more thorough, and most importantly, it deals with library research in general. In reality, it is among the best techniques to use in order to obtain genuine material because it offers a variety of problems-solving options. This research will aid in developing an authentic and comprehensive understanding of society as a whole, allowing for the development of clear conclusions that will further aid in understanding the role of the media as a crucial tool for societal debate.

Since the information for this project came from secondary sources, it is organized to provide the research an appropriate structure.

The sources used to support the thesis, i.e. written work, research in libraries. The information gathered includes: • Books • Articles • Journals

These facts are further supported by research and reference materials that are online

## Background

When negotiations for the draft Havana Charter (1948) were in their early stages, the necessity for a multilateral framework for investment was heavily argued and discussed. The final agreement, however, limited the provisions on investment to national level regulations as a result of major capital exporting countries' displeasure with a number of limitations on the rights of investors to fair treatment and protection. However, it was decided then that investment would be handled at the bilateral and/or regional treaties on investment since it was clear by the end of 1950 that the envisaged multilateral trading platform International Trade Organisation (ITO) would not take shape. Investment was therefore not covered by the GATT Agreements[2].

For more than a century, there have been numerous types and levels of international direct investment[3]. The 1920s saw the beginning of efforts to create a framework for the protection of

[2] The other three issues are: Competition policy; Trade facilitation and Government procurement.
[3] Lipson, Charles (1995). Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries. Studies in international political economy. Vol. 11. University of California Press. p. ?. ISBN 978-0-520-03468-6.

foreign investments, most notably through the negotiation of a League of Nations draft convention[4]. Bilateral investment treaties (BIT), which are negotiated between two countries and which set down the ideal conditions under which investment might occur between them, were essential in the development of investment protection beginning in the second half of the 20th century. The first BIT was signed in 1959[5] between West Germany and Pakistan, and since then, their numbers have continuously increased despite research suggesting that BITs have minimal effect on boosting foreign investment[6]. In the framework of the United Nations, the International Centre for Settlement of Investment Disputes (ICSID) was founded in 1965. The OECD also prepared the Draft Convention on the Protection of Foreign Property in 1967, but it was not accepted.

After it became clear that the Uruguay Round's Agreement on Trade Related Investment Measures (TRIMS), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and General Agreement on Trade in Services (GATS) addressed only some investment-related concerns and limitations, countries and investors sought more regulation for security, certainty, and mobility for their investments, leading to a rapid increase in the number of bilateral investment agreements during the 1990s[7]. The World Bank also adopted Guidelines on the Treatment of Foreign Direct Investment in 1992 in addition to these tools[8]. The Energy Charter Treaty gave an example of a global investment pact in 1994, although it was only applicable to the energy industry.

Noam Chomsky argued that alternative fora with more inclusive membership, such as the United Nations Conference on Trade and Development (UNCTAD) and the World Trade Organization, were less vulnerable to direct influence by transnational corporate forces than the OECD because it only includes wealthy nations (WTO).[9]

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[4] Picciotto, Sol (1998). "Linkages in International Investment Regulations: the Anatomies of the Draft
Multilateral Agreement on Investment" (PDF). University of Pennsylvania Journal of International Economic Law. 19 (3): 731–768. (Dec 2, 2022, 8:54 a.m.)

[5] Dolzer, Rudolf; Stevens, Margrete; Disputes, International Centre for Settlement of Investment (1995). Bilateral investment treaties. Martinus Nijhoff Publishers. p. 1. ISBN 978-90-411-0065-8.

[6] Hallward-Driemeier, Mary (1995). "Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite" (PDF). World Bank Policy Research Paper № 3121, June 2003. World Bank: 9.The author notes that Brazil has never signed a BIT. (Dec 2, 2022, 11:32 a.m.)

[7] Witherell, William H. (1995). "The OECD Multilateral Agreement on Investment" (PDF). Transnational Corporations. United Nations Conference on Trade and Development. 4 (2): 1–14. ISSN 1014-9562. (Dec 2, 2022, 2:49 p.m.)

[8] Sornarajah, M. (2004). The international law on foreign investment. Cambridge University Press. p. 291. ISBN 978-0-521-54556-3.

[9] Domestic Constituencies Z Magazine May 1998, at chomsky.info

## **Purposes and provisions**

The OECD Ministerial Council authorised the negotiations with the goal of establishing "a comprehensive multilateral framework for international investment, with high standards for the liberalisation of investment regimes and investment protection, and with effective dispute-settlement mechanisms." The objective was to improve investment conditions by establishing more uniform, transparent, and enforceable investment regulations.The objective was to create an open agreement to which non-OECD members might accede on a negotiated basis, even if the agreement was to be negotiated amongst the member states.

One of the main goals of the deal, according to MAI advocate Sergio Marchi, who at the time served as Canada's Minister of International Trade, was to do away with the "patchwork" of investment regulations contained in the then-1300+ bilateral investment treaties. He contended that the MAI, in contrast to many detractors, would aid in preventing a "race to the bottom" that would erode the high standards of Canadian legislation[10]. To be more precise, the agreement would:

Reduce the number of different state regulations that control the circumstances under which international firms may invest. (In this regard, the agreement represented adoption of a compliance regime that forbids the so-called ratchet effect and requires liberalisation to go forward at all times. So-called rollback and standstill clauses would be used to enforce this in order to guarantee investors' access to markets. These clauses mandated that nations stop passing any rules that contravened the MAI requirements in the future and to do so immediately or over a specific amount of time[11].

Allow firms to get compensation for loss of profit caused by discriminatory or unfair investment circumstances that have been proven. Allow nations and businesses to submit any disputes arising under the agreement to international arbitration (for example, through the International Centre for Settlement of Investment Disputes) rather than the national courts in the host state[12].

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[10] Marchi, Sergio (1997-11-10). "The MAI Debate: YES: Canada Needs Clear Investment Rules". Montreal Gazette: B3.

[11] Mechanisms for standstill, rollback and listing of country specific reservations Note by MAI Negotiating Group chairman, OECD,

[12] OECD, Negotiating Group on the Multilateral Agreement on Investment, Draft Consolidated Text of 11 February 1998, document DAFFE/MAI (98)7, pp. 58-64.

The Business and Industry Advisory Committee to the OECD (BIAC) and the Trade Union Advisory Committee to the OECD both endorsed the MAI (TUAC). TUAC was engaged in establishing norms for employment and labour relations, whereas BIAC was focused in the steady and consistent treatment of investments.

**Negotiations**

The OECD's Ministerial Council formally initiated the Multilateral Agreement on Investment discussions in May 1995, and they got going in September of that same year[13]. A high-level negotiating team made up of representatives from the OECD member states handled the negotiations, working outside the organization's committee structure and liaising with the non-member nations. Frans Engering (Netherlands) served as the group's chairman, and Al Larson (United States) and A. Saiki served as vice chairperson (Japan). The OECD Ministerial Council set a target of completion date for the negotiations to mid-1997.

Before a draft of the agreement was made public in March 1997, the public was mostly unaware of the specifics of the MAI negotiations[14]. Various NGOs from around the world criticised the material that was leaked. The negotiations ultimately collapsed in 1998 as a result of pressure from a large movement of NGOs, citizen groups, and several governments of developing nations. First France withdrew, then other countries did so in turn. The negotiations were formally put on hold in April 1998 for a period of six months. The OECD declared that "negotiations on the MAI are no longer taking place" on December 3, 1998[15].

**Protest movement**

In comparison to workers and people, multinational companies (MNCs) enjoy significant structural and resource advantages. However, a global coalition of activists blocked the MNCs and major countries from extending these benefits through the Multilateral Agreement on Investment (MAI). In order to spread awareness, exchange information, and plan strategies, MAI opponents made extensive use of email and the Internet. While MNCs and governments worked covertly and according to more conventional hierarchical frameworks, they worked collaboratively, were flexible, and used their imaginations to achieve their goals[16].

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[13] Geddes, John (1995-05-19). "Opening the Gates to Capital". Financial Post: 14.

[14] Smythe, Elizabeth (1998). "Your Place or Mine? States, International Organizations and the Negotiation of Investment Rules" (PDF). Transnational Corporations. United Nations Conference on Trade and Development. 7 (3): 112. ISSN 1014-9562. (Dec 4, 2022, 10:34 a.m.)

[15] Neumayer, Eric (1999). "Multilateral Agreement on Investment: Lessons for the WTO from the failed OECD-negotiations" (PDF). Wirtschaftspolitische Blätter. 46 (6): 618–628. (Dec 4, 2022, 12:56 p.m.)

[16] Varney W; Martin B. Net Resistance, Net Benefits: Opposing MAI in Social Alternatives, Vol. 19, No. 1, January 2000, pp. 47-51.

The first time that such large-scale agitation used the Internet was during the global demonstrations against the MAI. The internet played a key role in disseminating important information among members of a huge global network. The movement's fundamental claim was that the most powerful politicians and mass media had a stake in the MAI. Even their adversaries, regrettably, had to admit that the activists had analysts and leaders who were very skilled, persuasive, and had the ability to employ the new internet technology to deadly effect. "These organisations have polished and disseminated to all countries an anti-MAI attitude that is now voiced in similar terms throughout the varied countries of the OECD," said French MEP Catherine Lalumière[17]

**Active opposition**

The most effective opposition to the MAI, according to Theodore H. Cohn in Global Political Economy Theory and Practice (2005), was started by a large coalition of civil society NGOs. The protection of human rights, labour and environmental norms, and least developed countries, according to these NGOs, would be threatened by the MAI. Particularly worrying was the possibility that the MAI might lead to a "race to the bottom" among nations prepared to slash their labour and environmental standards in order to win over global investment. Katia Tieleman traced the history of organised opposition in her UN case study from 2000:

There were a few people who were in the forefront of the opposition to the MAI from the beginning, and they continued to be so as it developed. Martin Khor, the director of the Third World Network in Malaysia, acquired a document from the European Commission by the end of 1996 (Commission of the European Communities 1995: A Level Playing Field for Direct Investment World Wide, March 1, Brussels) that had been prepared for the OECD Ministerial meeting in May 1995 as well as for upcoming WTO negotiations. Mr. Khor deduced from the text that the OECD may be hosting multilateral investment negotiations, which his organisation as a member of a sizable coalition opposed at the WTO. He alerted a few NGO colleagues, including Tony Clarke, the director of the Canadian Polaris Institute.

The copy of MAI draft was obtained by Tony Clarke. In February 1997, he uploaded it to the le Forum international sur la globalisation email distribution list after "making the text into a readable paper and adding an analysis and interpretation" [source: interview with Tony Clarke, Brussels, April 28].

The document was posted online by the American NGO Public Citizen Global Watch. Harvard Law School alumna Lori Wallach rose to prominence as one of the campaign's most powerful and

[17] Lalumiere Report in English at webcitation.org

influential organisers. Building on her legal credentials, she reworded the official OECD documents into understandable language that was frequently "ready for use" in the ensuing NGO campaigns. She held a position of authority in the campaign due to her dual roles as an information and an explanation supplier. She would call the effort the "Dracula Strategy," with the implication that merely bringing the MAI project to light would be sufficient to end it (sourced to an interview with Susan George). NGOs demonstrated their strong connections. The document was quickly spread, and many things happened around the world. The fight against the MAI officially began[18].

NGOs organised a powerful and broad opposition made up of consumer advocates, labour and environmental groups, and human rights organisations using a number of websites.

## Arguments

Opponents of the MAI said that it would result in a "race to the bottom" in terms of environmental and labour norms, posing a threat to national sovereignty and democracy. The MAI drew criticism because it appeared to create a new body of universal investment laws to guarantee corporations excessive powers to buy, sell, and conduct financial operations throughout the world, significantly weakening national laws, such as those concerning environmental protection, labour standards, and human rights established in developed countries. According to their justifications, the draft proposed a tribunal for resolving investor-state disputes in the manner of the North American Free Trade Agreement, where corporations could file lawsuits against governments if laws (such as those pertaining to national labour, health, or environmental policy) threatened their interests or were seen as expropriating actual or potential assets and/or profits.[19]

## Mark Vallianatos, of Friends of the Earth, argued that:

The MAI would limit the government's authority to regulate foreign multinational corporations' involvement in particular industries. For instance, the Philippines now forbids foreign investment in rural banking, and Honduras only allows foreign investors to hold a limited position in the forestry sector. Within the MAI, these limitations would not be acceptable.

The agreement would establish "national treatment" as the standard for foreign investment, according to which governments must treat foreign businesses favourably. Indeed, international firms may occasionally enjoy more safeguards than domestic investors. "The MAI prohibits many

[18] The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public" (PDF). By K. Tieleman (2000).

[19]"SPECIAL COMMITTEE ON THE MULTILATERAL AGREEMENT ON INVESTMENT FIRST REPORT". Queen's Printer, Parliament of British Columbia. December 02,2022

different performance standards or criteria, even if they are placed on local businesses. "The MAI is important because its regulations can be upheld. Examples of prohibited conditions include requiring investors to form a partnership with a local business and mandating a minimum number of local employees. These kinds of policies are used by governments to help ensure that local people benefit from foreign investment.

Foreign investors have two options if they believe a country in which they have investments is breaking the MAI: they can complain to their own government, which can then take the host country to binding international arbitration, or they can directly challenge the host country. The arbitration process is over in any scenario[20].

## Growing Bilateralism and its Influences

According to the World Investment Report 2003, there were 1330 BITs in 1997. By 1999, the number had increased to 1856, continuing an upward trend. As of 2003, some estimates have it at around 2000. The growing number of BITs in the 1990s was largely between emerging nations. For instance, of the 96 countries who signed BITs in 1999 alone, 32.0 percent were between developed and developing countries, while 49.0 percent were between developing countries[21]. In contrast to prior agreements that were based on FCN (Friendship Commerce and Navigation), an important feature of these new investment treaties is that the majority of them are a part of a greater globalisation push to liberalise the investment. Generally speaking, the structure and substantive coverage of bilateral investment treaties[22] are very similar. The extent of application, admission of investment, general and specific norms of treatment, and dispute resolution are essential components of all these treaties. However, some comparison analyses of the content of these accords[23] point to a few areas where there may be significant consensus.

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[20] Mark Vallianatos (Friends of the Earth), July, 1997. From the IRC (International Relations Center) "Multilateral Agreement on Investment".

[21] UNCTAD, 2000, World Investment Report 2000: Cross Border Mergers and Acquisition and Development, United Nations Conference on Trade and Development, Geneva, pp.8-10.

[22] The texts of bilateral investment treaties can be found in a loose-leaf collection published by ICSID, Investment Promotion and Protection Treaties. The UNCTAD Compendium, Volume III, reproduces model bilateral investment treaties used by some countries.

[23] See, for example, Organization of American States, Trade Unit, op.cit.; UNCTAD, Bilateral investment treaties and their relevance to a possible multilateral framework on investment: issues and questions, TD/B/COM.2/EM.1/2, 21 March 1997; R. Dolzer and M. Stevens, Bilateral Investment Treaties (The Hague, Boston, New York, 1995); United Nations Centre on Transnational Corporations and International Chamber of Commerce, Bilateral Investment Treaties 1959-1991 (New York, United Nations, 1992); M.I. Khalil, "Treatment of Foreign Investment in Bilateral Investment Treaties", ICSID

## Proposed Multilateral framework on investment (MFI): flexibility for development

There was a resurgence of attempts to include "investment" under the wing of the multilateral regulatory framework after the failed attempt in the Havana Charter and by the end of the 1970s, under the aegis of the Development Committee (The World Bank and International Monetary Fund). The establishment of the Multilateral Investment Guarantee Agency (MIGA) in 1988 was the first step in this approach. Finally, in 1994, the Uruguay Round settled four sets of Agreements under the auspices of the GATT and WTO trading systems, notwithstanding the poor countries' initial resistance. These are:

1.Trade-Related Aspects of Investment Measures (TRIMs),

2.General Agreement of Trade in Services (GATS),

3.Trade-Related Intellectual Property Rights (TRIPs);

4.Agreement on Subsidies and Countervailing Measures (ASCM): and

5.Existing S & D provisions under the Marrakesh Agreements.

These were all connected in some way to problems with investments. The approaches to a global framework on investment, however, vary significantly among the current Agreements. One such fundamental difference is the difference between the US model's and the EC model's methods of operation[24]. These variations are based on the pre- and post-establishment rights of both investors and investments

## Groups' fundamental interests and the difficulties with flexibility

Because of factors such as a lack of capital, a technological gap, and the need to promote exports in order to achieve development goals, the emerging economies (DEs)[25] are more dependent on

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Review - Foreign Investment Law Journal, Vol.7, No. 2, Fall 1992, pp.339-383. Document WT/WGTI/W/21 includes a report on an UNCTAD expert meeting on bilateral investment treaties held in May 1997. A comprehensive study of bilateral investment treaties by UNCTAD is forthcoming.

[24] These two approaches differ because, one takes a post establishment approach (European) and the other takes a pre-investment approach, i.e. national treatment for the right to enter and establishment.

[25] The preamble to the Agreement on Trade-Related Investment Measures makes on clear distinction between developing and least developed countries, reducing the scope for developing countries special treatment. However, in the Doha Ministerial Declaration, all Member agreed to provide this distinction, in paragraph 21, in the context of enhanced support for technical assistance and capacity building. This in itself is a good beginning point for special and differential treatment under the WTO framework.

FDIs. The entire "development objective" in these economies is built on "catching-up syndrome," with the first goal being to catch up to the industrialised countries' development and the second goal being to catch up to the development made by the economy that came before it. The biggest flaw in this "race to the top" is that, in many instances, the two main participants in the game of capital mobility—investors (with surplus capital, primarily in developed economies) and recipients of capital (developing economies)—operate on uneven playing fields. There is concern that the flexibility of developing countries in light of their development priorities is becoming increasingly constrained by the numerous international agreements, such as the Agreement on TRIMS and the OECD's Multilateral Agreement on Investment (MAI), which are being pushed across the table in various shapes[26]. The European Community, OECD, NAFTA, and APEC all have rather advanced levels of investment protection, therefore the demand for a multilateral framework on investment was growing with the creation of the WTO and the Agreement on TRIMs. These industrialised nations have varying views on a variety of topics, including macroeconomic policies, agricultural subsidies, and the general management of the global recession. The three major markets of Japan, the United States, and the European Union are becoming more distinct on the topic of the global slowdown in 2001[27].There are significant differences on the topic of future direction as well as the issue of dominance in terms of this direction as a result of the global slowdown and the crash in the technology industry in the United States and Europe.

Three fundamental objectives that lie over a fundamental scale of equality and greater welfare can be used as a shorthand way to describe the difficulties that the international movement of capital faces. Which are:

1. The demand for a system that offered multinational corporations (private sector) who invest in developing countries assured returns and security;

2. Low-cost, high-quality consumer goods for developed markets (maintaining current high levels of life); and Essential household requirements (improving the living conditions of the vast majority) in underdeveloped developing economies.

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[26] There is an ongoing debate on trade centered Investment policies to that which has a larger context with respect of international relations. The effects that trade policies can have on FDI decisions is the broader question which is being raised, in assessing and enhancing the development dimension of national and international economic policies.

[27] Financial Times, 2001, “Fabius Blames US for World Slowdown”, July 7/8 2001, p.1, 2, 10 & 12.

## Methods for Increasing Flexibility in the Multilateral Framework Investment (MFI)

The settling of competing positions of the established and emerging economies would be the fundamental method of flexibility. The fierce competition among emerging nations to host (attract) capital flows is another challenging circumstance brought on by liberalisation and globalisation. This phenomena has significantly heightened the struggle among developing nations to draw the greatest amount of capital from the sources of available capital surplus, i.e., both developed and developing economies. The dialogue between these two major parties, in which they acknowledge the need for both parties to reach a common minimum programme with a bigger agenda of overall growth and development of the global economy, will provide the answer. Given their close relationship, investment and development are essential components of any growth plan. Due to the fact that relying solely on the "external economy" for investment (FDI and portfolio investment) is not always a workable model, efforts to supplement it with domestic resources should also find workable policy space in such discussions.

However, the OECD-MAI and the new BITS framework that form the basis of the proposed MFI's purview clearly emphasise three distinct sets of issues for developing nations. These include issues with the general conception of rights and obligations, the extent and definition of investment, the dispute resolution process, and issues with special and discriminatory treatment. The use of terminology like "code" has caused a reaction in industrialised nations, who instead prefer the use of phrases like "guidelines," which unmistakably indicate a voluntary approach to obligations and further a clear legal protection when it comes to the question of rights. Such strategies don't give any multilateral agreement a fundamentally strong foundation for a wholesome and mutually beneficial system. As a result, the methods proposed really provide emerging nations plenty of room to misuse their political and economic sovereignty over developed nations[28].

## Existing MFI and Flexibility Potential: Examining DTTs and BITs:

Because the contracting parties had a narrowly focused strategy, BITs were successful in promoting investment. The definition of investment, the pre-establishment non-discrimination

[28] The developed economies have built over the years systems which are best suited for their own economies and thus have insulated the larger economy from the negative effects of the operation of TNCs. The fundamental problem for the developing economies is that they are ill equipped with institutional support and secondly the developmental priorities (combined with capital scarcity) and the lack of market oriented experiences hamper the application of these advanced and sophisticated systems of protection, which are voluntary in nature and therefore can easily be violated by the MNCs.

rules, and the dispute resolution process are the three key distinctions between the bilateral agreements and the proposed multilateral framework for foreign investments. The usually worded preambles of the numerous multilateral agreements show the simplest solutions to address this fundamental flaw. These preamble objectives offer comprehensive coverage, great illustrations of particular development features of different countries, and excellent room for customization..

The current investment agreements provide four different levels of flexibility possibilities. The perambulate assertions of general principles, which frequently refer to broad development as the ultimate objectives, are among the first in this area. The general organisation and method of involvement make up the second angle. By creating the instruments in accordance with development principles and providing, where necessary, particular and differentiated treatment to developing nations, the agreement's structure can give effect to these objectives. The third is the substantive provision under any agreement, which shows a balance between the rights and obligations of all parties. The last item on the list—the actual application—can also serve as a foundation for advancing development goals since it offers varied degrees of flexibility for interpreting an MFI or tailoring it to evolving requirements and conditions

## Special and Differential Treatments for the Structural Issue

Any agreement's structure, which reflects the actual special treatment and differential treatment of the various principles and divergence from the balance of rights and obligations, is an important component. In the case of emerging or least developed countries, non-reciprocal responsibilities might be either long-term or short-term. Lower levels of duties might be among them, such as asymmetrically staggered implementation timelines, exceptions from commitments in specific areas, flexibility in the application and observance of disciplines under predetermined conditions, and technical help and training. But in reality, as can be seen from the many flexibility clauses of the GATTs, WTO, and GATS, a well-defined standard is formed, one that is frequently complicated and leaves out new development demands and unanticipated crises[29]. Therefore, it may be inferred from the experiences of emerging nations that specific criteria for special and deferential treatment may be substantially based on the application of principle. The latter allows for differences in social and economic divergence across supposedly homogenous groupings including the least developed, developing, and small economies.

## Structural Problem: Implementing the Rules

[29] Bernal Richard L. 1998, " Small Developing Economies in the World Trading Organisation", mimeo, December 1998.

Differentiating between developing and developed nations overall is one technique to implement the notion of special and differential treatment in order to structure an MFI. The different BIT examples show that, for the most part, there is no structural distinction between the partners from rich and developing countries. However, they might indirectly do so if certain clauses only apply to international interactions between rich and developing nations. Such a strategy has not always resulted in favouring the emerging nations. The BITs between Georgia and the United Kingdom are one uncommon instance of a good trend seen in the current Agreement[30]. The convention creating the Multilateral Investment Guarantee Agency (MIGA), which is founded on the general distinction between developed and developing countries, is another example of this type of situation.

## Significant Rules

The concrete mechanisms through which ideas like flexibility are put into practise are the substance of MFI. Countries decide which concerns to handle with in a specialised manner or under separate agreement when they sign an MFI, keeping them outside the agreement's purview. Countries may want to include some wiggle room in their pledges even if they elect to cover specific concerns in an MFI. The development issues that would necessitate perfecting the balance of rights and obligations for all involved players are substantially to blame for these flexibility requirements.

**Scope and definition of investment:** The most prevalent trend in recent MFI is to establish an expansive, all-inclusive definition of investment that may or may not be susceptible to limitation. A broad definition has ramifications for the state parties to an agreement's development policy. Simple explanation of the developmental concerns: treaty coverage of all assets contained in the definition may not always be consistent with these development objectives during the course of an agreement. At the same time, a wide, open-ended definition would not be ideal for nations that are worried about specific implications of foreign investment. An open-ended definition poses the risk of obliging the host nation to allow, encourage, or safeguard a significant amount of investments. Most of which, had the subject been raised directly, it might not have been aware of when it entered into an agreement and might not have agreed to include within the scope of the arrangement.

**National treatment:** This term refers to the formal equality of treatment of domestic and foreign businesses. Such legal equality may ignore variations in the realities on the ground when nations are at different stages of development. In such a situation, the application of the national treatment norm may call for more than just legal equality in order to take into account the development needs of a developing country party to an MFI. A national treatment provision may be given in a variety of ways. According to the custom in many BITs, some general exceptions may be applicable in

[30] UNCTAD, 2000, International Investment Agreements: Flexibility for Development, United Nations, Geneva. See for details Box III.4, p.38.

each circumstance. The basic policy variables in this case are: a) post-establishment national treatment; b) full post-establishment national treatment, which offers a higher standard to national treatment; c) pre-establishment national treatment; d) full pre- establishment national treatment and e) a mixed approach of the two broad classes[31].

**MFN treatment:** Another important clause in the most-favorable-nation (MFN) treatment is that a host nation must offer to foreign investors from one country the same, or no less favourable, treatment, as it does to investors from all other nations. On the basis of pre-entry treatment, the current MFI can be distinguished from confining it to post-entry treatment. Additionally, it has been discovered that nations are frequently less inclined to give national treatment than MFN for reasons related to development. As seen by the DDTs, the usage of subject-specific exceptions appears to be widely accepted. Beyond these explicit exclusions, a lot of investment agreements have broad exclusions based on public policy and national security; although they don't specifically target MFN, they may restrict its use indirectly. The combination of the NT and MFN concepts can, however, be used to find flexibilities in a broad sense.

## WTO Working Group Multilateral Discussions: The Investment Framework's Curves

Following the Singapore Ministerial Declaration, the Working Groups on Trade and Investment were established. In the declaration, it was agreed that the General Council would monitor the Working Group's progress and decide how to move forward with its work after two years. The Members agreed to: establish a working group to examine the relationship between trade and investment (WGTI); and the other topics that were brought up for discussion und the built-in agenda in these areas, including under the TRIMs Agreement. Taking into consideration the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement These groups agreed to consult each other's work as necessary and to consult UNCTAD and other pertinent intergovernmental forums without prejudice.Working together with the aforementioned organisations will help the working groups conduct their work in a way that makes the most use of the resources at hand and ensures that the development component is properly taken into consideration. The General Council will continuously assess how each body's work is going and examine each body's progress every two years. It is well acknowledged that any potential future negotiations on multilateral disciplines in

[31] Liberal commitment at the bilateral level can lead to issues related to most-favored nation treatment when such non-discrimination principles are applied at the multilateral level. This in turn can lead to free-riding problem as countries with lesser commitment would benefit on account of those with already liberalized regimes

these areas will only proceed when a clear majority decision has been reached among WTO Members on the matter[32].

**Development of Latin American Member Countries' Positions**

Apart from Asia, Latin American nations had the biggest representation of paper among developing nations. Discussions on regional investment included contributions from Mexico, Costa Rica, Cuba, and Peru. Situation in Costa Rica In the year 1998, Costa Rica submitted its first paper to this Working Group. FDI was discussed in the context of the papers filed by Costa Rica about the connection between investment and trade, as was also the case with the various other papers submitted by various other Members. The majority of developing nations only discussed FDI when talking about trade and investment-related issues. The topics and trends that were presented in the framework of commerce, technology, and economic expansion therefore had a limited contextual relevance. But it's crucial to realise that the OECD-MAI proposal's (asset-based) definition of investment encompasses a wide range of short- and long-term investment instruments. Therefore, any attempt to include such a strategy in the MFI would have to go beyond the empirical findings that have already been made about the connections between trade and investment that have been highlighted by the developing countries in a constrained context of FDI. The first paper from Costa Rica makes it very evident how crucial FDI is becoming to the host nation. It was discovered that FDI had positive benefits on exports, human capital, and the industrial and agricultural sectors[33]. Additionally, it helped Costa Rica's domestic industries expand and diversify. A market economy is guaranteed, economic freedom is protected, and private property ownership of tangible, intangible, and intellectual property is protected under liberal FDI governance in Costa Rica. Up to 1998, Costa Rica signed nearly ten bilateral investment treaties, and the concept of investment in these agreements includes investments that a foreign investor owns or controls. Costa Rica uses a broad definition of investments in its BITs, however it excludes loans that are not directly tied to investments or capital movements for speculative purposes. It distinguishes between the definitions of a natural person and a judicial person while discussing the concept of an investor. While discussing the MFI and the negotiation process under WGTI, Costa Rica advocated such differentiation in the definition of investment. This crucial distinction was made in order to separate cash flows related to speculative activities.

## Summary and conclusion on the Negotiations and Current Country Status

It is currently challenging to come to a conclusion in the context of the talks and negotiations on the international framework on investment as envisioned under the WTO. On the basis of the many discussion papers presented by the Member nations and several other intergovernmental organisations, an effort is made here to examine the negotiation process. The definition of investment, the connections between trade and investment and economic development, the degree

[32] Singapore Ministerial Declaration adopted on 13th December 1996.
[33] Refer submission WT/WGTI/W/31, 8th April 1998, p.2.

of flexibility in the discussion of rights and obligations, and the connection between technology and investment are some of the contentious issues in the direction of a multilateral framework on investment. The investment-related challenges that have arisen for developing nations are mostly based on the unpleasant experience of a few open economies that have gone through a "speculative finance-led" economic crisis. As many as 10 countries have completely lost control of their economic systems since the tequila crisis in the 1980s to the most recent of the series in Argentina in 2001, with many more suffering only modest losses in terms of confidence and debt accumulation. The most painful aspect of these crises was that they affected the most developed and open economies; some of these economies were early adopters of the "Washington Consensus" method of economic reform. It is also important to note that economies with similar characteristics, such as India and Malaysia, were able to protect their economic stability through a regulated regime on capital movements, which encouraged many developing nations to choose a regulated regime that also offers stability and security to genuine investors.

In this perspective, it's also critical to emphasise the relative importance of manufacturing sector investments for developing nations vs established nations. On a global scale, the manufacturing and services sectors absorbed 44.0% and 38.9% of the direct investment flow in 1998, compared to 37.5% and 42.9% for developed nations and 66.8% and 25.0% for developing nations.The topic of safeguarding the interests of manufacturing sector FDI, which has a bigger weight in the total FDI, in developing countries becomes a priority as a result of the GATS Agreement's provision of flexibility in the services sector FDI for host countries' needs.[34] Similar worries exist on how cross-border investment activities interact with the TRIPS, TRIMS, and ASCM agreements.

[34] For details on the FDI inflows trend see the submission of Japan, WT/WGTI/W/111.

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- The developed economies have built over the years systems which are best suited for their own
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