

The Quest for a Multilateral Agreement on Investment (MAI); Relevance and Effects on Developing African Countries.

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**A mini-thesis submitted in partial fulfilment of LLM degree in INTERNATIONAL TRADE
AND INVESTMENT LAW IN AFRICA at the University of the Western Cape South Africa.**

Date May 2005

CERTIFICATION

I Patricia Lenaghan certify that this study titled; The quest for a Multilateral Agreement on Investment (MAI); relevance and effects on developing African countries, is an original research, carried out by **Okhomina Esohe Grace** under my supervision at the Faculty of law, University of the Western Cape.

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LIST OF ABBREVIATIONS

Art	- Article
ASEAN	- Association of East Asian Nations
BITS/BITs	- Bilateral Investment Treaties
EU	- European Union
Pg.	- Page
FDI	- Foreign Direct Investment
GATS	- General Agreement on Trade in Services
MAI	- Multilateral Agreement on Investment
MNEs	- Multinational Enterprises
TNCs	- Trans -National Corporations
TRIMS	- Trade - Related Investment Measures
MNCs	- Multinational Corporations
MFN	- Most Favoured - Nation treatment
NAFTA	- North American Free Trade Agreement
NGO	- Non – Governmental Organization
FTA	- Free Trade Agreement
ICSID	- International Centre for Settlement of Investment Disputes
IMF	- International Monetary Fund
ISAC	- United States Industry Sector Advisory Committee on Services For Trade Policy Matters
U.N	- The United Nations Organization
U.S	- United States of America
OECD	- Organization for Economic Cooperation and Development
Pg/p.g	- Page
Para/para	-Paragraph
UNCTAD	-United Nations Conference on Trade and Development
LDCs	- Least Developed Countries
MENA	- Middle East and North African Countries
UNCITRAL	- United Nations Commission on International Trade Law
&	- And
WDM	- World Democracy Movement
WGTI	-The WTO's Working Group on Trade and Investment

WTO - World Trade Organization
WWF - World Wide Fund for Nature

DEDICATION

This paper is dedicated first and foremost to God the author and finisher of all things through whom the strength and discipline to write came from. My dedication also goes to my friend JESUS CHRIST.



ACKNOWLEDGEMENT

I would like to express my sincere gratitude to my supervisor Ms P Lenaghan without, whom I may not have researched on this topic. I want to say thank you for all the support and guidance that she gave me throughout the writing process.

I would also like to express my indebtedness to Adv R Wandrag, my LLM Coordinator for all the guidance and support she has given me throughout my studies. Riekie, thank you is not enough but that's all I can say for now.

Finally I want to say a big thank you to my parents Mr and Mrs E.A Okhomina for all the sacrifices and encouragement they gave to me throughout my studies and while I was writing. Only God can repay them for their sacrifices.

Okhomina Esohe Grace



ABSTRACT

The Quest for a Multilateral Agreement on Investment; Relevance for African Developing countries.

Foreign Direct investment (FDI) has been recognized as a vital source of development for African countries, which are mainly capital importing countries. This has led to a quest for effective regulation of the activities of foreign investors in a country while considering the profit making goals of the investors as well. As there is a need to strike a balance between the need to regulate entry and activities of investors and reaping the immense benefits of FDI such as growth and development. The regulation of FDI thus becomes important.

However, there is no universal multilateral agreement on Investment (MAI) that binds most states of the world. What we have is attempts at regional levels to regulate Investment uniformly. This quest has led to debates with many developing countries (Africa Inclusive) resisting attempts to formulate a MAI.



This paper will start with an introduction of the importance of FDI as well as the various attempts that have been made to regulate FID on a multilateral level.

Then the paper will go on to examine two Bilateral Investment Treaties (BITs) Botswana-China BIT on Promotion and Protection of Investments 2000, Czech-Tunisia BIT for the Promotion and Reciprocal Protection of Investment 1997, and two Free Trade Agreements (FTAs) - Chapter 11 of the North American Free Trade Agreement (NAFTA), 1990 and the investment provisions of the U.S –Morocco Free Trade Agreement 2004, to identify those trends that are common to these agreements that have been entered into by African countries. It will examine these provisions in line with the rights and obligations they create for the investors as well as the host countries.

The paper will then examine some crucial arguments for and against a MAI that have been proposed over the years, the practicability of a MAI from Africa's perspective and some reasons why the OECD MAI failed. It will further examine if there are enough trends to suggest a basis for a MAI and what forum it will be in or whether BITS are effective regulation of FDI as they are.

The paper will end with a conclusion on whether the trends will for a basis for a MAI, or act as a basis for a model BIT. It will also make certain recommendations for the effective regulation of FDI in the interest of African countries.

KEY WORDS

FDI- Foreign Direct Investment, MAI- Multilateral Agreement on Investment, BITS- Bilateral Investment Treaties, FTA – Free Trade Agreements, African Developing Countries, Multinational enterprises (MNEs), economic development, investors, host country, investment regulation.

FDI- Foreign Direct Investment,
MAI- Multilateral Agreement on Investment,
BITS- Bilateral Investment treaties,
African Developing Countries,
Multinational enterprises (MNEs),
Economic development,
Investors,
Host country,
Investment regulation,
FTA- Free Trade Agreements



CHAPTER 1

INTRODUCTION

Foreign Direct Investment (FDI) has increased in both relative and absolute terms in the past two decades¹ and has become a major engine for growth and development around the world.² This is mainly due to the fact that many African developing countries do not have the financial capacity as well as the technical know how for economic development and have to depend on the funds from foreign investors and Multinational enterprises (MNEs)³ to enable them grow economically. The importance of Foreign Direct Investment (FDI) to the economic development of a developing (African) Nation cannot be over emphasised.

FDI is normally defined as ownership together with some form of control of a business or part of a business in another country.⁴ The key determinant is that the foreign investor has a degree of managerial control over the business.⁵ In various press releases by The United Nations Conference on Trade and Development (UNCTAD), FDI is defined as an investment involving management control of a resident entity in one economy by an enterprise resident in another economy. FDI involves long-term relationships reflecting an investor's lasting interest in a foreign entity.⁶

¹ Ngowi, Honest Prosper, 2001 *Can Africa Increase its Global Share of Foreign Direct Investment* West African Review ISSN: 1525 4488 Vol. 2 No.2 (2001)

<http://www.westafricareview.com/war/vol2.2/ngowi.pdf> visited 11/10/2004

² As can be deduced from most legal write-ups on benefits of FDI; Anonymous, 2002 *Bilateral Investment Treaties as a Determinant of U.S. Foreign Direct Investment in Developing Countries*. Online

<http://www.moneymattersinstitute.org/BilateralInvestment.pdf> visited 31/12/04 pg 12

³ Since FDI has become one of the major approaches that business enterprises use to enter foreign markets; Moosa, Imad A. 2002 *Foreign Direct Investment Theory, Evidence and Practice* Palgrave Macmillan New York Pg 11; A similar opinion was expressed by Batshedisi, Pearl Kebalefetse 2002 in *Competition for Foreign Direct Investment and Its Implication for Developing Countries with Special Reference to Botswana* University of Stellenbosch Graduate School of Business as MBA Mini-study pg iv

⁴ See International Monetary Fund (IMF), 1997 Balance Of Payments Manual pg 408

(4th ed. 1977) "FDI is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor's purpose being to have an effective choice in the management of the enterprise."

⁵ Jürgen, Kurtz 2002, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment* Jean Monnet Working Paper 6/02

<http://www.jeanmonnetprogram.org/papers/02/020601.pdf> visited 23/10/04

⁶ Ngowi, Honest Prosper 2001 www.westafricareview.com/war/vol2.2/ngowi.pdf

FDI can contribute positively to the economic development of the host country. One of such contribution is that foreign investors usually bring capital into the host country, which in turn influences the quality and quantity of capital formation in the host country. This as well increases the tax revenue of the government and the level of economic /social well being in the host country.⁷ Other benefits of FDI include increased competition in industries with a likely improvement in productivity, replacement of inferior production functions in developing countries with superior ones through technological transfer, managerial and marketing skills, market information, training of workers,⁸ stimulating employment and wage levels⁹ amongst others.

FDI flows have expanded at an unprecedented rate during the 1990s becoming the most visible and prominent manifestation of the increasing global integration of economic activity. Compared to the average annual growth of trade in goods and services of about 6-7 per cent over the 1990s, FDI inflows have grown at an average annual rate of 20 per cent over 1991-95 and at 32 per cent during 1996-2000 despite the economic crisis in some important regions of the world. As a result, the magnitude of global FDI inflows has increased from US\$ 159 billion in 1991 to \$ 1.27 trillion in 2000.¹⁰



Developing countries accounted for only 19 per cent of global FDI inflows in 2000¹¹ and are heavily concentrated within particular parts of the developing world. In comparison, Africa remained severely marginalized as a host continent for FDI with its share in total inflows falling below 1 per cent.¹² Developing countries also remain largely capital importers or host states for FDI. They only accounted for approximately 8% of FDI outflows in 1999.¹³

⁷Seid, Sherif H. 2002 *Global Regulation of Foreign Direct Investment* Ashgate Publishing Ltd pg. xi (preface)

⁸ ibid

⁹ Stephan Szepesi 2004 *Comparing EU Free Trade Agreements: Investment* In Brief No 6D – July 2004 European Committee for Development Policy Management (ecdpm) Publication available online at www.ecdpm.org and www.ileapinitiative.com pg 1

¹⁰Kumar, Nagesh 2003 *Investment on the WTO Agenda: A Developing Country Perspective and The way Forward for the Cancun Ministerial Conference* RIS-DP # 56/2003 online at http://www.ris.org.in/dp56_pap.pdf visited 17/04/2005 pg 5 of 34

¹¹ United Nations Conference on Trade And Development (UNCTAD), World Investment Report 2001: *Promoting Linkages* 10 (2001).

¹² Supra note 12 at pg xiii-xiv.

¹³ UNCTAD, World Investment Report 2000: *Cross-Border Mergers and Acquisitions and Development* pg. 20

Due to the nature of activities and entities involved in FDI, most host nations try to regulate the entry and operation of these foreign entities in their domain. Developing countries have stressed that governments need to have the authority to regulate the entry and operations of foreign investors so as to ensure net positive benefits from foreign investment.¹⁴ There is however a need to strike a balance between the need to regulate entry and activities of investors and reaping the immense benefits of FDI such as growth and development.

The regulation of FDI thus becomes important for it to be beneficial to the host country. This is because in some countries, it can cause damage, which may be amongst others, environmental, transfer pricing by multinational enterprises (MNEs) as well as civil unrest and political instability in the host country where the MNEs are involved with internal political affairs of host countries (e.g. Chile).¹⁵

As it stands, there is no comprehensive Multilateral Agreement on Investment (MAI) or a global agreement regulating FDI, which binds most states of the world.¹⁶ Thus there is a large loophole in the investment aspect of the network of regulatory measures governing the world economy. What we have is attempts at regional levels to regulate investment uniformly. Today, all countries seek foreign direct investment to advance their development processes. They have therefore shown keen interest in promoting and protecting such investment through national and international policy instruments.

¹⁴ Anonymous, *MAI -type Investment Model Criticized at NGO –Ambassadors Meeting* online at <http://www.twinside.org.sg/title/model-cn.htm> visited 09/10/04; This is true because MNEs have advantages in global trade because they possess distinct /superior assets which enable them to compete well in the global market. Hence developing countries want the authority to regulate their entry and operations in their territory. - Batschedisi Pearl Kebalefetse 2002 *Competition for Foreign Direct Investment and Its Implication for Developing Countries with Special Reference to Botswana* University of Stellenbosch Graduate School of Business as MBA Mini –study pg iv

¹⁵ *ibid*

¹⁶ Jürgen, Kurtz, 2002, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on investment* Jean Monnet Working Paper 6/02 online at <http://www.jeanmonnetprogram.org/papers/02/020601.pdf> visited 23/10/04; UNCTAD, Trends in International Investment Agreements, An Overview UNCTAD series on Issues in International Investment Agreement, UN New York Geneva 1999 online at <http://r0.unctad.org/p166/module2002Bangk/Module3/trends.pdf> visited 10/10/04

Various attempts have been made to regulate investment globally. These attempts include two agreements entered by the world trade organization (WTO),¹⁷ which is the highest trade regulatory body in the world. It has two multilateral Agreements, which deal with investment to a limited extent:

One of them is the Agreement on Trade – Related Investment Measures (TRIMS)¹⁸. It covers basically trade restrictive and distorting effects of investment measures¹⁹ and applies to investment measures related to trade in goods only.²⁰ This in itself is not sufficient regulation of investment because there is also services and movement of finance, which is a major part of FDI. The Agreement²¹ provides that no member shall apply any TRIM that is inconsistent with the provisions of Article III or article XI of the GATT 1994.

The other agreement is the General Agreement on Trade in Services (GATS). This is a more detailed agreement that deals with trade in services and its aim was to establish a multilateral frame work of principles and rules for trade in services while recognizing the rights of members to regulate and to introduce new regulations in the supply of services within their territories in order to meet national policy objectives.²² However, this agreement is not automatic i.e. it only applies to the sectors mentioned in the member's schedules which can be modified.

Further, there were attempts by the EU and Canada to introduce a proposed Multilateral Framework on Investment (MFI) under the auspices of the WTO. However, given the resistance of developing countries, a consensus to negotiate could not be obtained on the subject but a Working

¹⁷ There are two other agreements in the WTO that deal with aspects of investment; the Plurilateral Agreement on Government Procurement (GPA) and the Agreement on Subsidies and Countervailing Measures. However, this paper will only look at the GATS and TRIMS for the purpose of the research.

¹⁸ This is a short Agreement that has 9 Articles and an Annex. It is more of a framework to regulate trade related aspects of investment. There are those who feel this is sufficient regulation of investment as against a MAI

¹⁹ Preamble TRIMS 2002 WTO Legal Texts WTO Secretariat Pg 143

²⁰ Article 1 TRIMS 2002 WTO Legal Texts WTO Secretariat Pg 143

²¹ In Article 2

²² General Agreement on Trade in services Preamble WTO Legal Texts WTO Secretariat Pg 286; under part 2, its general obligations include MFN, transparency, domestic regulation, and recognition amongst others. While part 3 includes market access, national treatment as well as provision for additional commitments.

Group on Trade and Investment (WGTI) was set up in WTO to study the issue without a negotiating mandate.²³

The OECD- Organization for Economic Co-operation and development²⁴, tried to propose a multilateral agreement on investment (MAI),²⁵ which was heavily criticised by NGOs and developing countries because it tended to give more rights than obligations to the foreign investors. The MAI failed because of the failure of the OECD members to reach a consensus on the/core issue(s). Sadly, most attempts made to regulate investment multilaterally have failed because there has always been the lack of compromise in the positions held by the major stakeholders.²⁶

Other major organizations have been involved in the quest to find a multilateral regulatory framework for investment. For instance the UN was involved in the drafting of the code of conduct for MNCs until the early 1990's and is actively involved in this quest through UNCTAD. The World Bank stated in its Articles, that the promotion of private foreign investment is one of its purposes. Further, the World Bank in 1992 adopted a set of non-binding guidelines for the treatment of foreign investment in the Asian-Pacific region.



These various attempts have been somewhat successful at the regional levels but none of these global organizations has so far succeeded in developing a comprehensive and acceptable global framework for regulating investment, which all countries subscribe to.²⁷ There are also FTAs and

²³ Kumar, Nagesh 2003 *Investment on the WTO Agenda: A developing Country Perspective and the Way Forward for the Cancun Ministerial Conference* RIS-DP #56/2003 online at http://www.ris.org.in/dp56_pap.pdf Visited 17/04/2005 Pg 7 of 34

²⁴ Consisting of predominantly wealthy countries such as the United States, the United Kingdom, Canada, Australia, New Zealand and over 20 other rich countries.

²⁵ Negotiated from April 1995 – May 1998. The MAI however did not come into existence as a result of criticism; Kumar, Nagesh 2003 *Investment on the WTO Agenda: A developing Country Perspective and the Way Forward for the Cancun Ministerial Conference* RIS-DP #56/2003 online at http://www.ris.org.in/dp56_pap.pdf Visited 17/04/2005 Pg 6 of 34

²⁶ Seid, Sherif H. 2002 *Global Regulation of Foreign Direct Investment* Ashgate Publishing Ltd pg. xi (preface); The stakeholders referred to here include developed countries, the OECD and its members -who are mainly capital exporting countries and want an agreement that will give their investors the highest possible protection especially from expropriation; developing countries who want to attract FDI and want to be able to regulate effectively the activities of foreign investors in their territories; public interest groups and representatives of the business community-those who actually put their money into these investments and are the ones actually affected by investment regulations and international organizations- who have a duty make sure that international standards are incorporated into the agreement and maintained by all concerned.-See Seid 2002 pg xii

²⁷ Supra at page 6

regional trade agreements,²⁸ which have investment provisions, which include national treatment, performance rights, expropriation and so on.²⁹

In the quest to effectively regulate FDI in their respective territories and facilitate the benefits of FDI, many countries enter into Bilateral Treaties for the promotion and protection of investment.³⁰ BITs are a form of investment regulation that is prevalent in Africa, and across the globe,³¹ because of the increased competition amongst developing countries to attract FDI from developed countries; they sign a lot of BITs.³² It is believed that by concluding these BITs, developing countries are trading sovereignty for credibility.³³ As at 2002, 2,181 BITs had been established³⁴ across the globe.

African Countries negotiate Bilateral and Regional Investment Treaties (BITs) among themselves, with other developing countries as well as developed countries (e.g. the U.S).³⁵ It is on record that Africa has entered the highest number of BITs in the last 20yrs,³⁶ however, there are doubts³⁷ that

²⁸There are more than 172 Regional trade Agreements in force a small but growing number of them dealing with investment issues.

²⁹ Correa, Carlos M 2004 *Investment protection in Bilateral and Free Trade Agreements: Implications for the granting of Compulsory Licenses* online at http://www.wdi.bus.umich.edu/global_conf/papers/papers/correa.pdf visited 29/12/04 pg 1

³⁰ UNCTAD *Bilateral Investment Treaties 1959-1999* UNCTAD/ITE/IIA/2 United Nations New York and Geneva 2000 (online) <http://www.unctad.org/en/docs/poiteiid2.en.pdf> visited 12/10/04

³¹ BITs were historically developed and “sold” by developed countries looking to protect their home investors (although developing countries such as China now proactively address potential BIT partners). See Anonymous, 2002 *Bilateral Investment Treaties as a Determinant of U.S. Foreign Direct Investment in Developing Countries*. Online at <http://www.moneymattersinstitute.org/BilateralInvestment.pdf> visited 31/12/04 pg 14

³² Neuyamer, Eric and Spess, Laura 2004 *Do Bilateral investment Treaties increase foreign direct investment to developing countries?* Online at <http://econwpa.wustl.edu:8089/eps/if/papers/0411/0411004.pdf> visited 30/12/04 pg 5

³³ This is because the BITs act as a guarantee for investors and gives them an opportunity to challenge any public policy in the host state that affects them if altered after they have set up their investment through the dispute settlement mechanism. -Elkins, Guzman and Simmons 2004 *Competition for Capital: The diffusion of bilateral investment treaties, 1960-2000*. Working Paper University of Illinois, University of California at Berkeley and Harvard University.

³⁴ UNCTAD 2000 *Bilateral Investment Treaties 1959-1999*, UNCTAD/ITE/IIA/2, United Nations New York & Geneva online <http://www.unctad.org/en/docs/poiteiid2.en.pdf> visited 12/10/04; UNCTAD 2003 *World Investment Report 2003 FDI Policies for Development: National and International Perspectives*, United Nations, New York & Geneva.

³⁵ The U.S has entered FTAs and bilateral treaties with many African countries e.g., Morocco, and is currently negotiating with South Africa

³⁶ This increase in the signing of BITs was synonymous to the growing importance of FDI hence the large number of BITs entered into. – Neuyamer, Eric and Spess, Laura 2004 *Do Bilateral investment Treaties increase foreign direct investment to developing countries?* Online at <http://econwpa.wustl.edu:8089/eps/if/papers/0411/0411004.pdf> visited 30/12/04 pg 8; as documented in the

these BITs have indeed achieved their desired goals or that they are in the best interest of the African countries. Some are of the opinion that these BITs are not sufficient regulation of foreign investment and believe that there is a need for an international regulation for FDI.

Africa's position on the past attempts at regulating investment has been that shared by most developing countries; that those attempts especially the OECD'S MAI, require host countries to give up their right to adopt a selective approach to foreign investment to promote their chosen development strategy. There is also the question of whether the previous attempts at regulating FDI made adequate allowance and consideration for African developing countries that were mainly the host countries as many of them depended, and still depend on FDI for their economic development.

Also the proposed venue or forum of the multilateral framework has been in issue because some countries want it to be in the WTO while others feel UNCTAD will be the appropriate forum³⁸.

There have been arguments³⁹ that because BITs are limited to relations between the states that negotiate them and as such are a special law between the parties to it as opposed to a universal set of rules that govern foreign investment, there is a need for a MAI to produce a framework of uniform rules that govern FDI in the interest of international trade relations⁴⁰. On the other hand, others argue that BITs as they are, constitute sufficient regulation of FDI and that a MAI will not be in the interest of developing African countries.

various articles and periodicals on investment and FDI by UNCTAD over the years available online on its website www.unctad.org visited 15/12/04

³⁷ Two Studies analyze this issue over the period of 1980-2000 and they both came to the conclusion that BITs were not necessarily increasing the flow of FDI to developing countries who had signed so many BITs - Hallward-Driemeir, M 2003 *Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite*. World Bank Policy Research paper WPS 3121. World Bank Washington DC; Tobin, J and Rose- Ackerman, S. 2004 *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment treaties* Yale Law School Centre for Law, Economics and Public Policy. Research Paper No 293

³⁸ This debate on the forum will be looked into in chapter four and is part of what influenced the research in the first place. It is my view that part of the reasons why there has not been an agreement on a MAI so far is because of the forums where attempts have been made in the past. For instance the OECD MAI failed because it was criticised as not being the right forum to negotiate a multilateral agreement, which will encompass states not members of the OECD.

³⁹ This was the view expressed by Mr Sornarajah, M 1996 in *The International Law of Foreign Investment* Grotius Publications Cambridge University press pg 226

⁴⁰ This stems from the broader argument that BITs will lead to the creation of customary international law as they tend to indicate the same standards of protection

Despite these debates, African developing countries continue to enter into BITs, which have exhibited certain common trends, and yet they continue to resist a multilateral Agreement on Investment⁴¹ because they feel that it will have negative effects on them.

1. OBJECTIVE OF THE STUDY

The general objective of this study is to examine two BITs; the Botswana-China BIT on Promotion and Protection of Investments 2000, as well as the Czech-Tunisia BIT for the Promotion and Reciprocal Protection of Investment 1997. This will be followed by an examination of two Free Trade Agreements (FTAs) -Chapter 11 of the North American Free Trade Agreement (NAFTA), 1990 and the investment provisions of the U.S-Morocco Free Trade Agreement 2004.

The aim of this examination is to identify those evolving trends that are common to these Agreements some of which have been entered into by African developing countries, bearing in mind the debates and position of African developing countries.

The study also aims at examining the effects of these regulations on African countries especially with key provisions and the kinds of rights and obligations they confer on investors as well as the host country. As there is a need to create a balance between the interest of the host nation and the investor, the study also aims at identifying if those evolving common trends can be used to establish a guideline for a standard BIT or on the other hand whether they can be used as a template for a MAI. Finally the study will examine the influence a MAI will have on African developing countries.

2. SCOPE OF STUDY

Due to the limited scope of this study, this research shall look at only two BITs and two FTAs referred to above and will focus only on the most relevant trends that are found in these agreements drawing inference from the agreements being examined in the paper.

⁴¹ They resist a multilateral agreement on investment especially under the auspices of the WTO

The aim of the study is to determine if there is indeed a need for MAI or if there is a move towards it based on the existing BITs and FTAS that regulate FDI. In addition it will attempt to determine its relevance and effects on developing African Nations.

3. SIGNIFICANCE OF RESEARCH

Due to the fact that FDI is crucial to the development of economies in African Countries, the regulation of investment (FDI) is of great importance both to the investors (and their home country) as well as to the host country receiving the benefits of the investment.

However, the question of creating a balance between the investor's rights and that of the host state arises and the research will attempt to determine if the balance will be created by a MAI or if the BITs as they exist are sufficient to regulate FDI. The research will also determine if BITs are in the best interest of developing countries.



4. OVERVIEW OF CHAPTERS

Chapter one will look at introduction and background on importance of regulation of FDI and attempts that have been made to regulate FDI on a regional level as well as a multinational level. This will include the failed OECD MAI, TRIMS, GATS and BITs. It will also examine Africa's interest in past attempts at regulating investment.

Chapter two will introduce the agreements being examined as well as identifying and discussing in detail the similar trends in the selected Agreements. It will pay particular reference to definition of investor, investment, MFN, national treatment and other rights and obligations covered in the agreements.

After identifying these trends in the Agreements, chapter three will examine relevant literature with regards to a few of the legal effects of some of these regulations on some developing African countries. It will examine key arguments in favour of and against a MAI. It will further look at a few of the reasons why the OECD MAI failed.

Chapter 4 will examine whether there are enough similar trends in these BITs that will form a basis for a MAI and the influence/relevance such MAI will have on Developing countries. On the other hand, it will examine whether these BITs effectively regulate FDI as they are. It will also examine what forum the MAI will be in.

The conclusion will determine whether based on these evolving trends there is a justification for a MAI. If there is no need for a MAI it will also determine whether a model law on BITs can be formulated based on these trends. Certain recommendations for effective regulation of FDI and to improve benefits of FDI to African countries will be made. This will include the manner in which a MAI should be negotiated in order for it to be balanced and appealing to African Developing countries as well as meeting their developmental needs.



CHAPTER TWO

BILATERAL INVESTMENT TREATIES AND INVESTMENT REGULATION IN AFRICA

1. INTRODUCTION

As noted earlier,⁴² Africa has entered the largest number of BITs and so BITs are a major part of investment regulation in Africa.⁴³ BITs have become an important part of FDI regulation and almost every country on the globe has signed at least one BIT. In Africa, as at January 1995 over 230 BITs had been signed in the region and many more have been signed since, most of which were concluded with capital exporting countries.⁴⁴ At that time Egypt had the highest number of BITs, followed by Tunisia and Morocco.⁴⁵ These BITs contain general standards of treatment including fair and equitable treatment, national treatment, most favoured-nation treatment (MFN), expropriation and dispute settlement. A number of African countries have also concluded bilateral treaties for the avoidance of double taxation of income and capital.⁴⁶

BITs arose out of a desire to create specialized instruments to address investment related concerns that were only partially covered by the existing agreements at that time.⁴⁷ Before BITs

⁴² From the discussion in chapter 1 pg 6

⁴³ See p.g 5; Neuyamer, Eric and Spess, Laura 2004 *Do Bilateral investment Treaties increase foreign direct investment to developing countries?* Online at - <http://econwpa.wustl.edu:8089/eps/if/papers/0411/0411004.pdf> visited 30/12/04 pg 8;

⁴⁴ African countries in their bid to create a domestic investment climate have entered BITs see UNCTAD 1999 African Ministerial Declaration on UNCTAD X and Africa's Development Challenges AF/MM/77(X) 1 August 1999 online at http://www.unctad-10.org/pdfs/ux_g77african.en.pdf pg 13 visited 27/12/04

⁴⁵ 33,31&23 respectively, Sources UNCTAD 1993&94 World Investment Report in UNCTAD, 1995 *Foreign Direct Investment in Africa* pg 14 &15

⁴⁶ UNCTAD, 1995 *Foreign Direct Investment in Africa* UNCTAD/DTCI/19 Current Studies Series A, No 28 UN New York and Geneva pg.13

⁴⁷ These were mainly, FCN (Friendship, Commerce and Navigation) treaties that did not cover all the aspects that BITs cover now. - Anonymous *The contribution of BITS to Cuba's foreign Investment*

were conceived of, foreign investment was protected by customary international law (The Hull Rule).⁴⁸ It was premised on the customary international rule of prompt adequate and effective compensation. It is important to add that under customary international law, there is no right of admission or right to invest in a foreign country. Thus states retain the power to determine which foreign investor or investment to allow and into what sectors.⁴⁹

For instance the court in the Chorzow Factory Case⁵⁰ decided that expropriation of private property is not allowed and where it occurred full compensation must be paid i.e. reparation that can as far as possible restore the parties to their status quo ante. The Hull rule was criticized by developing countries at the U.N and its status as customary international law was challenged.⁵¹

It is a paradox⁵² that developing countries⁵³ have embraced BITs, which impose obligations⁵⁴ that exceed those imposed by traditional rule of customary Law (the Hull Rule) since they had advocated for fewer of such legal requirements.⁵⁵ This is because they strongly opposed the Hull Rule as an infringement on the sovereignty of the expropriating nation and called for a less



Program online at <http://www.futurodecuba.org/THE%20CONTRIBUTION%20OF%20BIT1.htm> visited 14/12/04

⁴⁸ It dealt specifically with expropriation and guaranteed the investor of compensation should expropriation occur.

⁴⁹ See Submission by the European Communities, Concept Paper on Non-discrimination WTO Doc. WT/WGTI/W/122,22 June 2002, stating: "Customary international law does not require any host country to guarantee a non-discriminatory treatment to foreign investors wishing to establish their activities in its territory or even to those already established." Culled from Mosoti V 2003 *Non-Discrimination and its Dimensions in a Possible WTO Framework Agreement on Investment; Reflections on the Scope and Policy Space for the Development of Poor Economies The Journal of World Investment Vol. 4 No.6 December 2003 Geneva Pg. 1012*

⁵⁰ The *Chorzow Factory Case*, 1928 PCIJ.Ser. A, Nos 7,9,17,19

⁵¹ See Jean Monnet Centre 1997 *Explaining the Popularity of BITs* online at <http://www.jeanmonnetprogram.org/papers/97/97-12-IV.html>. Pg 2 of 11 visited 17/08/2004

⁵² The paradox lies in the fact that developing countries opposed the hull rule but have embraced BITs and FTAs, which impose more obligations on host states than the Hull Rule did.

⁵³ Most of which are from the African continent

⁵⁴ As will be seen from the examination of the agreements in chapter two, BITs impose a lot more obligations on the host country (who are mainly developing African countries than the Hull Rule did. Since the Hull Rule was limited to expropriation. Such obligations include, restriction of discriminatory treatment of foreign investors, requiring nations to submit to binding arbitration in the event of dispute as well as the prohibition of performance requirements in some FTAs and BITs.

⁵⁵ Jean Monnet Centre, 1997 *Explaining the Popularity of BITs* <http://www.jeanmonnetprogram.org/papers/97/97-12-I.html>. Pg 1 of 3 visited 17/08/2004

exacting expropriation standard,⁵⁶ while in contrast, they have embraced BITs and FTAs that implement the Hull Rule, providing much greater protection to investors than the Hull Rule did. It is pertinent to add here that though the Hull Rule could at one time lay claim to the status of customary international law, it can no longer be said to represent a binding international legal norm. The change in its status was as a result of disagreement between developed and developing countries as to the validity of the Hull Rule.⁵⁷

2. EVOLVING TRENDS IN BOTSWANA-CHINA; CZECH-TUNISIA BILATERAL INVESTMENT TREATIES AND NAFTA; US-MOROCCO FREE TRADE AGREEMENTS

As mentioned earlier, Bilateral Investment Treaties (BITs) are a form of regulating investment especially in Africa. They are investment treaties negotiated between two countries where certain rights and obligations as well as limitations are clearly stated and negotiated on.

For the purpose of this paper, focus shall be on the following BITs:

Botswana-China BIT on Promotion and Protection of Investments 2000, Czech-Tunisia BIT for the Promotion and Reciprocal Protection of Investments 1997, and two FTAs; Chapter 11 of the North American Free Trade Agreement (NAFTA) and the US-Morocco Free Trade Agreement 2004.⁵⁸

This chapter shall focus on the following similarities in the most important provisions similar to the four above-mentioned agreements. These include definition of investment and investor, conditions of entry, performance requirements, most favoured nation treatment, National treatment,

⁵⁶Jean Monnet Centre 1997 *Explaining the Popularity of BITs* online at <http://www.jeanmonnetprogram.org/papers/97/97-12-IV.html>. Pg 1 Of 11 visited 17/08/2004; this was the only legal protection for investors against unfair treatment by the host nations and it dealt only with expropriation source- Neuyamer Eric and Spess Laura 2004 *Do Bilateral investment Treaties increase foreign direct investment to developing countries?* Online

<http://econwpa.wustl.edu:8089/eps/if/papers/0411/0411004.pdf> visited 30/12/04 pg 6

⁵⁷ Jean Monnet Centre, 1997 *Explaining the Popularity of BITs* online at

<http://www.jeanmonnetprogram.org/papers/97/97-12-I.html>. Pg 3 of 4 visited 17/08/2004

⁵⁸ These agreements were selected because the BITs are between African developing countries and other developing countries, which is what the paper wants to focus on. While the FTAs were chosen because one is quiet recent and also involves an African developing country and the United States which is a major trader with Africa in its AGOA and with the rest of the world on trade and investment. Finally NAFTA was selected because it involves the United States and other key players in world trade. It was to help give the comparison a broader perspective.

expropriation and compensation, Dispute resolution and transfer of capital as well as some other provisions not common to all four agreements but which are important in FDI regulation.

2.1 DEFINITION

An agreement must clearly define the terms, key words, rights and objectives that it will confer on the signatories to it. In clearly defining these terms, definition is a trend that is common to all the above named agreements. In particular, the definition of investment and investor is paramount.

2.1(1) Investment

The Botswana-China BIT defines investment as *"every kind of assets invested by investors of one contracting party in accordance with the laws and regulations of the other contracting party in the territory of the later."*⁵⁹ It further lists some forms of investment that fall under this definition. The Czech –Tunisia BIT also has a similar definition⁶⁰ with slightly altered wordings.

The NAFTA defines investment with a long list of forms of investments similar to that of the U.S –Morocco FTA and goes on to list what investment doesn't mean; claims to money arising from commercial contracts between members of the contracting states or extension of credit in a commercial transaction except as mentioned in sub paragraph d.⁶¹ It further defines *investment of an investor of a party* as an investment owned or controlled directly or indirectly by an investor of such Party.⁶² In addition, the U.S- MORROCCO FTA defines investment⁶³ as *"every asset that an investor owns or controls directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk."*⁶⁴

This definition is more extensive and gives the meaning of investment to cover assets that an investor controls. It made no mention of the territory of the latter state nor does it mention the laws

⁵⁹ Art.1 Agreement between the Government of Republic of Botswana and Government of the people's republic of China on Promotion of Investments 2000

⁶⁰ Article1 defines investment as "...every kind of asset invested by an investor of one Contracting party in the territory of the other Contracting party in accordance with the laws and regulations of the latter..."and lists some forms of investment covered in the definition though the list was not exclusive.

⁶¹ Para d provides that an investment could include a loan to an enterprise, where the enterprise is an affiliate of the investor or where the original maturity of the loan is at least 3 years. See Article 1139 par d of the NAFTA

⁶² Art.1139 NAFTA

⁶³ Article 10.27 of the U.S- Morocco FTA 2004

⁶⁴ Art.10.27 US-Morocco FTA 2004 www.ust.gov/assets

and regulations of the other contracting party. Further, its list of forms of investment includes intellectual property, without any qualifications like the other Agreements.

2.1(2) Investor

Botswana-china BIT defines investor as "*Natural persons who are nationals of either contracting party in accordance with the laws of that contracting party.*"

Czech –Tunisia have similar wordings⁶⁵, both BITs also described what legal persons are i.e. entities incorporated in accordance with the laws of either party and having its head office in that contracting party's territory. Botswana goes further to add irrespective of whether or not for profit or whether their liabilities are limited or not.

The NAFTA has a different type of definition because it distinguishes between *the investor of a party*⁶⁶ and *investor of a non-party*⁶⁷

On the other hand, the U.S-MOROCCO FTA does not define investor in a general sense as the BITs, but distinguished between *investor of a non-party*; an investor who attempts or has made an investment in the territory of that party and is not an investor of either party, *and investor of a party* i.e. a party or state enterprise or national or enterprise of a party that is attempting to or makes an investment in the territory of the other party. It further provides that a person with dual nationality is deemed to be exclusively a national of the state of his dominant and effective nationality. The definitions in the FTAs are more detailed in their distinction of investor of a party and investor of a non-party as against the BITs that simply define investor.

2.2 CONDITIONS OF ENTRY

Some countries have conditions that restrict entry of foreign investment. It could be in the form of capitalization requirements where the government wants the foreign investors to bring all or most of its capital from outside to help it deal with its shortage of foreign currency as well as to preserve

⁶⁵ Art 1(2) defines the term investor to mean "... any natural person having the nationality of either Contracting Party in accordance with its laws.

⁶⁶Which it defines in Art 1139 as "...a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment"

⁶⁷ This means an investor other than an investor of a Party, that seeks to make, is making or has made an investment.

local capital for local projects.⁶⁸Sometimes they limit entry into some areas⁶⁹ and prefer certain areas to be dominated by domestic entrepreneurs for domestic reasons and to prevent a foreigner leaving the country stranded when he decides to relocate. There is also the fear that a foreign national may eliminate or hinder the emergence of a domestic entrepreneurial class. A lot of countries⁷⁰ incorporate some of these conditions into their national laws even if they are not reflected in any BIT.

2. 2(1) Performance Requirements

These are the main conditions of entry a nation provides for foreign investors to fulfil before they are allowed to come into a country. Performance requirements are stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country. They are and have been used by developed and developing countries together with other policy instruments, such as trade policy, screening mechanisms and incentives, to enhance various development objectives.⁷¹

They are operating expectations demanded of foreign enterprises, which are often applied to foreign investors only. It could come in form of requirements for local purchase of capital goods, intermediate goods and services, recruitment, employment and training practices. It could also include requirement for local purchase of raw materials and technology transfer⁷². Performance requirements tend to cause investors to pursue practices they would not otherwise adopt in the open market. Thus many developed countries, who are the major exporters of capital want to include provision limiting the kind of performance requirements placed on foreign investors.

⁶⁸ Seid Sherif 2002 Ashgate pg. 36

⁶⁹ For example in Australia, Foreign investors are not allowed to buy developed residential real estate and in Ethiopia they are not allowed into the banking and insurance sectors.

⁷⁰ Some examples are Tanzania, The National Investment (Promotion and Protection) Act 1990; Uganda, The Investment Code 1991; Zimbabwe, The promotion of Investment Policy and Regulation, 1991, to mention just a few. Some of the functions of these laws include the screening potential investors and determining the terms and conditions which may be imposed in relation to the operation of a business enterprise as well as issuing and approval of licenses.

⁷¹ UNCTAD 2003 *Foreign Direct Investment and Performance Requirement: New Evidence from Selected Countries* online at UN New York and Geneva online at http://www.unctad.org/en/docs/iteiia20037_en.pdf visited 20/04/2005 pg 14 of 318

⁷² Barle (Jr), H.E 1990 International Investment policy: A view from the private sector, in C D Wallace (Ed) *Foreign direct Investment in the 1990s: a New Climate in the Third World* Dordrecht Boston Martinus Nijhof (cross check to see if this is ok.)

It has been noted that there are divergent views as regards the effectiveness of performance requirements to achieve development objectives. While some experts regard them as an essential instrument in a country's FDI policy package, others tend to argue that their impact on investments is at best limited and at worst costly and counter-productive.⁷³

Arguments in favour of performance requirements state that it is essential to assert the host country's control over the national economy and its development as well as channelling foreign investment into areas of priority for the host country.⁷⁴ There are counter arguments however, such as that the protection of infant industries through performance requirements tends to create inefficient indigenous firms, which may adversely affect the host economy. Consumers may not always get better and cheaper products.

It has also been argued that the use of World Market prices or other commercial standards to determine arms-length transactions between companies and their subsidiaries can regulate transfer pricing other than performance requirements. It has further been argued that they are not the best way to solve balance of payment problems, since these problems can best be resolved by deflationary monetary or fiscal policies or exchange rate depreciation.⁷⁵

It is clear that the effect of FDI on domestic investments and growth depend very much on the nature or quality of FDI. Certain types of FDI tend to have more favorable developmental externalities than others. In that context attention needs to be paid by host countries to the quality of FDI inflows besides attracting greater magnitudes of FDI. Recent work has shown that host country policies have an important bearing on the quality of FDI inflows received.⁷⁶ Thus, the kind

⁷³ Some of these experts include, Kumar Nagesh 2001 WTO's Emerging Investment Regime; Way Forward for Doha Ministerial Meeting *Economic and Political Weekly* 36(33) August 18 pgs 3151-58, Moran Theodore H. 2002 *The relationship between trade, foreign direct investment, and development: new evidence, strategy, and tactics under the Doha Development Agenda negotiations*", paper prepared for ADB's Study on Regional Integration and Trade: emerging policy issues for selected developing member countries, November 2002, mimeo; as well as Rodrick, Dani 1987 The Economics of Export Performance Requirements *Quarterly Journal of Economics*, 102 pg 633-650-Source UNCTAD 2003 *Foreign Direct Investment and Performance Requirement: New Evidence from Selected Countries* online at UN New York and Geneva online at http://www.unctad.org/en/docs/itejia20037_en.pdf visited 20/04/2005 pg 56 of 318

⁷⁴ Fisher, B.S & Turner, J.1983 *Regulating the Multinational enterprise: national and International Challenges* New York Praeger pg.80

⁷⁵ Supra note at pg 79

⁷⁶ Kumar, Nagesh 2003 *Investment on the WTO Agenda: A developing Country Perspective and the Way Forward for the Cancun Ministerial Conference* RIS-DP #56/2003 online at http://www.ris.org.in/dp56_pap.pdf Visited 17/04/2005 Pg 8 Of 34; See Kumar, Nagesh (2002)

of performance requirements a host country has the liberty to impose will play an important role in determining this⁷⁷

Developed countries of today have extensively employed performance requirements (PRs) in their process of development especially when they were net importers of capital. For instance, Chang⁷⁸ documents how USA had all kinds of performance requirements on foreign investors when it was a capital-importing country in the nineteenth century.⁷⁹ Another instance is that the European Union countries have also extensively used certain regulations,⁸⁰ which are in effect like local content regulations to deepen the local commitment of Japanese corporations in consumer goods industries in the past.⁸¹ EU countries have also used anti-dumping measures to regulate imports of cars and other products from Japan and South-east Asia, and the US has aggressively used similar measures in attempting to achieve reciprocity (i.e. substantially equivalent competitive opportunities) in trade and investment with Japan and other countries.⁸²

Another instance is in the US provisions of the Buy American Act, which have also been used as local content requirements. For instance, in order to qualify as domestic product to claim a 25 per cent price preference under the Buy American Act, a Hungarian manufacturer of buses had to buy US made engines, transmissions, axels and tyres.⁸³ This way, the US government employed performance requirement as a way of providing jobs for producers of engines, transmissions, axels

Globalization and Quality of Foreign Direct Investment: A Quantitative Analysis of the Role of Host Country Characteristics and Emerging WTO Regime, New Delhi: Oxford University Press.

⁷⁷ Governments have employed various measures to improve the overall quality of FDI inflows. These include performance requirements (PRs) like local content requirements (LCRs) on MNE affiliates to intensify generation of local linkages or export obligations for expanding the contribution of FDI to expansion of manufactured exports of developing countries.

⁷⁸ Chang, Ha-Joon (2002) *Kicking Away the Ladder- Development Strategy in Historical Perspective*, London, Anthem Press; Chang, Ha -Joon (2003) *Foreign Investment Regulation in Historical Perspective-Lessons for the Proposed WTO Agreement on Investment*, Cambridge University, memo.

⁷⁹ Kumar, Nagesh 2003 Investment on the WTO Agenda: A developing Country Perspective and the Way Forward for the Cancun Ministerial Conference RIS-DP #56/2003 online at http://www.ris.org.in/dp56_pap.pdf Visited 17/04/2005 Pg 9 of 34

⁸⁰ One of which is the Screwdriver regulation, a kind of performance requirement that imposed some level of local content on foreign investors manufacturing in the United States.

⁸¹ Safarian, A.E. 2002 *The Use and Impact of Performance Requirements in the Developed Countries*, Geneva: UNCTAD, memo

⁸² *ibid* - Safarian,

⁸³ Krugman, Paul and Obstfeld M. 2000 *International Economics*, 4th Ed., McGraw Hill.

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and tyres. Thus protecting those industries even though a foreign bus producer had been allowed to enter the country.

The Botswana –China BIT and the Czech –Tunisia BIT are silent on performance requirements that are excluded by the agreements but they both mention⁸⁴ that each contracting party shall encourage and create favourable conditions for investors of the other contracting party to make investments in its territory.

The NAFTA⁸⁵ lists a lot of performance requirements that are forbidden under the FTA. It includes the requirement to export a given level or percentage of goods or services, a given level of domestic content, purchases of goods and services locally, relating volume and value of import to exports or the amount of foreign exchange inflows, to transfer technology, a production process or other proprietary knowledge to a person in its territory except in enforcing a court order for violation for competition laws or an act inconsistent with the agreement, and to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market among others.

It further mentions⁸⁶ that so far the measures are not a disguised barrier to international trade nothing in Para 1(b), (c) or 3(a)⁸⁷ shall prevent any party from adopting measure to protect human, plant and animal health, exhaustible natural resources or to secure the compliance with regulations that are not inconsistent with the Agreement.

The US-Morocco FTA⁸⁸ also has similar provisions to NAFTA with a little variation but makes mention of Article 39 of the Agreement on Trade Related Aspect of Intellectual Property (TRIPS) and excludes “for export promotion and foreign aid programs” from the ambit of para.1 (a), (b), (c), 2(a) and (b).⁸⁹

⁸⁴ In Articles 2 respectively

⁸⁵ In Article 1106

⁸⁶ In Para 6 of Article 1106

⁸⁷ Which provide that “No party may enforce the following requirement.... (a) to export a given level or percentage of goods or services; (b) to achieve a given level of domestic content; (c) to purchase use or accord a preference to goods produced or services provided in its territory, or to purchase good or services from someone in its territory.... No party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a party or a non party on compliance with any of the following requirements: (a) to achieve a given level or percentage of domestic content” Articles 1106 NAFTA par 1(b), (c) and 3(a) respectively.

⁸⁸ Article 10.8

⁸⁹ Which provide that “ neither party may impose or enforce any requirement.... (a) to export a given level or percentage of goods or services; (b) to achieve a given level of domestic content; (c) to purchase use or accord a preference to goods produced or services provided in its territory, or to purchase good or services

Something to note is that the FTAs are very extensive on the kinds of performance requirements that cannot be imposed on the foreign investor as against the BITs that are almost silent on the issue. Another factor that influences investors is the treatment and protection of investors and their investments.

2.3. TREATMENT AND PROTECTION OF INVESTORS / INVESTMENT

An investor considers important factors before deciding to invest in a foreign country. They include the country's treatment of foreign investors and their investments, the degree of protection the host country provides to the investors and its property, and the right to repatriate earnings⁹⁰ under this category are two very important provisions the Most-Favoured Nation (MFN) treatment and National treatment. These are non-discriminatory provisions that ensure that parties treat investors of the other party in a manner that is equal and fair compared to other investors from non-party states and its own investors. The provisions are to ensure a level and competitive grounds for all the investors in a particular country

2.3. (1) Most Favoured - Nation Treatment (MFN)



One thing investors would like to be sure of before going into any country is that their investments will be treated equally and fairly thus most BITs and investment treaties contain an MFN provision to ensure equal and fair treatment of investors. MFN clauses have thus become a significant instrument of economic liberalization in the investment area.⁹¹

The MFN treatment is another provision that is common among all the agreements being examined.

Botswana –China BIT provides⁹² that investments by investors of each contracting party shall all the time be accorded fair and equitable treatment in the territory of the other contracting party. The

form someone in its territory... No party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a party or a non party on compliance with any of the following requirements: (a) to achieve a given level or percentage of domestic content” – Article 10.8 U.S- MOROCCO FTA, para.1 (a), (b), (c), 2(a) and (b) respectively.

⁹⁰ Seid 2002 Ashgate Publishers pg 44

⁹¹ This is premised on the twin pillars of the WTO National Treatment and MFN, which demand that global trade relations be done equitably and that WTO members should accord equal and fair treatment to all their trading partners so as not to place one person in an advantage against the other(s)

⁹² Art. 3 but it is titled Treatment of Investment; OECD 2004 *Most Favoured Nation treatment in International Investment law* Working Papers on International Investment Number 2004/2 online at <http://www.oecd.org/dataoecd/21/37/33773085.pdf> visited 3/11/04

parties shall not subject the investor or his investments to treatment less favourable than that accorded to its own investors or investors of any third state.

The Czech- Tunisia BIT⁹³ jointly provides for both MFN and National Treatment and provides that each contracting party shall treat investors of the other party in its territory fair and equitably in the same way it treats its own investors and those of third states.

NAFTA provides⁹⁴ for treatment of investors of the other party in a manner no less favourable than it will treat investors of a non-party in the acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. It also requires the same treatment for their investments.

US-MOROCCO FTA has an exact provision⁹⁵ but it uses the term covered investments unlike investment used in the other agreements.

2.3. (2) National Treatment.

Application of National treatment differs from country to country. Most countries have post entry and establishment provision for national treatment. The principle is aimed at eliminating discrimination vis-à-vis foreign investment, the comparison usually being between firms in the same sector.⁹⁶

Both the Botswana and Czech BITs do not have separate provisions for National treatment but provide jointly for National treatment and MFN in single chapters. BOTSWANA-CHINA does not mention national treatment in a separate heading but incorporates it into Article 3 in Para 2. It provides that each party shall accord investors and investments of the other party treatment not less favourable than that accorded to investments and associated activities by its own investors, without prejudice to its laws and regulations.⁹⁷

⁹³ Art. 3 CZECH -TUNISIA BIT

⁹⁴ Art 1103 of NAFTA

⁹⁵ Article 10.4 U.S –Morocco FTA 2004 provides that no party shall treat the investor of the other party in a manner less favourable than it accords investors of a non-party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments. Para 2 provides the same treatment for covered investments

⁹⁶ OECD, 1993 *National Treatment for Foreign–Controlled Enterprises* Paris OECD pg 62-64,22

⁹⁷ Para 3 has an exact provision but refers to the investors of third states.

CZECH-TUNISIA has the same Article for MFN and National treatment.⁹⁸ It provides that the investors shall be treated fairly in the use enjoyment and disposal of their investment in relation to other investors.

The U.S –MOROCCO FTA⁹⁹ provides that foreign investors of the other party shall be treated no less favourably than its own investors as well as non-party investors. Whereas NAFTA has a similar provision which is more elaborate and includes a paragraph which states that with respect to a state or province, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

Another factor that influences investors' decisions is expropriation and compensation, which is common to all the Agreements.

2.4. EXPROPRIATION AND COMPENSATION

The payment of compensation for expropriation is one of the major elements of a lawful act of expropriation. Some countries stipulate adequate compensation to the prevailing market value and in convertible currency should be paid without delay¹⁰⁰, while others use just compensation in place of adequate¹⁰¹ It has been argued that in the case of developing countries a strict compliance with the orthodox standards of compensation would thwart their efforts to carry out badly needed social and economic reforms and that the ability of the expropriating state to pay should be taken into consideration.¹⁰²

Expropriation and compensation is provided for in the BOTSWANA-CHINA BIT,¹⁰³ and it forbids expropriation of investor's investment unless it is for the public interest, under domestic legal procedure and without discrimination. It further provides for compensation for damages, which will be the value of the expropriated investment immediately before expropriation. The compensation shall be made without delay, be effective, realizable and freely transferable.

⁹⁸ Article 3 Czech-Tunisia BIT

⁹⁹ In Article 10.4

¹⁰⁰ For example Investment Protection Proclamation No 37/1996 (of Ethiopia) Article 21

¹⁰¹ For example Foreign law Act 1990 (of Namibia)

¹⁰² Seid 2002 Ashgate pg 47

¹⁰³ Article 4 of Botswana-china BIT

CZECH-TUNISIA provides for both expropriation and compensation¹⁰⁴ and it forbids expropriation of a foreign investor's property except for public purpose and such expropriation must be carried out under due process of law on a non-discriminatory basis while prompt, adequate and effective compensation must follow. The compensation must amount to the effective value of the investment expropriated immediately before expropriation. It further provides¹⁰⁵ for compensation or damages suffered inside the territory of the other contracting state in case of war, a state of national emergency etc, which must not be discriminatory.

NAFTA and US-MOROCCO FTA have provisions in one article¹⁰⁶, which are similar and more elaborate. They both talk about compensation being paid without delay and it should be fully realisable and freely transferable as well as with interest accrued from the date of expropriation to the date of payment. They also talk about compensation being paid with interest on the currency being used for the repayment from the date of expropriation to actual date of payment.

An aspect that is very prominent about the FTAs is that they have more detailed compensation provision¹⁰⁷ and emphasis is placed on payment of interest on the value of the property expropriated in whatever currency it is paid in.



2.5. DISPUTE RESOLUTION

The provision for dispute settlement is paramount in any bilateral or multilateral agreement because parties must always decide what laws they want to govern a dispute if any arises. The provision covers areas such as the forum and other details that will be used to determine the dispute. Thus these agreements are no exception and this provision is one that all the agreements have in common.

¹⁰⁴ Article 5 of the Czech–Tunisia BIT

¹⁰⁵ In Article 4

¹⁰⁶ Article 1110 NAFTA; Article 10.6 U.S Morocco FTA

¹⁰⁷ Note that in the NAFTA Agreement, Canada reserved the right to continue reviewing foreign investments about a \$150 million threshold as provided in the FTA. Mexico committed to raising its foreign investment review threshold to \$ 150 million within 10 years of the implementation of the Agreement –See Trebilcock, J. M and Howse, Robert 1999 *The Regulation of International Trade* 2nd Edition Routledge pg42

BOTSWANA-CHINA divides it into settlement of dispute between contracting parties and between investor of one contracting party and the other contracting party¹⁰⁸

Settlement of dispute between contracting parties

On disputes between contracting parties it suggests negotiation as a first step and only when that fails should it be referred to an ad hoc arbitral tribunal consisting of 3 arbitrators one appointed each by the parties. These two then appoint another from a third state who will then be the chairman of the tribunal. This appointment must be done within 3 months of the appointment of the other two members. If this is not done within 4 months of receipt of request for arbitration then the parties may invite the chairman of the international court of Justice to appoint the arbitrators. If he is a national of any of the contracting parties then his assistant or the next in line who is not a national of either party and who is not prevented from discharging such duties shall be invited to make the appointments. The tribunal shall determine its own procedure and both parties shall bear the costs of its own arbitrator and that of the chairman jointly.

Settlement of dispute between investor of one contracting party and the other contracting party

Here it provides that such disputes should as far as possible be settled amicably through negotiations. If it cannot be settled in six months, then either party can submit the dispute to the competent court of the contracting party accepting the investment. It also mentions an ad hoc arbitral tribunal without specifying the use of United Nations Commission on International Trade Law (UNCITRAL) RULES. The BIT requires that the contracting party involved insist that the investor exhaust the domestic administrative review procedure specified by the laws and regulations of that contracting party before submission of the dispute to arbitration. It also makes the provision for the appointment like in the other case and how the tribunal shall operate.¹⁰⁹

CZECH – TUNISIA has very similar provisions and divided them into the two categories settlement of dispute between contracting parties and between a contracting party and an investor of the other contracting party.¹¹⁰

Settlement of Dispute between contracting parties

¹⁰⁸ Articles 8 and 9 of the Botswana – China BIT, respectively

¹⁰⁹ i.e., in accordance with the law of the Contracting Party to the dispute accepting the investment including its rules on the conflict of laws, the provisions of the agreements as well as principles of international law.

¹¹⁰ Articles 9 & 8 Czech – Tunisia BIT respectively.

Its provisions are similar to BOTSWANA's, but differ in the appointment when there is a failure to appoint after the period stipulated the Secretary General of the United Nations or his assistant/next in line if he is a national of either state shall be invited to appoint the arbitrators. Settlement of dispute between contracting party and investor of the other contracting party

This shall be settled by negotiation between the contracting parties. If it continues after six months, the matter may be submitted at the request of either party to International Centre for Settlement of Investment Disputes (ICSID) having regards to its provisions on the settlement of dispute between states and nationals of other states, if both parties are parties to the convention or to an international ad hoc arbitral tribunal established under the UNCITRAL. The parties may agree to modify the rules in writing and the arbitral awards shall be final and binding on both parties. The investor shall only be entitled to submit the dispute to ICSID OR UNCITRAL, if the dispute has not been brought before a competent court in either contracting state or if it has not been submitted for resolution in accordance with any previously agreed dispute settlement procedure.

NAFTA has a very elaborate dispute settlement provision it provides for settlement of dispute between a party and investor of another party and provides for claims by an investor on its own behalf or on behalf of an enterprise. However it also provides for consultation as a first step before submission to arbitration.

Its arbitration rules are extensive and it provides that six months after the events that gave rise to the claim, the investor can submit the dispute to arbitration and ICSID rules would apply if they are both parties to the convention or UNCITRAL rules if one of them is not party to ICSID. It provides that the disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which shall include the name and address of disputing investor/enterprise, provisions that have been breached, factual basis of claims, relief sought and approximate amount of damages claimed.¹¹¹ It also provides for the consent to arbitration being in line with chapter II of ICSID and the Additional Facility Rules for written consent of the parties; article II of the New York Convention for an agreement in writing; and Art I of the Inter American Convention for an agreement. It provides for appointment of arbitrators, ¹¹²as well as the place of arbitration.

¹¹¹Article 1119 NAFTA

¹¹²Similar to the BITs but the secretary-general shall serve as appointing authority of arbitrators when the parties fail to appoint arbitrators. Other provisions include governing law (in accordance with the

The U.S-MOROCCO FTA has similar provisions too on dispute settlement. It however does not have the initial claim by investor on his behalf or on behalf of an enterprise but starts with consultation and negotiation and provides that if it fails the claimant can on its own behalf submit to arbitration a claim that the respondent has breached an obligation under section A, an investment authorization or an investment agreement and the claimant has incurred loss or damage by reason of that breach.¹¹³

2.6. TRANSFERS

This is another core element of investment protection, because the ability to transfer capital and earnings is critical for any foreign investor. The scope has been said to be broader in developed countries than in developing countries. In developed countries, it includes principal investment and additional amounts to maintain or increase an investment, the returns, repayments of loans, proceeds from liquidation or sale of the whole or any part of the investment, and compensation in case of expropriation etc.¹¹⁴ However, an examination of the BITs and FTAs been focused on in this paper revealed that the scope of transfers permitted in all four agreements was very similar as will be seen in the examination that is to follow shortly.

BOTSWANA –CHINA calls it repatriation of investments and returns¹¹⁵ and provides that each contracting party shall subject to its laws and regulations guarantee the investors of the other contracting party the transfer of their investments and returns held in its territory. It lists those things that are covered such as profits, dividends, interests and other legitimate income, proceeds from partial or total sale of investment, payments pursuant to a loan agreement, royalties or fees, technical service fees, management fees, earnings of nationals of the other contracting party who work in connection with an investment in its territory. It also mentions that the transfers shall be made in a freely convertible currency and at the prevailing market exchange rate on the date of transfer.

agreement and principles of international law), and place of arbitration (territory of a party that is party to the New York convention).

¹¹³ Article 10.15 US-MOROCCO FTA 2004

¹¹⁴ OECD 1995 *Towards Multilateral Investment Rules* Paris OECD 142-43

¹¹⁵ Article 6 Botswana-China BIT

CZECH- TUNISIA has similar but slightly different wordings. It adds that the transfers shall be made in a freely convertible currency, without restriction and undue delay. For the exchange rate, it adds, "unless otherwise agreed". Finally it provides that either contracting party may maintain laws and regulations that require reports of currency transfer, impose income taxes, or to protect the rights of creditors or ensure the satisfaction of judgment in adjudicatory proceedings.

NAFTA has similar provision with some variations. It provides¹¹⁶ that all transfers relating to an investment in contracting states should be made freely without delay. It adds to its list of the forms of transfers, payments made under a contract entered into by the investor. It also provides that no Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of another Party. It adds that this does not prevent a party from restricting transfers acting in good faith and not discriminating in the event of bankruptcy, criminal or penal offences along with others listed in the other BITs.



US-MOROCCO FTA has a slightly shorter version of the NAFTA provisions. It talks about covered investments and adds to its forms of transfer, payments arising out of a dispute. It further provides that each party shall permit returns in kind relating to a covered investment to be made as authorised or specified in a written agreement between the party and a covered investment or an investor of the other party.

US-MOROCCO FTA provides for Investment and environment¹¹⁷ and it allows a party to maintain or enforce a measure consistent with the chapter that it considers appropriate to ensure that investment in its territory is undertaken in a manner sensitive to environmental concerns. Although this is absent in the BITs it is a good provision and NAFTA has a similar but longer provision in Article 1114.

¹¹⁶ Article 1109 NAFTA

¹¹⁷ In Article 10.10

3. CONCLUSION

It was possible to find common trends among the BITs as well as the FTAs even though there were slight variations in some cases and more detailed provisions in the FTAs compared to the BITs. The chapter focused on the trends and provisions common to all agreements and this will form a basis for the rest of the paper. The paper will discuss in chapter 4 whether these trends are sufficient to suggest a MAI and in what manner if at all they should be included in the MAI.

The agreements examined clearly show us that BITs/FTAs impose more restrictions as well as obligations on the host states in relation to expropriation unlike those imposed by the Hull Rule which was being used before the advent of BITs.¹¹⁸

In conclusion, it can be said that the above-examined trends are crucial to investment relations and regulations between states. Thus a multilateral framework or a standard BIT will have to contain most if not all the provisions examined above. Further, it must be noted that the right of compensation and transfer of property/funds will have to be negotiated so that the wordings will create a balance between the interest of the host state as well as the investor and its home country. One must note however, that the multilateral framework should not aim at reproducing these provisions as they are presently contained in BITs and FTAs, but they should be act as a guide towards the kind of provisions and content to be debated upon while a MAI is being negotiated.

The identification of these trends thus brings us to the issue of regulating FDI on a multilateral level in Africa. As Africa is a major recipient of FDI flows, the next chapter shall examine her attempts at regulating FDI on a multilateral level as well as some crucial arguments for and against a MAI.

¹¹⁸ See 1, introduction of the chapter.

CHAPTER 3

REGULATION OF FDI ON A MULTILATERAL LEVEL IN AFRICA

1.INTRODUCTION

The OECD, the Organization for Economic Co-operation and development in 1998 proposed a Multilateral Agreement on Investment which was negotiated by a 'high level negotiating group with a mandate to provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute settlement procedures'¹¹⁹, with the aim of allowing other countries to sign on to it after it had been ratified. The OECD MAI was the first and only attempt at regulating FDI on a multilateral level and it failed for a number of reasons.



Firstly, the choice of OECD as the forum for the MAI was making the great mistake of using a negotiation among like-minded developed countries to set the terms for a global agenda that was intended to encompass countries outside its own membership.¹²⁰ Secondly, it failed to address the central problem of balancing liberalization with a positive framework of regulation but instead tried to constrain government's power of intervention in market mechanism.¹²¹ It contained no binding

¹¹⁹ Picciotto, Sol & Mayne, Ruth (Eds) 1999 *Regulating International Business Beyond Liberalization* Oxfam in association with Macmillan pg. 82

¹²⁰ Furthermore, as 95.4% of the largest MNCS are headquartered in OECD countries this further emphasised the OECD being the wrong forum because the agreement would not have been balanced. – Clark, Tony *The Corporate Rule Treaty: The Multilateral agreement on Investments seeks to consolidate global corporate rule* in The MAI Briefings online at <http://www.geocities.com/CapitolHill/Lobby/7111/maibrief.htm> visited 03/01/05

¹²¹ *ibid*; The MAI sought to impose tight restrictions on what national governments can and cannot do in regulation of their economies - source Clark, Tony *The Corporate Rule Treaty: The Multilateral agreement on Investments seeks to consolidate global corporate rule* in The MAI Briefings online at <http://www.geocities.com/CapitolHill/Lobby/7111/maibrief.htm> visited 03/01/05

and enforceable obligations for corporate conduct,¹²² and protected the rights of foreign investors some of which were not available to the domestic investors¹²³.

Furthermore, the scope of the MAI was very broad in that it covered all economic sectors, all forms of investment, all stages of investment and all type of measures. It adopted a 'top down approach' unlike the WTO's 'bottom up approach' and included all sectors in the scope of the agreement except those which contracting parties made specific reservations against.¹²⁴

The top down¹²⁵ structure of the MAI was particularly problematic in terms of the rights of entry provided under the agreement. Given the often sensitive political grounds for restricting entry, the top down approach forces contracting parties to be overly cautious and lodge extensive exceptions to liberalization commitments.¹²⁶

The MAI was concerned with protecting proprietary and contractual rights acquired by foreigners without examining if the acquisition entailed any actual inflow of money or other new resources.¹²⁷ Its rules on performance requirements were similar to those in NAFTA i.e. minimum export, domestic content and domestic sourcing requirements were all prohibited.¹²⁸ It also prohibited technological transfer requirements except as a competition law remedy, provided for movement of key personnel and dispute settlement similar to NAFTA's.¹²⁹

¹²² History has shown that MNCs are not always law abiding and will break even their home country's laws if it will fetch them more profit and influence.

¹²³ This in itself was discriminatory and would have significantly reduced the ability of the governments to set national objectives and regulate MNCs accordingly –see Seid Sherif 2002 pg 178

¹²⁴ Seid, Sherif H 2002 *Source Global Regulation of FDI* Ashgate Publishing pg 80

¹²⁵ that is the approach of trying to include as much as possible in the definition of terms, rights and so on.

¹²⁶ Kurtz, Jurgan 2002 *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment* A Jean Monnet Working paper 06/2 NYU New York online at

<http://www.jeanmonnetprogram.org/papers/02/020601.pdf> visited 23/10/04 pg 56 of 80

However, some members raised a surprisingly high number of exceptions.

¹²⁷ Picciotto, Sol A critical Assessment of the MAI in Picciotto, Sol & Mayne, Ruth (Eds) 1999 *Regulating International Business Beyond Liberalization* Oxfam in association with Macmillan pg 85

¹²⁸ Trebilcock, Michael, J and Howse, Robert 1999 *The Regulation of International Trade* 2nd edition Routledge pg 358-359

¹²⁹ Trebilcock and Howse 1999 Routledge pg 359

Another area was the "rollback" clauses¹³⁰ and the "standstill" positions¹³¹ of the MAI which were aimed at ensuring that the investors will continue to enjoy favourable conditions for investment in the future regardless of the government or state interest.¹³²

All these added to its failure because it was not a balanced agreement,¹³³ which most developing countries would have not acceded to.

The MAI was negotiated exclusively without consultation with the various stakeholders. The preparation of an agreement such as the MAI should have involved at least the concerned key international players and should have been transparent.¹³⁴

Some arguments against a MAI will be examined next to see why it was opposed.

2. SOME CRUCIAL ARGUMENTS AGAINST A MULTILATERAL AGREEMENT ON INVESTMENT

The fear of taking on obligations under an agreement that binds them and limits their rights amongst others,¹³⁵ has led to a lot of debate on the necessity of negotiating a multilateral framework of FDI regulation despite the existing forms of regulation,¹³⁶ despite the argument by its proponents that a multilateral framework will help improve the rights and negotiating position of weaker and poorer states in the global economy. Some of the arguments against a MAI shall be examined shortly and they include the following; insignificant increase in FDI flows, security considerations, need for host country to retain sovereignty, regulation of performance requirements a tool for development, national priority, political stability, rights without corresponding obligations, negotiation strategy, corporate practices and preserving the status quo.

¹³⁰ This provided that any measures or policies by the government already in existence that did not conform to the principles and conditions of the MAI would be reduced and eventually eliminated.

¹³¹ Under which the contracting government would agree not to introduce any new non-conforming law or policy in the future. Once a country had signed the agreement it would be locked in for 20yrs.

¹³² Clarke, Tony *The Corporate Rule Treaty: The Multilateral agreement on Investments seeks to consolidate global corporate rule* in The MAI Briefings online at

<http://www.geocities.com/CapitolHill/Lobby/7111/maibrief.htm> visited 03/01/05

¹³³ As it tended to give the investors a lot of rights and limited the host nations ability to impose certain performance rights as it attempted to give it a broad scope without imposing corresponding responsibilities on the investors to assist with the host country's developmental needs.

¹³⁴ Seid Sherif 2002 pg 176

¹³⁵ One of these fears includes the fear of loosing their sovereignty over their natural resources

¹³⁶ SELA 2004 International Negotiation on Foreign Direct Investment prospects for Latin America and Caribbean SELA Permanent Secretariat Caracas Venezuela pg 3 online at

http://www.sela.org/public_html/AA2K4/ING/consejo/Di3.pdf visited 18/12/04

2.1 Insignificant increase in FDI flows

It has been stated that a MAI will not necessarily lead to increased FDI flows to poorer countries nor constitute a guarantee for stronger investment currents¹³⁷ because BITS/FTAs already have strong investor protection provisions and thus protection in a MAI may not necessarily add to what already exists in these BITS.¹³⁸ This conclusion is based on the evidence of the effects of the GATS commitment, which has not necessarily brought additional FDI to developing countries.¹³⁹ Also a survey of investment determinants across 30 African countries identified the regulatory and legal framework as having a negative impact on the investment decisions in less than 5% of cases.¹⁴⁰ This further buttresses the argument that a MAI will not have any significant impact on FDI inflows to Africa.¹⁴¹ The debate is complicated by the fact that there is as yet no evidence linking the conclusion of bilateral investment agreements with increases in FDI inflows.¹⁴² Further, in Asia, it has been noted¹⁴³ that countries that received the most investments have not had the highest growth rates.¹⁴⁴ There is also a need to create a relationship between policies that



¹³⁷ *ibid*; CUTS 2002, IFD Asia Pacific Regional Seminar; Investment for Development online at http://www.cuts-international.org/APRS_IFD.doc visited 16/04/2005 pg 10

¹³⁸ World Bank 2003 *Global Economic Prospects and the developing countries 2003: Investing to Unlock Global Opportunities* World Bank, Washington DC pg 133; see also Unknown 2003 *Unwanted, Unproductive and Unbalanced: Six Arguments against an Investment Agreement at the WTO* online at <http://www.ong-omcmexico.org.mx/Webpage/web/doctors/CAF0D6.pdf>. Visited 18/12/04

¹³⁹ Despite the assurance given to developing countries that making GATS commitments will increase their FDI inflows, UNCTAD in 2000 reports that there is no empirical evidence to link any significant increase in FDI flows to developing countries with the conclusion of GATS. See UNCTAD 2000a *A positive Agenda for developing Countries: Issues for future Trade negotiations* UNCTAD New York and Geneva pg 172

¹⁴⁰ UNCTAD World Investment Report 1999 *Foreign Direct Investment and the Challenges of Development* UNCTAD New York and Geneva online at cts.nankai.edu.cn/html/yjry/zxnlw.htm visited 15/02/2005 pg 51

¹⁴¹ The absence of a MAI up till now has not discouraged foreign investment neither has it prevented substantial unilateral liberalisation of investment regimes. On the contrary foreign investment has grown in the last decade, outpacing both trade and output growth. See Charlton, Andrew 2004 *Initiative for Policy Dialogue Background note for 'The IPD/Stiglitz Plan,' Part II Regulatory Harmonization: the Singapore Issues* online at http://www0.gsb.columbia.edu/ipd/pub/IPD_Appendix_2_Final.pdf visited 30/12/04 pg 4

¹⁴² Stephan Szepesi 2004 *Comparing EU Free Trade Agreements: Investment* In Brief No 6D – July 2004 European Committee for Development Policy Management (ecdpm) Publication available online at www.ecdpm.org and www.ileapinitiative.com pg 2

¹⁴³ This was an observation made by Christina Rogg, one of the speakers at the Asian Pacific Regional Seminar in India 2002

¹⁴⁴ CUTS 2002, IFD Asia Pacific Regional Seminar; Investment for Development online at http://www.cuts-international.org/APRS_IFD.doc visited 16/04/2005 pg 2

are aimed at attracting FDI and those that are aimed at ensuring that FDI translates into host country benefits.¹⁴⁵

2.2 Security considerations

This is arguably a very legitimate reason that can give governments certain discretion over decisions concerning foreign investment. The definition of what constitutes security interest for a country is ambiguous so countries define their security interest differently. For some it may mean protection of special interest groups,¹⁴⁶ for others it may mean a greater concern with equity.¹⁴⁷ Therefore, negotiations of MAI are unlikely to succeed unless countries have a clear understanding of what constitutes a national interest, and this understanding does not fundamentally deviate among countries.¹⁴⁸

Security interests are often also associated with the loss of sovereignty. The fear of losing control, due to globalisation; of losing the right to tax the residents on their territories and of foregoing the right to promote economic activities that are a national priority, are all examples that fall into this category.¹⁴⁹



2.3 Need for host country to retain sovereignty

It is argued by the advocates of a MAI, that it is precisely what Africa needs to attract foreign direct investment (FDI) for enhancement of her economic performance. While its opposers do not deny that foreign investment has some role to play in a developing country's economy, it is argued that everyone (even the World Bank) now recognizes that the role of foreign investment can be positive if and only if it contributes to the building of a country's domestic productive capacity.¹⁵⁰ For instance if a country does not have a measure of control over the sectors it wants to open to investors it may be flooded with investment in a sector where it does not have a productive

¹⁴⁵ *ibid* -

¹⁴⁶ For instance in Zimbabwe, President Mugabe insists that his government will use privatisation and foreign investment to give the country's black majority a greater share of the white dominated economy. - Financial Times "*Role of State Vital says Mugabe*" Financial Times, 5 March 1997, pg 7

¹⁴⁷ Which is what the Indian Prime Minister had in mind when he argued that India wants "growth with equity" source-Wall Street Journal "India talks the talk" 10 March 1997

¹⁴⁸ Drabek Zdenek 1988 pg 7

¹⁴⁹ *ibid*

¹⁵⁰ Oduor, Ong'wen *Multilateral Agreement on Investment and Africa: A case of Potential rape in Marriage* online at http://www.ms.dk/uk/Politics_press/Articles/oduor.htm visited 10/10/04

comparative advantage instead of in an area where it requires FDI to build its domestic productive capacity.

The kind of contribution by foreign investment cannot be realized without the government of the host country retaining the sovereign right and ability, even if they don't exercise it all the time, to select and direct such foreign investment to specific priority areas.¹⁵¹

It is important to add that the key benefits which developing countries are likely to get from FDI and transnational corporations (TNCs) / Multinational enterprises (MNEs) involve dynamic effects of upgrading which occur over time and which might not happen automatically without significant government management.¹⁵² Furthermore, to ensure that developing countries benefit from MNEs/TNCs investment as well as FDI, developing country governments must be able to guide and regulate MNEs/TNCs in varying ways and to various degrees depending on the particular situation facing those countries and governments. In short, while developing countries can reap some substantial benefits from FDI and TNCs, they are most likely to do so if they attract investment that complements their domestic needs. One way to ensure this is to have a say as to what kind of investment comes in and to which areas as well.¹⁵³

Likewise, those who oppose a MAI fear that the MNCs will have the freedom to cross borders and set up projects or buy up local companies while facing minimal or no regulation in the host country as to entry conditions and so on.¹⁵⁴ Thus the rights and authority to regulate foreign investors and

¹⁵¹ *ibid*; Countries in the south and east Asia believe that the National treatment clause in BITS if introduced into a MAI will mean that incentives for local investors in those sectors that are open to both local and foreign investors would also be open to foreign investors because they will be obliged not to discriminate by the MAI and this may not be in the best interest of their local investors. -See Seid, Sherif 2002 pg 110; Lobe Jim 2003 NGOs Organize Against Proposed WTO Investment Agreement <http://www.globalpolicy.org/soecon/bwi-wto/wto/2003/0624ngoinvest.htm> visited 03/01/05

¹⁵² Prof Epstein, Gerald in *A critique of Neo- Liberal Globalization* online at <http://www.twinside.org.sg/title/critique-cn.htm> visited 19/04/2005; a similar opinion was expressed in UNCTAD 2003 *Foreign Direct Investment and Performance Requirement: New Evidence from Selected Countries* online at UN New York and Geneva http://www.unctad.org/en/docs/iteiia20037_en.pdf visited 20/04/2005 pg 13 of 318

¹⁵³ Prof Epstein, Gerald in *A critique of Neo- Liberal Globalisation* online at <http://www.twinside.org.sg/title/critique-cn.htm> visited 19/04/2005; most developing countries feel that BITS and not a MAI gives them this flexibility –Anonymous, 2000 Working Group on the Relationship between trade and Investment Communication from India online at http://commerce.nic.in/wto_sub/Invest/sub_invest_w86.htm visited 20/04/2005 para. 7

¹⁵⁴ This was the intention of the U.S when the OECD MAI was being negotiated and it hasn't changed till date; Clark, Tony *The Corporate Rule Treaty: The Multilateral agreement on Investments seeks to consolidate global corporate rule* in The MAI Briefings online at

the degree of freedom and policy options of host countries would be reduced or constrained significantly.¹⁵⁵

Several developing countries see liberal investment rules as an incursion into their national sovereignty that is not justified by the benefits they bring.¹⁵⁶ It is important to add that it is not all FDI that is good for the poor that is why there is a need for government regulation.¹⁵⁷ Also, MNCs have the power to influence the weak regulatory systems of the third world states. For example in Argentina, a railway privatisation to an MNC was followed by the said MNC exerting pressure to decrease the tenure of the contract to get out of difficulties of operation.¹⁵⁸

Another example of how a MNC may harm the interest of a state is the case of Uganda and Pakistan where power projects set up by MNCs were subject to the condition that the state would buy all electricity produced by the MNCs at fixed dollar-based prices. After the devaluation of the local currency the contracts were breached and the two countries came under threat from the



<http://www.geocities.com/CapitolHill/Lobby/7114/maibrief.htm> visited 03/01/05; many countries (e.g. Mauritius) Require investors to get approval before new investment can go on. This enables it to screen investment and access its risk and benefits to the community before approval is given. A MAI may take away this right and may lead to serious harm to the poor people. - ActionAid *Unlimited Companies, The Developmental Impacts of an Investment Agreement in the WTO* online at <http://www.globalpolicy.org/socecon/bwi-wto/maimia/2003/06companies.pdf> visited 03/01/05 pg 15 ;It has been observed that if MNEs are not well regulated they can out compete all local firms and establish monopolies. -Blomstrom, M et al 2000 *Foreign Direct Investment and host Country Strategies* London Macmillan Press Ltd pg 105

¹⁵⁵ Khor, M *The effects of FDI, the Need for National Investment Policy and the Issue of Multilateral Investment Framework*, paper presented on Global Investment Forum, UNCTAD, 10 October, 1996; A similar view was expressed by Prof Epstein Gerald in *A critique of Neo- Liberal Globalization* online at <http://www.twinside.org.sg/title/critique-cn.htm> visited 19/04/2005

¹⁵⁶ Charlton, Andrew 2004 *Initiative for Policy Dialogue Background note for 'The IPD/Stiglitz Plan,' Part II Regulatory Harmonization: the Singapore Issues* online http://www0.gsb.columbia.edu/ipd/pub/IPD_Appendix_2_Final.pdf visited 30/12/04 pg 1

¹⁵⁷ ActionAid 2003 *Unlimited Companies; The Developmental Impacts of an Investment Agreement in the WTO* online at <http://www.globalpolicy.org/socecon/bwi-wto/maimia/2003/06companies.pdf> visited 03/01/05 pg 2; Most Developing countries generally accept that FDI could make a big contribution to their development efforts. Their concern is however that all types of FDI, flowing in all sectors of an economy, may not necessarily constitute a necessary condition for achieving rapid growth and sustainable development. The countries that oppose a global investment regime argue that FDI could only be beneficial to their economies if they can control, regulate and direct it according to their development objectives. -See Seid 2002 pg 104

¹⁵⁸ Khaled, Ahmed *The 10 Misconceptions of the Opponents of Globalisation* online http://www.hbfasia.org/southeastasia/thailand/exhibitions/identitiesversusglobalisation/ivg_debates/globalisation_debate/khaled_ahmed_10mis.htm visited 05/01/05

World Bank and had to raise power tariffs domestically till they made the entire economy unviable.¹⁵⁹

As it has been rightly observed,¹⁶⁰ any rights or obligations that a state may have with respect to foreign investment are born of treaties and other instruments of international law negotiated by choice with or amongst other states. Therefore, the autonomy and ability of a state to regulate such inward foreign investment flows is an affirmation of its sovereignty.¹⁶¹ According to Mr Sornarajah a state's right to control foreign direct investment is based on the international law regarding aliens and the right of a state to deny entry to such aliens.¹⁶² However, as countries struggle to attract FDI, there is a corresponding move towards giving up some of that autonomy and relaxation of limits placed on aliens.

It can also be seen by some as another way of colonization. Since many African states were once colonies of the countries, which are the major exporters of capital,¹⁶³ even though they have achieved independence with a flag and national anthems, Africa still depends on her former colonizers for capital through FDI. A MAI will further increase their dependence on these countries and reduce their sovereignty.¹⁶⁴ This is because by signing on to a MAI they will be giving up a lot of their sovereignty and the ability to determine who can come into their territory and how their resources should be dealt with.

¹⁵⁹ *ibid*; This further emphasises the need for states to be able to regulate these MNCs so as to avoid such situations, which can have damaging effects on the economy of a poor developing nation.

¹⁶⁰ This observation has been made by several authors one of which is Mosoti Victor in his work Non-Discrimination and its Dimension in a Possible WTO Framework Agreement on Investment; Reflections on the Scope and Policy Space for the Development of Poor Economies *The Journal of World Investment* Vol.4 No.6 December 2003

¹⁶¹ Mosoti, Victor 2003 Non-Discrimination and its Dimension in a Possible WTO Framework Agreement on Investment; Reflections on the Scope and Policy Space for the Development of Poor Economies *The Journal of World Investment* Vol.4 No.6 December 2003 pg.1012

¹⁶² Sornarajah, M. 1994 *The International Law on Foreign Investment*, Cambridge University Press Cambridge U.K pg 83

¹⁶³ For instance as at 2002 it was noted that in South Asia, The benefits of FDI in the colonial period were limited, and went into areas, which had little connection with most of the domestic economy. In present times very little was done to prepare domestic economy for FDI inflows. Thus, the MAI may be away of extending/re-establishing some countries' colonial powers. - CUTS 2002, IFD Asia Pacific Regional Seminar; Investment for Development online at http://www.cuts-international.org/APRS_IFD.doc visited 16/04/2005 pg 3

¹⁶⁴ These are my words based on a conversation I had with Professor Benyah of the Mathematics department at the University of the Western Cape, and some PhD students in December 2004.

It has also been argued that in order to attract more investment, there is no need for a host country to conclude a BIT or a multilateral framework on investment (MFI), if doing so would mean conceding so much of the country's economic autonomy. Therefore, at present, it has been advised¹⁶⁵ that it is important to give a comprehensive and correct assessment of BITs and a multilateral framework on investment before advocating that a MAI be adopted.

It has been said that compared to possible regional or multilateral investment agreements, BITs had the advantage that it could be tailored to the specific situations of the two countries. On the other hand, with a multilateral investment framework, developing countries would be under high pressure to open their markets to developed countries.¹⁶⁶

2.4 Regulation of performance requirements a tool for development

Many countries today view inward foreign direct investment as an important means of integrating their economies with international markets and expect it to contribute to their economic development. In this vein many have opened up their economies to foreign investors in the name of liberalization. Nonetheless, openness alone is not always sufficient for the expected benefits to materialize. In order to narrow the gap between the objectives of host countries and transnational corporations, governments use a variety of policy measures.¹⁶⁷ Thus there is a need for host governments to have the liberty to influence their local policies to help them achieve their desired objectives.

Performance requirements can be an important policy tool in this context, to enhance the benefits of, and address concerns related to, inward FDI. Their role in policy-making is still controversial, however. Many developing countries seek to preserve their right to utilize them, arguing that they should have the right to use tools that were available to developed countries when they were industrializing their economies. Developed countries, on the other hand, tend to associate

¹⁶⁵ This advice has been given by many NGOs and writers in their comments, while contributing to numerous literature on the debate so far.

¹⁶⁶ As expressed by a Chinese expert in Third World Network 1997 *Bilateral investment agreements play only a minor role in attracting FDI* online at <http://www.twinside.org.sg/title/bil-cn.htm> visited 18/04/2005

¹⁶⁷ UNCTAD 2003 *Foreign Direct Investment and Performance Requirement: New Evidence from Selected Countries* online at UN New York and Geneva http://www.unctad.org/en/docs/itejia20037_en.pdf visited 20/04/2005 pg 3 of 318

performance requirements with interventionist strategies of the past and question their effectiveness.¹⁶⁸ It has been argued that any attempt to curtail the policy space available to the host governments for regulation of FDI is likely to have a bearing on the quality of FDI.¹⁶⁹

2.5 National Priority

Charlton Andrew and Seid Sherif have argued that different countries have the areas they feel require propriety and this determines the kind of foreign investment that comes into that sector. Thus the current regulatory framework as it is gives different countries the flexibility to negotiate investment agreements based on their national interests without violating any existing laws.¹⁷⁰

If a MAI is introduced, it will greatly limit the flexibility that nations have in placing their national interest as priority in the investment agreements they enter as well as the regulation of foreign investors in their territories¹⁷¹.

It has further been argued that an international agreement on investment rules of this type is ultimately designed to maximise foreign investors' rights whilst minimising the authority, rights and policy space of governments and developing countries. This has serious consequences in terms of policy making in economic, social and political spheres, affecting ability to plan in relation to local participation and ownership, balancing of equity shares between foreign and locals and between local communities, the ability to build capacity of local firms and entrepreneurs, and the need for protecting the balance of payments and the level of foreign reserves. It would also weaken the

¹⁶⁸ *ibid*

¹⁶⁹ Kumar, Nagesh 2003 *Investment on the WTO Agenda: A developing Country Perspective and the Way Forward for the Cancun Ministerial Conference* RIS-DP #56/2003 online at http://www.ris.org.in/dp56_pap.pdf Visited 17/04/2005 Pg 11 of 34

¹⁷⁰ Despite the number of BITs and the shift towards liberalization of investment rules, many developing countries still maintain policies that allow them to manage foreign investment to their own advantage and avoid its negative effects. A MAI will remove or greatly limit this right, which they feel is essential. - ActionAid *Unlimited Companies The development impact of an Investment agreement in the WTO*.pg15

¹⁷¹ Seid, Sherif 2002 pg 110; This is an essential reason for its opposition by a lot of developing countries particularly the South East-Asian countries who believe that there is no single model of development that could apply to all countries and believe that a global investment would deprive them of the flexibility and pragmatism they need to design, change and implement their investment laws depending on their particular circumstances; Charlton Andrew, 2004 **Initiative for Policy Dialogue** Background note for 'The IPD/Stiglitz Plan,' Part II Regulatory Harmonization: the Singapore Issues online at http://www0.gsb.columbia.edu/ipd/pub/IPD_Appendix_2_Final.pdf visited 30/12/04 pg 1

bargaining position of government vis-à-vis foreign investors (including portfolio investors) and creditors.¹⁷²

There is also a possibility of MNE entry affecting domestic enterprises adversely given the market power of their proprietary assets such as superior technology, appeal of brand names and aggressive marketing techniques. Therefore, FDI may crowd-out domestic investment and may thus be immiserizing.¹⁷³ For instance, FDI was found to have a significant negative effect on domestic investment or crowding it out. However, this effect varies across countries and in the Pacific basin countries FDI seems to have crowded-in domestic investment.¹⁷⁴ Similarly, Agosin and Mayer¹⁷⁵ analyzing the effect of FDI inflows on investment rates in host countries over the 1970-95 period found that FDI crowds-in domestic investment in Asian countries, crowds out in Latin American countries while in Africa the relationship is neutral.¹⁷⁶

Evidence is also available on the adverse effect of foreign ownership on productivity of domestic enterprises in developing countries.¹⁷⁷ A recent G-24 Working Paper brought out by UNCTAD¹⁷⁸ has also highlighted cases where FDI may have lowered host country welfare.¹⁷⁹ Thus investors have to be properly regulated for the host country to keep its national priority in focus.

2.6 Political stability

¹⁷² Khor, Martin 2003 TWN Cancun's Briefing 3- WTO Singapore Issues What's at stake and Why it Matters online at http://twnafrica.org/news_detail.asp?twnid=492 visited 15/04/2005

¹⁷³ Fry, Maxwell J. 1992 *Foreign Direct Investment in a Macroeconomic Framework: Finance, Efficiency, Incentives and Distortions, PRE Working Paper*, Washington, DC: The World Bank.

¹⁷⁴ Kumar, Nagesh 2003 Investment on the WTO Agenda: A developing Country Perspective and the Way Forward for the Cancun Ministerial Conference RIS-DP #56/2003 online at http://www.ris.org.in/dp56_pap.pdf Visited 17/04/2005 Pg 7-8

¹⁷⁵ Agosin, MR, and Ricardo Mayer 2000 *Foreign Investment in Developing Countries: Does it Crowd in Domestic Investment? UNCTAD Discussion Paper, No.146*, Geneva.

¹⁷⁶ Kumar, Nagesh 2003 Investment on the WTO Agenda: A developing Country Perspective and the Way Forward for the Cancun Ministerial Conference RIS-DP #56/2003 online at http://www.ris.org.in/dp56_pap.pdf Visited 17/04/2005 Pg 7-8

¹⁷⁷ See Aitken, Brian and Harrison Ann E. 1999 Do Domestic Firms Benefit from Direct Foreign Investment? *American Economic Review*, 89(3): 605-618.

¹⁷⁸ Hanson, Gordon 2000, *Should Countries Promote Foreign Direct Investment?*, *Research Programme of the G-24*, Kennedy School of Harvard University, Cambridge University, Mass.

¹⁷⁹ Kumar, Nagesh 2003 Investment on the WTO Agenda: A developing Country Perspective and the Way Forward for the Cancun Ministerial Conference RIS-DP #56/2003 online at http://www.ris.org.in/dp56_pap.pdf Visited 17/04/2005 Pg 7-8

Political instability is a common feature in many African nations, caused mainly by income inequality and increased poverty amongst other factors. Political instability in turn complicates the pursuits of other economic policies, however rational or sensible they might be.¹⁸⁰ This will ultimately discourage inflow of foreign capital, which requires politically stable regimes as a condition for long-term investment. Political stability was seen as key for generating savings and investments.¹⁸¹ Thus it can be inferred that if there is no political stability in a potential host country, a MAI may not have any effect on the volume of investment it attracts as well as economic development.

2.7 Rights without corresponding obligations

One of the greatest criticisms of some attempts at creating a MAI was that they tend to give rights to investors without corresponding obligations.¹⁸² For instance, it could be they encroached on the sovereign rights of the state by limiting the host country from selecting the type of FDI they would allow into their country or the prohibition of performance rights.¹⁸³ This denial of policy choice would be a major challenge to any country that may wish to revise its investment policies as it reaches new levels of development in the future.¹⁸⁴ It has been argued by opponents of a MAI that it should not be about market access for MNCs but should be about creating an opportunity where FDI contributes to the economic development of the host country.¹⁸⁵ Further, it has also been

¹⁸⁰ Drabek, Zdenek 1988 pg 13

¹⁸¹ Nordic Africa Initiative High level Seminar Tanzania, 2004 online at

<http://www.sweden.gov.se/content/1/c6/03/57/85/8b3c96b6.pdf> visited 15/04/2005 pg 6

¹⁸² A typical example is the failed OECD MAI which gave the foreign investors more privileges than local investors in its dispute settlement provisions.- Seid, Sherif H 2002 *Global Regulation of Foreign Direct Investment* Ashgate Publishing pg.95

¹⁸³ - Seid, Sherif H 2002 *Global Regulation of Foreign Direct Investment* Ashgate Publishing pg.95; ActionAid *Unlimited companies, The Developmental Impacts of an Investment Agreement in the WTO* pg 15 A similar opinion was expressed by Kurtz Jurgen in the Jean Monnet paper where it was stated that the failed OECD MAI proposed more performance requirement prohibition than that contained in the NAFTA. This definitely did not go down well with developing countries. See Kurtz, Jurgen 2002 *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment* Jean Monnet Working Paper 6/02 NYU School of Law New York online at <http://www.jeanmonnetprogram.org/papers/02/020601.pdf> visited 23/10/04 pg 56 of 80

¹⁸⁴ *ibid* - ActionAid *Unlimited companies, The Developmental Impacts of an Investment Agreement in the WTO* pg 15

¹⁸⁵ see Seid Sherif 2002 pg 111

argued that a MAI should put obligations on the multinational companies and not only on the host countries.¹⁸⁶

2.8 Negotiation strategy

Another argument against a MAI is that many countries are not ready for negotiations of multilateral investment rules. Countries like Bangladesh argue that they do not have the necessary administrative support,¹⁸⁷ while others say they do not fully understand the issues. Some LDCs have also expressed their preference for negotiations on a regional basis.¹⁸⁸ However, it is important to add that developing countries (Africa inclusive) are divided on whether there should be a multilateral regime for investment and in which forum it should be negotiated and implemented.¹⁸⁹

2.9 Corporate Practices

A further argument against a MAI is the malpractices of the MNEs who are the major exporters of capital for foreign investment. MNEs tend to abuse the fact that the host country needs their funds and try to cut corners or go to countries with cheap labour or standards that are not well enforced to produce their products. An example is transfer pricing which is one of the ways in which MNCs deprive host country governments of fiscal resources and causing them to depend on these MNCs. It has also been argued that MNCs take advantage of globalisation to get around environmental and operating rules such as rules on labour conditions.¹⁹⁰ Critics from the Washington based centre for public policy and the Geneva/ Gland-based Worldwide Fund for Nature,¹⁹¹ see these practices as unethical and highly detrimental to the development of poor countries. They fear that a

¹⁸⁶ See Seid Sherif supra, where he expressed the opinion of a Chinese diplomat; This is a very serious point for the opposers of a MAI since the BITs as they exist and the past attempts at a global framework for regulating FDI have failed to create this balance.

¹⁸⁷ An example is the negotiation of the WTO agreements a lot of African developing countries are under represented at these negotiations and mainly because they do not have the required manpower to represent them at these negotiations. So there is the fear that they may not be able to actively participate in the negotiation of a MAI and be roped into signing an agreement, which does not reflect their interests and may greatly put them at a disadvantage against the foreign investors.

¹⁸⁸ Drabek Zdenek 1988 pg 8

¹⁸⁹ Seid, Sherif H 2002 *Global Regulation of Foreign Direct Investment* Ashgate Publishing pg 99

¹⁹⁰ Drabek Zdenek 1988 pg 8

¹⁹¹ Based on studies carried out by these organizations .See Drabek Zdenek 1998, pg 8

full-blown international treaty such as an MAI, facing approval by each signatory's parliament, will simply hand corporations more power if it is signed.¹⁹²

Shah Anup opined that the MAI would result in real transfer of decision making power to unaccountable private corporations, making it more difficult for elected governments to pass and apply laws for their public's interest with the effect of reducing democracy so that people are locked in corporate-right agreements "all under the banner of free trade."¹⁹³

2.10 A MAI will create development costs not benefits for developing countries

Some of the opposers of a MAI mainly the civil societies and some NGOs¹⁹⁴ feel that some of the existing multilateral agreements are not well balanced and give more costs than benefits to the developing countries especially the members of the WTO. In their opinion the WTO is not capable of producing rules and regulations that are fair to developing countries. They fear that once these agreements are reached (for e.g. the MAI) it becomes virtually impossible to change them in the light of experience.¹⁹⁵

They fear that the developing countries (mostly African) will be forced to make more trade offs than will benefit them during the negotiations which may not necessarily be balanced, as is evidenced from previous agreements.¹⁹⁶ This is because the bulk of FDI flows originate in developed countries and developing countries are on the receiving end most of the time. The top 10 industrially and technologically most advanced countries account for as much as 74 per cent of FDI outflows. Keeping in mind the increasing importance of FDI as a channel of servicing the markets,

¹⁹² *ibid*; As it is MNCs are often in a position to obtain incentives from the host country in excess of their needs and perhaps in excess of the benefits they bring to the host country.-Source Moosa Imad A. 2002 pg 271-272

¹⁹³ Shah Anup 2000 Multilateral Agreement on Investment online at <http://www.globalissues.org/TradeRelated/MAI.asp> visited 13/10/2004 pg. 1

¹⁹⁴ In this case ActionAid and WDM

¹⁹⁵ Hardstaff, Peter and Rice, Tim 2003 More Market Access for Less Policy Space- A bad Deal for Development online at <http://www.ActionAid.org.uk/wps/content/documents/baddeal.pdf> visited on 19/04/2004 pg 3

¹⁹⁶ *ibid*

a favourable international framework for FDI is seen by developed countries as furthering their commercial interests and national competitiveness. Therefore, developed country governments identify themselves with the investors and have tended to protect their interests at these negotiations.¹⁹⁷

2.11 Preserving the status quo

Some opposers of a MAI have proposed maintaining the status quo of investment regulations as they are. They feel that BITs, FTAs and other investment regulations allow countries to negotiate on their own strength, thus enabling countries with similar strength to enter into agreements.¹⁹⁸UNCTAD in its 1996 annual report concluded that the “current arrangements (concerning foreign direct investment regulation” are working well in providing an enabling framework that allows FDI to contribute to growth and development and in supporting a high and growing volume of FDI¹⁹⁹. It has been suggested that developing countries negotiate FTAs with industrialised countries in order to help them develop their industrial capacities. They also believe that an agreement negotiated with an industrialised country could increase the economic and political reputation of the respective developing country and thus help to attract FDI.²⁰⁰This happens to be the aim of most African developing countries, which is why they enter into multiple agreements.

It was also suggested that transnational corporations are flexible and experienced enough in operating diverse policy frameworks and they can adapt to regulatory differences among countries.²⁰¹

¹⁹⁷ Kumar Nagesh 2003 *Investment on the WTO Agenda: Developing Country Perspective and the Way Forward for the Cancun Ministerial Conference* online at http://www.ris.org.in/dp56_pap.pdf visited 19/04/2005 pg 6 of 34

¹⁹⁸ The accuracy of this position is doubtful as most developed countries are entering BITs and FTAs with developing countries whom obviously are not of the same economic or political strength with them. E.g. U.S –Morocco FTA 2004,EU –SA TDCA 2004

¹⁹⁹ Which I might add is being directed mainly at a particular group of developing countries little of which is coming to Africa.

²⁰⁰ Kreinin, Mordechai E. /Plummer, Michael G (2002) *Economic Integration and development, Has Regionalism Delivered for Developing countries* Edwer, Elgar, Cheltenham et. Al see Mariele, Meyn 2003 *The TDCA and the proposed SACU –USA FTA: Are Free Trade Agreements with Industrialized Countries beneficial for SACU NEPRU Working Paper No 89 pg 4*

²⁰¹ Drabek Zdenek 1988 pg 8

This opposition notwithstanding, countries still agitate for a MAI and some attempts have been made in that direction one of which is the OECD's MAI.

3. ARGUMENTS IN FAVOUR OF A MULTILATERAL AGREEMENT ON INVESTMENT

The developed countries²⁰², who are the major exporters of capital, are the major proponents of a MAI. The major proponents of a MAI are developed countries who are the major exporters of capital. However certain developing countries have joined them. The debate on the need for a MAI has been going on for a long time. For the purpose of this chapter, the following arguments in favour of a MAI shall be examined policy coherence, national legislation not an alternative, transparency, predictability and legal security, marginalisation /conflicts with non signatories, the need to move to a multilateral level, growing importance of FDI, uncertainty and international policy spillovers.

3.1 Policy coherence



A multilateral frame work on investment will greatly promote policy coherence which in turn will encourage investment in those regions of the Africa and the rest of the developing world that really need them.²⁰³

Bilateral investment treaties and free trade agreements are an example of proliferation of various international agreements to regulate foreign investment. Their existence creates certain problems. Firstly, the different agreements often have different coverage of issues and may apply different rules, separate negotiating initiatives increase the risk of inconsistent rules established in different agreements.²⁰⁴ Secondly, it has also been pointed out²⁰⁵ that WTO members would have to sign over 7500 agreements if they wished to provide the investment protection through bilateral treaties.

²⁰² Mainly the EU

²⁰³ As stated earlier some countries do not have the negotiating power to enter agreements that will be in their favour and a MAI will put everyone on an equal footing and prevent or greatly limit exploitation. This has been said to be in the best interest of developing world-ICC Crusading for Investment liberalisation ICC fact sheet # 4-The ICC and investment Liberalisation online at http://www.corporateeurope.org/icc/icc_investment.html visited 02/01/2005

²⁰⁴ Drabek Zdenek 1988 pg 5

²⁰⁵ WTO 1996 *Foreign Direct Investment*, WTO Geneva

It is virtually impossible to avoid inconsistencies in such a large number of treaties whereas one multilateral framework on investment will help to remove these inconsistencies as everyone will be working with one set of rules and negotiating on the same baseline.²⁰⁶

Thirdly, inconsistencies lead to confusion, uncertainty and legal conflicts as well as increasing the cost of doing business, something often overlooked by proponents of bilateral and regional approaches.

Fourthly, policy coherence in international trade (especially in FDI regulation) can contribute to an equitable and sustainable global development.²⁰⁷ This will definitely be beneficial to all stakeholders in international trade.

Finally, the need for rule and policy coherence is now well recognised among all major analysts who have been involved in the discussion.²⁰⁸

3.2 National legislation not alternative

Many countries have liberalised their policies in the bid to attract and facilitate FDI. This rapid policy liberalization has made outward and inward FDI more attractive but the legal provisions which underly this process are not sufficient. Thus the absence of an international agreement can have serious consequences for FDI flows.²⁰⁹ Investors may feel that the risk of doing business in some countries is too high and decide not to invest. On the other hand, the cost of compliance may be too high and will result in investments that would typically be highly speculative and short term.²¹⁰

Another argument is that national legislation is often not sufficient to provide adequate security for foreign investors. This is mainly due to the fact that enforcement of national laws differs between the host and home country and most times require an international mechanism for dispute

²⁰⁶ This is a simple logical conclusion and has been expressed in various ways by writers in support of a multilateral agreement on Investment.

²⁰⁷ Nordic Africa Initiative High level Seminar Tanzania, 2004 online at <http://www.sweden.gov.se/content/1/c6/03/57/85/8b3c96b6.pdf> visited 15/04/2005 pg 4

²⁰⁸ Drabek Zdenek 1998 Pg 5; this need is also recognized by those who are not necessarily in favour of a MAI but prefer the bilateral, regional and plurilateral approach.

²⁰⁹ A major effect is that it could discourage foreign investors from coming into a country where the national laws and mechanisms are different from its home country. This in the long run will not help a nation achieve its developmental goal as it will not attract the volume of FDI it requires even if it has entered numerous BITs and FTAs

²¹⁰ *ibid* Drabek Zdenek 1988 pg 5

settlement. What is needed instead is an international agreement reached and signed by governments that will be supported by the national legislation in order to have moral authority and for enforceability.²¹¹

The need for an international agreement can be clearly seen in the example of the financial sector where deregulation and technological progress has led to an explosion of cross border financial services. This thus gives rise to the need for international agreements between the different participants in the market.²¹²

3.3 Transparency, predictability and legal security

In order to reap the benefits of foreign investment²¹³ and convince the investors to come into their countries with their much needed capital, the investors need transparent and predictable rules²¹⁴ on which they can operate, and these rules must include legal security, otherwise they would require a corresponding financial return as compensation for these additional risks which will be prohibitive for the host countries.

A powerful argument for a MAI is, thus, that it will provide the needed transparency, predictability and legal security, the lack of which is precisely what is often the difficulties of countries to attract FDI and other types of foreign capital.²¹⁵ Further, a MAI will be significantly important to the international economy and to the insertion of least developed countries into it as long as the

²¹¹ *ibid*

²¹² *ibid*

²¹³ These benefits include, transfer of technology, job creation, more consumer goods made available and so on. The most important is the developmental objective of most host nations.

²¹⁴ This is the major drawback of the BITs and FTAs because they are negotiated on separate terms for each agreement. It has been argued that this puts some countries at a disadvantage and in their bid to attract FDI they enter into agreements that are not well negotiated. A multilateral framework will put everyone at an equal starting point and investors the world over will know they will get the same treatment anywhere in the world.

²¹⁵ Drabek, Zdenek 1998 pg 4

contents of such agreement are compatible with the discretion necessary for the creation of public policy and foster development in the host countries.²¹⁶

3.4 Marginalisation /conflicts with non signatories

The marginalisation of countries not signatory to the bilateral or regional agreement is a major problem because foreign investors naturally prefer to do business with those countries in which they have a legal protection through an international agreement.²¹⁷ It has been argued that one of the reasons why the network of BITs need to be replaced by a multilateral agreement is that the poorer smaller countries are being discriminated against because they are not party to bilateral treaties.²¹⁸

The proliferation of FTAs, BITS and regional trade agreements to govern FDI will lead to a web of obligation that the different countries owe to the individual countries they have entered each agreement with. This in turn leads to conflicts of interest because each agreement has its own level of rights and obligations it confers on signatories to it²¹⁹. This in itself does not help promotion of FDI and can lead to a lot of conflicts and lawsuits especially with regards to the MFN provisions in those agreements.



²¹⁶SELA 2004 *International Negotiation on Foreign Direct Investment prospects for Latin America and Caribbean* SELA Permanent Secretariat Caracas Venezuela pg 3 online

http://www.sela.org/public_html/AA2K4/ING/consejo/Di3.pdf visited 18/12/04

²¹⁷Drabek Zdenek 1988 pg 5; For instance a major criticism of the OECD MAI was that it was being negotiated by OECD countries and non member countries remained outside the negotiation even though it was assumed that any country would be invited to sign on the actual agreement once it was concluded.

²¹⁸Richard Eglin: *An Overview of the Current State of Negotiations at the WTO* in CUTS 2002, IFD Asia Pacific Regional Seminar; Investment for Development online at http://www.cuts-international.org/APRS_IFD.doc visited 16/04/2005 pg 11

²¹⁹This can lead to marginalisation by the treatment of investors from countries they have entered particular BITs and FTAs with in a manner more advantageous than those from countries not party to a particular agreement. This can lead to a lot of confusion and the difficulty of whom to treat differently and in which manner. This might as well result in conflicts of interest because the terms and rights in one agreement will definitely affect that country's investment relations with other state it has entered different agreements with.

A MAI will be useful to minimise conflicts between standards from different BITs or multilateral agreements and act as a driver of internal policies in countries by providing greater judicial security.²²⁰

Conclusively, one can say that there are two main advantages of a truly multilateral MAI. It is a complete instrument while regional bilateral and plurilateral agreements are not, and a non-MAI would be a stand-alone agreement, which would still have to be integrated into international law.²²¹ It is believed that a MAI will lead to greater foreign investment for the poorest and most marginalised countries²²² that have not been able to attract meaningful FDI.²²³

3.5 The need to move to a multilateral level

From an African perspective, it has been observed that though regional and bilateral agreements have been proliferated across the continent and the globe in general, there is complementarity between regionalism and multilateralism and thus there is a need for progress in the multilateral level²²⁴ and one way to do that will be by a multilateral agreement/framework governing foreign investment. It has been argued that a MAI will be in the best interest of African countries, who need a well negotiated investment agreement that takes into account their developmental interest on a multilateral level. Some developed countries²²⁵ are of the opinion that after seven years of work, the preparatory work in the WTO's Working Group on Trade and Investment (WGTI) was complete, and that "the negotiation of comprehensive investment rules in the WTO was overdue".²²⁶

According to Canada, the Working Group on Trade and Investment (WGTI) has considered and discussed well over fifty submissions from Members, international organizations, and the Secretariat (including reports to Council), amounting to many hundreds of pages of documentation

²²⁰ It would create a framework of international rules and commitments supported by a dispute settlement system with a multilateral scope that would in turn guarantee policy continuity and thus greater stability in the general environment of investment and business. See SELA 2004 pg 3

²²¹ Drabek Zdenek 1988 pg 6

²²² Most of which are from Africa

²²³ This was the proposition of the U.K government, one of the foremost proponents of an Investment Frame work in the WTO in 2003.

²²⁴ Nordic Africa Initiative High level Seminar Tanzania, 2004 online at <http://www.sweden.gov.se/content/1/c6/03/57/85/8b3c96b6.pdf> visited 15/04/2005 pg 2

²²⁵ For instance, Canada who is a prominent member of the WTO. This opinion was expressed in a paper submitted to the WGTI in 2003

²²⁶ Oh, *Cecilia WTO Talks on Investment- Developing Countries Still Against Negotiations* online at http://twnafrica.org/news_detail.asp?twID=379 visited 27/04/2005

which covered not only all the issues that the Group had been asked to cover, but additional issues as well. Thus, the sponsors of the paper said that they now find themselves ready to proceed to the next phase of work: negotiations on a multilateral framework for investment within the WTO. The sponsors also envisaged that such negotiations would ultimately be part of a single undertaking associated with WTO agreements as a whole.²²⁷

The European Union has also advocated for a move towards a multilateral level on investment regulation, by stating that Many host countries have unilaterally liberalised their domestic investment regimes, having realised that this is the best avenue to attract much needed investment. Thus, circumstances appear ripe for a multilateral framework of rules that could consolidate this favourable climate, and do so in a balanced manner, which could ensure greater stability of investment flows, in the interest of investors and host countries alike.²²⁸ It has also been noted that a major advantage of a regional/multilateral integration agreement for small countries is, of course, to create larger markets, and market size is a major FDI determinant.²²⁹



Further, the E.U in 1998 in a document on investment regulation stressed that rule making for investment on the multilateral scale, however, is still embryonic. Some 1600 bilateral Treaties cover investment protection, while market opening rules on the admission of investment are confined to regional initiatives (for e.g. EC Treaty, MERCOSUR, NAFTA). It further observed that WTO rules cover some forms of investment ("commercial presence" for service suppliers under the GATS) or address issues highly relevant to investment (e.g. TRIMs and subsidies) but do not address for instance, investment protection.²³⁰ Investment protection is something that greatly concerns developed countries as they are the major capital exporting countries and have investments in different parts of the world. Hence, they have been the main proponents advocating on the need for a MAI.

²²⁷ *ibid*

²²⁸ See European Commission 1998 Discussion Paper: *WTO New Round: Trade and Investment* online at <http://www.corporateeurope.org/mai/eu/113invest.html> visited 20/04/2005 para 7;

²²⁹ Young Steven & Tavares Teresa Ana 2004 Multilateral rules on FDI: do we need them? Will we get them? A developing country Perspective in UNCTAD 2004 *Transnational Corporations* Vol. 13, Number 1, April 2004 United Nations Publication pg 5

²³⁰ European Commission 1998 Discussion Paper: *WTO New Round: Trade and Investment* online at <http://www.corporateeurope.org/mai/eu/113invest.html> visited 20/04/2005 para 6

3.6 Growing Importance of Foreign Direct Investment

A powerful argument in favour of A MAI is the growing importance of FDI. Many countries in the world depend on FDI for their growth²³¹ and Africa is no exception.²³² In many countries, FDI has already taken over as the most important component of external financial flows exceeding even official assistance.²³³ In 2002, FDI remained the most important source of external financing for developing countries with net FDI reading \$143billion.²³⁴

FDI plays an increasingly important role in promoting worldwide economic growth and development by stimulating markets, creating jobs, increasing wages and transferring knowledge and technology. It also stimulates development and helps to reduce poverty.²³⁵ In addition, FDI contributes to growth in government's revenue.²³⁶

Furthermore, research shows that FDI complements trade²³⁷ in addition to the benefits it poses for both the home and the host countries.²³⁸



²³¹ Over the period 1973-1995 the estimated value of annual outflows multiplied more than twelve times (from \$25billion to \$315billion) while the value of merchandise exports multiplied more than eight and a half times (from \$75billion to \$490billion)- Source Drabek, Zdenek 1998 *A Multilateral Agreement on Investment: Convincing the Sceptics* WTO Working paper ERAD-98-05 pg.4

²³² According to a report of the World Bank, FDI in sub-Saharan Africa yielded the highest returns in the world in 2002. The World Bank predicted that Africa would grow at 3% in 2003 if weather conditions were normal and commodity prices higher. -Source BBC April 8 2003 *Africa Best for Investment*, online <http://www.globalpolicy.org/sececon/develop/africa/2003/0408fdi.htm> visited 17/12/04

²³³ Drabek, Zdenek 1998 *A Multilateral Agreement on Investment: Convincing the Sceptics* WTO Working paper ERAD-98-05 pg.4; FDI is an important source of funding for developing countries. It involves the transfer of financial capital technology and other skills desperately needed by developing countries and raises income and welfare in the host country. -Moosa, Imad A 2002 pg 270

²³⁴ BBC April 8 2003 *Africa Best for Investment*, online <http://www.globalpolicy.org/sececon/develop/africa/2003/0408fdi.htm> visited 17/12/04

²³⁵ Business Roundtable 2003 A business Roundtable WTO Policy Paper: How the WTO can Promote the Benefits of International Investment online at <http://www.brtable.org/TaskForces/TaskForce/document.aspx?qs=6C25BF159F249514481138A74FA1851159169FEB56936B3> visited 26/04/2005 pg 2

²³⁶ *ibid* pg 3

²³⁷ A number of studies show this. An example WTO 1996 report on Foreign Direct Investment; The research carried out by the Centre d'études Prospectives et d'Informations Internationales in Paris clearly show that there is a strong element of complementarity between trade and FDI both in the home and host countries.

²³⁸ For the home country the benefits include the benefits from increased market access and improved competitiveness due to a better access to cheaper inputs or to strengthening of the company's capital base as a result of strategic alliance with foreign partners. For the host country the benefits include an improved access to technology, marketing channels, organizational and managerial skills and the contribution to domestic savings and investment.

There is therefore a need to effectively regulate the flow of FDI as well as the activities of the investors globally to enhance the benefits of FDI and promote developmental goals of host countries.

3.7 Uncertainty

It has been argued that a lot of countries²³⁹ have uncertain policies due to the numerous agreements they enter into over the years. Investors may avoid a country because it has a history of frequent policy reversal, or whose commitments to reversal are not deemed credible.²⁴⁰ This is because governments seeking to attract FDI may be pursuing all the right policies without generating the right supply response due to a history of policy reversals.²⁴¹ A Multilateral Agreement on Investment would anchor investors' expectation and lead to increased FDI flows. It can serve as a mechanism through which governments make irrevocable commitments and guarantees against policy reversals, thereby anchoring expectations of investors.²⁴²



3.8 International Policy Spillovers

Some have argued that domestic law and regulation of FDI may have negative effects (spillovers and externalities) at a global level, leading to distortions in the allocation of investment and can lead to coordination failures which result in inefficient outcomes. A Multilateral Agreement on Investment could overcome this problem and increase global welfare.²⁴³ The MAI has the potential

²³⁹ As stated earlier, African countries have entered into the largest no of BITs each having its own provisions as well as limitations as a result there is a measure of uncertainty on the rules applicable to FDI in those countries. See page pg 5 footnote 36

²⁴⁰ Ferrarini Berno 2003 *A Multilateral Investment Framework: Would it be Justifiable on Economic Welfare Grounds* World trade Institute Berne online at <http://www.wti.org/res/documents/AWI2003Ferrarini.pdf> visited 2/12/04 Pg 5 of 29

²⁴¹ Hoekman Bernard and Kamal Saggi 1999 *Multilateral Disciplines for Investment –Related Policies?* paper presented at the conference “Global Regionalism”, Instituto Affari Internazionali Rome Feb 8-9 available online at <http://econ.worldbank.org/docs/489.pdf> visited 2/12/04 pg 2

²⁴² Ferrarini Berno 2003 *A Multilateral Investment Framework: Would it be Justifiable on Economic Welfare Grounds* World trade Institute Berne online at <http://www.wti.org/res/documents/AWI2003Ferrarini.pdf> visited 2/12/04 pg 6 of 29

²⁴³ Ferrarini Berno 2003 *A Multilateral Investment Framework: Would it be Justifiable on Economic Welfare Grounds* World trade Institute Berne online at <http://www.wti.org/res/documents/AWI2003Ferrarini.pdf> visited 2/12/04 pg 6 of 29

of leading to a higher degree of transparency, credibility and commitment as compared to the standards already prevailing in BITs, FTAs and RTAs.²⁴⁴

4. ACHEIVABILITY OF A MULTILATERAL AGREEMENT ON INVESTMENT IN AFRICA

A basic question before entering into any negotiation on a multilateral agreement on investment (MAI) is to determine to what extent there is a need for a new multilateral instrument on investment, and what its costs and benefits for developing country members who accede to it may be.²⁴⁵

There is no clear-cut position of African countries on the need for a MAI. In 1999, at the ministerial conference of UNCTAD X the ministers stated that UNCTAD should intensify its work in the areas of a possible multilateral framework for investment with a view to promoting the better understanding of its implication for the development of developing countries.²⁴⁶ This could be an indication that there were those leaders who were not opposed to the idea of a MAI and its benefits to Africa.



An interview conducted by Seid Sherif, revealed that some African countries believe that investment frameworks such as a MAI do not consider issues that are more important to them, as they are mainly about securing a high standard treatment for MNCs.²⁴⁷ Therefore, many African countries may not be in a hurry to negotiate or sign a MAI, if they feel it will not cover issues that are important to them.

²⁴⁴ *ibid* pg 10 of 29

²⁴⁵ Kumar Nagesh 2003 Investment on the WTO Agenda: A Developing Country Perspective and The way Forward for the Cancun Ministerial Conference RIS-DP # 56/2003 online at http://www.ris.org.in/dp56_pap.pdf visited 17/04/2005 pg 11 of 34

²⁴⁶ UNCTAD 1999 UNCTAD X pg 13

²⁴⁷ Interview conducted by Seid Sherif with Egyptian and Malaysian Diplomats culled from Seid, Sherif H 2002 *Global Regulation of FDI* Ashgate Publishing pg 111

As mentioned earlier²⁴⁸ FDI is a major source of funding for developing countries and also poses a lot of benefits for everyone involved. There is thus a need to have a universal regulatory framework in order to enhance and facilitate these benefits for those developing countries that need them most.

In the absence of one, some developing African countries are using policies such as tax holidays, import duty exemptions and subsidies to foreign companies in a bid to attract FDI. This is because it is believed that FDI will help create jobs, act as a source of income and the foreign firms will transfer technology to the local firms.²⁴⁹ Further, FDI appears as a way to attract foreign capital without assuming the risk linked with ²⁵⁰ the debt. Morocco has been one of the preferred targets of FDI in MENA (Middle East and North African Countries). Morocco's case is particularly useful to other less-developing countries because the World Bank and IMF consider it a good "pupil".²⁵¹ Recently, many countries have taken steps to attract FDI by improving their Policy Framework. For instance, 26 out of the 32 LDCs in Africa surveyed by UNCTAD in 1997 have a liberal or relatively liberal regime for the repatriation of dividends and capital.²⁵² Further, many African countries have concluded BITs to contribute to the creation of a more secure environment for foreign investors on the continent.²⁵³ However, in a bid to attract FDI, many African countries have also privatised some of their services sector. Approximately 145 of FDI flows to Africa during the Period of 1990 -1998 were linked to privatisation.²⁵⁴ Countries like Kenya, Nigeria, Lesotho and South Africa, are currently undergoing major privatisation efforts especially in the area of telecommunication, power, Transport and industry.²⁵⁵

²⁴⁸ See page 39/40

²⁴⁹ Bouoiyour, Jamal 2003 *The Determining Factors of Foreign Direct Investment in Morocco* http://www.erf.org.eg/tenthconf/Trade_Background/Bouoiyour.pdf pg.2 visited 15/11/04

²⁵⁰ *ibid*

²⁵¹ *ibid*

²⁵² UNCTAD 1998 *Foreign Direct Investment in Africa, Performance and Potential* New York, United Nations

²⁵³ Naude, W. and Krugell, W 2003 *Developing Human Resources to Attract Foreign Direct Investment in Africa* from *Management Dynamics Journal of Southern African Institute of Management Scientists* Vol 12, Issue 3 2003 pg 6 online http://www.journals.co.za/images/ejour/mandyn_v12_n3_a1.pdf visited 22/12/04

²⁵⁴ UNCTAD 2000 *World Investment report Cross Border mergers and Acquisitions and Development* New York; United Nations pg 42

²⁵⁵ *ibid*

African countries' efforts to attract a bigger share of world FDI flows are driven by their potential positive impact on increasing export capacity and access to markets, and the transfer of technology, know-how, managerial and labour skills.²⁵⁶

This notwithstanding, developing countries have resisted multilateral efforts to regulate FDI because they believe that restrictive investment policy is a sovereign right and an element of national economic policy.²⁵⁷ They fear abuse by MNEs and a loss of sovereign control over National development if investment policies are liberalised.²⁵⁸

Africa countries have proposed that with respect to investment, they (African countries) would like to have a set of studies to better understand the obstacles that continue to discourage foreign direct investment (FDI) before engaging in further liberalization, whether in the context of the TRIMS Agreement or a multilateral agreement on investment.²⁵⁹ This in a way can be seen as an opposition to a MAI while on the other hand can be seen as an indication of interest in the benefits and acknowledgment of the shift towards a MAI. Thus better understanding will equip them to better negotiate a balanced and functional multilateral investment agreement in the future.

Further, African countries request/ argues in favour of preserving policy space for developing countries. In particular, it calls for exemptions from the disciplines regarding the application of local-content requirements, emphasizing the role of performance requirements in building supply and export capacity in developing countries.²⁶⁰

In 2003, at the African Union Ministers of Trade conference, the leaders observed and quiet correctly that Africa continues to receive inadequate benefit from globalisation as result of an unfair

²⁵⁶ UNCTAD 1999 African Ministerial Declaration on UNCTAD X and Africa's Development Challenges AF/MM/77(X) 1 August 1999 online http://www.unctad-10.org/pdfs/ux_g77african.en.pdf pg 13 visited 27/12/04

²⁵⁷ Burt, Eric M. 1997 *Developing Countries and The Framework for Negotiations on Foreign Direct Investment in the WTO* American University Journal of International Law and Policy 1997 1016

²⁵⁸ *ibid*

²⁵⁹ Oyejide, Ademola T. and Njinku Dominique 2000 *African Countries Proposals and Objectives in the Post-Seattle Framework of WTO Trade Negotiations* online at <http://www.aercafrica.org/documents/Chapter%201.pdf> visited 18/04/2005 pg 3 of 6

²⁶⁰ *Supra* at pg 3

international economic regime that works against its interests. Although, the African continent contains 13 per cent of the world's population, it accounts for only two per cent of global trade.²⁶¹

Kenya was of the view that that investment was a new issue and there was a need for full understanding of the development implications before negotiations began. In the words of the Kenya delegate to the meeting of the Working Group on the Relationship between Trade and Investment (WGTI) in Geneva held from 10 –11 June 2003, *"We do not believe that the many questions that so far remain unanswered can be done so in a negotiating mode"*.²⁶² As far as the delegate was concerned, the clarification needed to produce a convergence leading to the understanding of the issues had not yet been achieved.²⁶³

Developing countries were also not convinced that their concerns and special needs would be adequately addressed in an investment agreement. Kenyan further opined that statements of good intention are often heard, for example, on provision of technical assistance and capacity building; appropriate flexibility for developing and least developing countries and that the development interests of developing and least developed countries will be fully taken into account as an inducement to start negotiations in this area. In the words of their delegate to the WTO working group on investment meeting in 2003, *"We also need to clearly know how the interests of developing and least developed countries will be taken into account before we start negotiations and not just statements of good intention"*.²⁶⁴

On the other hand, Canada, Costa Rica and Korea said that a WTO agreement on investment could complement the already existing large network of bilateral investment agreements. While the relationship between investment agreements and investment flows, or investment agreements and trade flows is arguably more complex than that of trade rules and trade flows, it cannot be denied

²⁶¹ Oxfam *People Before Cows: Setting the Standards for Cancun* online at http://www.oxfam.org.uk/what_we_do/issues/trade/downloads/people_before_cows.pdf visited 17/04/2005

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²⁶² Oh, Cecilia 2003 *WTO Talks on Investment – Developing Countries Still Against Negotiations* online at http://twnafrica.org/news_detail.asp?twnID=379 visited 27/04/2005

²⁶³ *ibid*

²⁶⁴ *ibid*

that these relationships exist, or that they would not benefit from clear rules at the multilateral level.²⁶⁵

Noting, that developed countries see FDI as furthering their commercial interests and national competitiveness, developed country governments identify themselves with the investors and have tended to protect their interests at negotiations on a global investment framework. As a part of this developed countries have resisted initiatives of the UN System evolving binding Codes of Conduct on corporations in the 1980s and have, on the other hand, been seeking to evolve an international regime guaranteeing an unfettered movement for their corporations through multilateral trade negotiations.²⁶⁶ This has met with strong resistance from developing countries (especially Africa) Developing African countries resisted negotiations on a investment framework especially in the WTO because they wanted to first complete the study process at the Working Group on Trade and Investment (WGTI) before agreeing to a negotiating mandate.²⁶⁷

The least-developed countries at the Trade Ministers' Meeting (May 31 - June 2, 2003) in Dhaka also came to the same conclusion. The Dhaka Declaration makes it clear that the LDC group of countries did not envisage the start of negotiations on the investment issue at Cancun. This was obviously the case, as investment was not negotiated at the meeting.²⁶⁸

There is a need to examine the implication a multilateral framework will have on developing African countries. A lot of African countries have negotiated or are negotiating bilateral treaties and FTAs, which have investment regulating provisions. These agreements have their different definitions, scope and limitations which they place on the parties a MAI will help to allow poor African countries negotiate investment deals on an equal footing since there would be a uniform framework

²⁶⁵ Oh, Cecilia 2003 *WTO Talks on Investment – Developing Countries Still Against Negotiations* online at http://twnafrica.org/news_detail.asp?twnID=379 visited 27/04/2005 -

²⁶⁶ Kumar Nagesh 2003 *Investment on the WTO Agenda: A developing Country Perspective and the Way Forward for the Cancun Ministerial Conference* RIS-DP #56/2003 online at http://www.ris.org.in/dp56_pap.pdf Visited 17/04/2005 Pg 6 Of 34

²⁶⁷ *ibid*; Khor Martin 2003 “WTO Singapore Issues”: What’s at Stake and Why it Matters Third World Network online at <http://www.twinside.org.sg/title/cancun3.doc>

²⁶⁸ Oh, Cecilia 2003 *WTO Talks on Investment – Developing Countries Still Against Negotiations* online at http://twnafrica.org/news_detail.asp?twnID=379 visited 27/04/2005

governing all investment transactions in every part of the world. This in turn will foster the development they require from the FDI.²⁶⁹

4. Conclusion

Those who propose a MAI do that for various reasons some of which may be selfish or personal, while those who oppose it have certain crucial arguments in their favour. However, the merits of a MAI on world investment regulation cannot be over emphasised. On the other hand, those who oppose it do so mainly because of the fear that it will give the investors too much control, limit the state's sovereignty over its natural resources, as well as encourage corporate malpractices without corresponding responsibilities. Finally it is opposed because some believe that it will not have any significant influence on FDI inflows to the poorer nations of the earth.

Despite the different views and arguments about the MAI discussed above, it is important to note that the aim of poorer countries entering BITs and FTAs is to foster an environment that will attract and promote FDI to their nations. Furthermore, for a MAI to work and in the interest of the continuance of the multilateral trading system, there is a need for an improved dialogue between the developed and the developing countries. Thus a MAI should focus more on achieving his goal for it to be acceptable to the majority of developing countries most of which are from Africa.

After examining these arguments from both sides, it is important to examine if there is indeed a move towards a multilateral agreement on investment to govern FDI.

CHAPTER 4.

TOWARDS A MULTILATERAL AGREEMENT ON INVESTMENT FOR FOREIGN DIRECT INVESTMENT

1. BITS AND EFFECTIVE REGULATION OF FOREIGN DIRECT INVESTMENT

²⁶⁹ SELA 2004 pg 3

The need for a universal and effective framework for foreign investment regulation has been discussed earlier. In the absence of such an agreement, therefore BITs²⁷⁰ have been used as the second best solution²⁷¹ and as an important instrument in negotiation to attract FDI but in very few cases has this solution been successfully oriented towards economic and social development objectives.²⁷²

BITs have acted as a tool to generate and increase economic and trade cooperation between the parties involved and to assume legal protection of FDI in the receiving country.²⁷³ African countries sign BITs believing that they will significantly help in attracting FDI,²⁷⁴ however BITs have been said to have a positive but relatively small and marginally significant effect on FDI flows.²⁷⁵ This being the case, can it be said that BITs/FTAs have been efficient regulation of FDI?

One cannot say that BITs have been effective regulations of FDI because even though they are formerly symmetrical in the sense that they establish rights and obligations that are supposed to be identical for both parties, in reality however, they are asymmetrical because they deal almost exclusively with the treatment that foreign investors²⁷⁶ are supposed to get from the receiving

²⁷⁰ As at 2002 over 2000 BITs had been signed and many more have been signed ever since. Their goal was to protect foreign investors and promote foreign investment; Anonymous, 2002 *Bilateral Investment Treaties as a Determinant of U.S. Foreign Direct Investment in Developing Countries*. Online <http://www.moneymattersinstitute.org/BilateralInvestment.pdf> visited 31/12/04 pg 2

²⁷¹ See Anonymous, 2002 *Bilateral Investment Treaties as a Determinant of U.S. Foreign Direct Investment in Developing Countries*. Online <http://www.moneymattersinstitute.org/BilateralInvestment.pdf> visited 31/12/04 pg 2; SELA, 2004 *International Negotiation on Foreign Direct Investment prospects for Latin America and Caribbean* SELA Permanent Secretariat Caracas Venezuela pg 4 online http://www.sela.org/public_html/AA2K4/ING/consejo/Di3.pdf

²⁷² SELA, 2004 *International Negotiation on Foreign Direct Investment prospects for Latin America and Caribbean* SELA Permanent Secretariat Caracas Venezuela pg 4 online http://www.sela.org/public_html/AA2K4/ING/consejo/Di3.pdf visited 18/12/04

²⁷³ The protection was needed because a lot of countries had unstable laws. Anonymous, 2002 *Bilateral Investment Treaties as a Determinant of U.S. Foreign Direct Investment in Developing Countries*. Online <http://www.moneymattersinstitute.org/BilateralInvestment.pdf> visited 31/12/04 pg 2-3

²⁷⁴ Which they hope will help them in their efforts towards economic development. However, by signing these BITs, they subscribe to basic standards for investment protection and treatment while rejecting them on the multilateral level; UNCTAD 1998 *Trends in International Investment Agreements: An Overview* United Nations New York and Geneva 1999 online <http://r0.unctad.org/p166/module2002Bangk/Module3/trends.pdf> visited 14/10/04 pg 6 and 21

²⁷⁵ Anonymous, 2002 *Bilateral Investment Treaties as a Determinant of U.S. Foreign Direct Investment in Developing Countries*. Online <http://www.moneymattersinstitute.org/BilateralInvestment.pdf> visited 31/12/04 pg 4

²⁷⁶ Whom the host countries try to guarantee by entering these BITs, that their investments and their interests will be well treated. -UNCTAD 1997 *Bilateral Investment Treaties and their Relevance to a Possible Multilateral framework on Investment: Issues and Questions* TD/B/COM.2/EM.1/2 online <http://www.unctad.org/en/docs/c2em1d2.en.pdf> visited 04/01/05 Pg 3

country and they do not set up any obligations to be fulfilled by the investing country of the investor.²⁷⁷ It has been argued that BITs have a weak connection/ link with FDI ²⁷⁸and do not necessarily increase its attraction to the signatories.

2. IMPLICATIONS OF BILATERAL INVESTMENT TREATIES AND FREE TRADE ARGREEMENTS ON THE PARTIES

One striking effect of the agreements examined is that they tend to provide for the rights of the investors without necessarily making provisions for the host country²⁷⁹, this just emphasises the imbalance in the negotiating process and these African countries are so blinded by the amount of money that will be brought in by the investors²⁸⁰, that they sign the agreements without understanding the implications.²⁸¹

For instance the United States Industry Sector Advisory Committee on Services for Trade Policy Matters (ISAC), in its report on the effects of the US-Morocco FTA concluded in April 2004 said that; "*The Agreement will help promote a secure and predictable legal framework for U.S. investors in Morocco. Such provisions are of particular interest to service providers, whose services often require a local presence.*"²⁸² However, the committee made no mention of the benefits for Morocco or how it was going to control these investors who were going to have easy access into Morocco "by reducing the barriers to U.S investments in Morocco."²⁸³

²⁷⁷ SELA, 2004 pg 4; a Perusal of some BITs and FTAs will reveal this fact.

²⁷⁸ Tobin Jennifer and Rose-Ackerman Susan 2003 *Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties* William Davidson Institute Working Paper Number 587 June 2003 online <http://www.bus.umich.edu/KresgeLibrary/Collections/Workingpapers/wdi/wp587.pdf> visited 30/12/04

²⁷⁹ Which I might add are mainly African countries

²⁸⁰ 90% of which is most likely to be repatriated as salaries of their experts and managers whom they will bring along since the agreements restrict performance requirements on repatriation of profits the host countries are at the losing end of the bargain.

²⁸¹ In the end the development, which was their primary aim is not achieved and their people are at a loss.

²⁸² ISAC 13 2004 *U.S Morocco- FTA Report of the Industry Sector Advisory Committee on Services for Trade Policy Matters* (ISAC 13) April 6 2004 online http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/Reports/asset_upload_file426_315_2.pdf pg 6 visited 30/12/04

²⁸³ Quoted from ISAC report 2004 pg 6; this notwithstanding the committee stated that nevertheless, it was disappointed by several limitations in this agreement. First, the Agreement fails to provide protection for existing investment agreements, defined as agreements relating to natural resources or other assets controlled by the foreign government.

However the U.S-Morocco FTA does make mention of allowing governmental restrictions on financial services activities, including the transfer of capital, through the operation of a broad prudential carve-out for financial services measures taken by the host government. The procedure developed to review whether a measure correctly falls within the prudential carve-out is extremely lengthy and onerous, allowing not only a government-to-government review, but also a separate dispute settlement proceeding if the two governments cannot agree that the measure taken properly fits within the prudential carve-out.²⁸⁴This obviously did not suit the US trade committee who want unlimited access for its foreign investors.

The US-Morocco FTA and NAFTA are more elaborate and tend to limit the countries in their performance requirements right. This greatly limits African developing countries who want FDI for technology transfer, development, foreign exchange and development of their local producers who make goods/products the investors may need. The Agreements limit their ability to determine what happens in their territory, with their raw materials and their labour once the investors have moved in.

The US-Morocco FTA is said to have certain benefits,²⁸⁵ the lowered tariffs of Moroccan products into the U.S will help balance the higher tariffs with the EU and offset trade diversions caused by the FTA with the EU²⁸⁶ On the other hand, by implementing the FTA with the US-Morocco would lose \$ 293 million it would have earned from tariffs while the U.S.²⁸⁷ would lose only \$10.9 million²⁸⁸

²⁸⁴ ISAC report 2004 pg 7

http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/Reports/asset_upload_file426_315_2.pdf pg 6 visited 30/12/04

²⁸⁵ These includes lowered tariffs of Moroccan products into the U.S as well as the liberalization of the service sector

²⁸⁶ Gala Ahmed and Lawrence Robert 2003 *Egypt –US and Morocco-US Free Trade Agreements* Egyptian Centre for Economic Studies (ECES) Working paper No. 87 online <http://www.amcham.org.eg/BSAC/ustrade/PDFFiles/Egypt%20Morocco%20and%20the%20US%20FTAs%20WP.pdf> visited 03/01/05 pg 18

²⁸⁷ This is because the U.S already has low tariffs for minerals and some agricultural products so Morocco already had low duty access to the U.S market in these areas. This could also lead to a decline in terms of trade for Morocco because it is making more tariff cuts than the U.S.

²⁸⁸ Gala Ahmed and Lawrence Robert 2003 *Egypt –US and Morocco-US Free Trade Agreements* Egyptian Centre for Economic Studies (ECES) Working paper No. 87 online <http://www.amcham.org.eg/BSAC/ustrade/PDFFiles/Egypt%20Morocco%20and%20the%20US%20FTAs%20WP.pdf> visited 03/01/05 pg 18

The US-Morocco FTA could lead to gains due to liberalization of services and investment that have not been modelled.²⁸⁹ The FTA also gives Morocco greater leverage to negotiate better conditions with other countries it proposes to enter FTAs with. For instance, it can use the Agreement in bargaining with the EU to improve its market access in agricultural products.²⁹⁰ However, it is important to note that the benefits may not be as high as projected because of the challenge of implementation.²⁹¹ For the U.S, the agreement is a defensive measure towards an important competitor and an indication of its willingness to move to free trade with all partners who are willing to reciprocate.²⁹² Finally, the U.S hopes to combat terrorism by entering BITS and FTAs with Arab countries and that is one of the implications of the US-Morocco FTA.²⁹³

Until the 1990s, Botswana was the fastest growing economy in the world,²⁹⁴ and FDI was a driving force in this dramatic growth.²⁹⁵ However there seems to have been a decline in that growth. As at 2001, the FDI inflow into Botswana was \$ 30 million while its FDI inflows per GDP was 0.83% as against \$111.55 million and 9.87% respectively in 1980.²⁹⁶ This notwithstanding, Botswana remains one of the most prosperous economies in Africa, with a consistently sound investment climate.²⁹⁷ Botswana has operated an open door policy to foreign investment since independence,²⁹⁸ however recently it has imposed some restrictions to avoid unscrupulous people



²⁸⁹ Since Morocco already has a BIT with the U.S, it would have to improve its business environment through other measures for it to stimulate more investment. The gains could come in the areas of improved policy transparency and sectoral provisions for market access and national treatment for a number of modes of delivery. E.g. E-commerce, telecommunications, financial and banking services

²⁹⁰ Gala Ahmed and Lawrence Robert 2003 pg19- 20

²⁹¹ It takes considerable administrative capacity to implement an agreement of this nature and it will require an upgrading of skills and resources in certain areas to ensure compliance. This in turn may lead to additional economic costs, but with positive “spillovers” to the rest of the economy.

²⁹² Gala Ahmed and Lawrence Robert 2003 pg 22

²⁹³ Lining Trade policy and national security has been a recurring theme in President Bush’s administration. See Lindsey Brink 2003 *The Trade Front Combating Terrorism with Open Markets Centre fro Trade Policy Studies* online <http://www.freetrade.org/pubs/pas/tpa-024.pdf> visited 03/01/05 pg 2

²⁹⁴ UNCTAD 2003 *Investment Policy Review of Botswana* UNCTAD/ITE/IPC/Misc.10 UN New York and Geneva online http://www.unctad.org/en/docs/iteipcmisc10_en.pdf visited 06/01/05 pg 22;

²⁹⁵ *ibid*; As at 1999, It had an average annual GNP growth rate of over 6% for the last decade. - Darwood, A.Rhys 2001 *The Foreign Direct Investment Friendliness of Botswana and Tunisia: A Comparative Study of Two of Africa’s Most Competitive nations*. University of Stellenbosch Graduate School of Business MBA mini-study pg v

It is however important to add that wise management of the natural resources good governance, reinvesting of the profits, building long term projects like road and schools as wells as saving the excess revenue was a major factor in this growth.

²⁹⁶ UNCTAD 2003 *Investment Policy Review of Botswana* UNCTAD/ITE/IPC/Misc.10 UN New York and Geneva online http://www.unctad.org/en/docs/iteipcmisc10_en.pdf visited 06/01/05 pg X

²⁹⁷ *ibid* pg 4

²⁹⁸ This has led to the growth of some of its very strong sectors. However the government still maintains control of some key utilities and services. - UNCTAD 2003 *Investment Policy Review of Botswana* pg

posing as investors. Thus a foreign investor will not be allowed in if his investment is less than a certain amount. In addition, 30% of government construction contracts is reserved for citizens.²⁹⁹ This is to encourage national investors to become competitive. It has an investment framework that covers all the basic provisions discussed in chapter two that are contained in most BITs. Suffice is to say that the various agreements have varying effects and implications for the parties.

3. TRENDS TOWARDS A MULTILATERAL AGREEMENT ON INVESTMENT

From the comparison done in chapter two the conclusion can be drawn perhaps that there are indeed common trends among the BITs examined as well as various existing bilateral and free trade agreements.

From the agreements examined, ³⁰⁰ it is evident that there are some key provisions that run through most BITs/FTAs and countries seem to have accepted them in theory by their signatures even though in practice they may be opposed to them. The question that comes to mind is thus; do these trends indicate a shift towards a unified multilateral agreement?

On the one hand one can answer in the affirmative based on the rate at which developing countries³⁰¹ have signed BITs and FTAs in the last decade. However, it is important to note that many of them sign these agreements in the hope of attracting FDI not necessarily because they are in agreement with the provisions.³⁰² Conversely, the answer could be no, because there is need for consensus if there is to be a MAI, and if developing countries negotiate these BITs with the knowledge that it will not last forever, they may not necessarily be a shift towards a MAI.

25; Botswana gives tax holidays and special tax treatment of capital expenditure in respect of some projects in the mining sector. See Batshedisi 2002 pg 75

²⁹⁹ UNCTAD 2003 *Investment Policy Review of Botswana* pg 28

³⁰⁰ Botswana-china BIT on Promotion and protection of Investments 2000, Czech- Tunisia BIT for the promotion and Reciprocal protection of Investments 1997, and two FTAs; chapter 11 of the North American Free Trade Agreement (NAFTA) and the U.S- Morocco Free Trade Agreement 2004

³⁰¹ Most of which are from Africa and who are the major opposers of a MAI

³⁰² BITs are normally negotiated for a specified period of time after which these cease to be effective unlike a MAI that will be in existence forever, unless it is repealed or amended.

As at 2003, it was observed that most developing countries are for continued discussions and clarification of investment issues.³⁰³ This includes opinions of African, Caribbean and Asian Ministers at the WTO. Together they form at least 70 developing country members of WTO.³⁰⁴ This position could have been induced as a result of the inadequately negotiated and unbalanced agreements many of them have signed in the past which have resulted in obligations that some countries still have to deal with till date.

It is important to add that based on the above discussion, that in the interests of poor developing AFRICAN countries, there is actually a need for a MAI. However, such an agreement has to be carefully negotiated putting the interest of the host countries as well as the capital exporting countries in focus. Investment experts should be consulted during the negotiations and all the stakeholders should be duly represented. A MAI will act as a base for negotiations of future investment agreements it will be a reference point from which to negotiate rights and obligations in future BITs without some countries being at a disadvantage.

The U.S model BIT, which was the model used to draft the U.S–Morocco FTA is a detailed agreement but tends to give a lot of rights and protection to foreign investors without corresponding obligations. A MAI should not lose sight of the developmental goals of the capital importing countries, as this is their major way of financing developmental projects³⁰⁵. Thus the investors should give something back to the community from which they will reap immense profits over a period of time.

Despite the arguments against a MAI discussed earlier, it is evident from the endless literature on FDI and its importance that in the interest on world trade and global investment there is indeed a need for effective regulation of FDI. As stated earlier, BITs/FTAs are not sufficient effective

³⁰³ That is based on the submissions and representations of Ministers of ACP Group, LDC Group, African Union and Caribbean countries have proclaimed at their own regional meetings that they do not want negotiations to start but instead want the discussions (i.e. no commitment to new treaties) to continue. A similar opinion was held by most Asian countries (including India, Malaysia, China, Indonesia, Bangladesh and Philippines).

³⁰⁴ Khor Martin 2003 “WTO Singapore Issues”: *What’s at Stake and Why it Matters Third World Network* online at <http://www.twinside.org.sg/title/cancun3.doc> visited 27/04/2005 Para 1

³⁰⁵ It should provide for a certain flexibility for countries to be able to follow their policies for economic growth and development; UNCTAD 1998 *Trends in International Investment Agreements: An Overview* United Nations New York and Geneva 1999 online <http://r0.unctad.org/p166/module2002Bangk/Module3/trends.pdf> visited 14/10/04 pg 7

regulation of FDI. Even though they have been proliferated over the years,³⁰⁶ it is evident from this research that they are mainly unbalanced agreements which focus on protection of investors in a host country without accompanying obligations on those investors. It is understandable that anyone putting money into a country would want to protect his investment and ensure he yields profits. However to do this by practically tying the hands of the host government is not in the best interest of development.

The fact that the OECD negotiations on a multilateral agreement on investment failed, yet debate continues to this day is an indication of either the need for such a regulatory instrument or the resilience of this issue.³⁰⁷ This in itself is an indication of a shift towards a MAI and even though it takes time, eventually, a MAI or some form of foreign investment regulation will be introduced.

Further, it has been observed that only by listening to and, more importantly, acting upon the views of developing countries can the developed countries hope to revive the vision of a vibrant and active global trading system that encourages development of poorer countries.³⁰⁸ Doha.

4. APPLICABLE FORUM



Along with the intense debate on whether or not there is a need for a MAI is the crucial issue of the forum. It should be noted that even before the experiences of MAI negotiations in OECD were available, an attempt was made to push the investment issue on the WTO's agenda at the First Ministerial Conference of WTO in Singapore where the EU and Canada proposed to create a Possible Multilateral Framework on Investment (MFI) under the auspices of WTO.³⁰⁹ This in itself has generated a lot of debate.

³⁰⁶ With over 2000 BITs alone in existence as at today.

³⁰⁷ Mosoti Victor 2003 Non-Discrimination and its Dimension in a Possible WTO Framework Agreement on Investment; Reflections on the Scope and Policy Space for the Development of Poor Economies *The Journal of World Investment* Vol.4 No.6 December 2003 pg.1018

³⁰⁸ Third World Network 2003 *Four Arguments Against a Plurilateral Approach to Singapore Issues in WTO* online at <http://www.twinside.org.sg/title/twninfo96.htm> visited 19/04/2005

³⁰⁹ Kumar Nagesh 2003 Investment on the WTO Agenda: A developing Country Perspective and the Way Forward for the Cancun Ministerial Conference RIS-DP #56/2003 online at http://www.ris.org.in/dp56_pap.pdf Visited 17/04/2005 Pg 6 Of 34. After the failure of the OECD MAI, the EU and some industrialised countries renewed their efforts to put formal negotiations on multilateral investment rules on the WTO agenda. This was actually set back by the Cancun debacle. Hence the debate as to the forum for a MAI continues. –Ferrarini Berno 2003 *A Multilateral Investment Framework: Would*

Further in 2001, the WTO's Doha Declaration in November 2001, launching a new round of trade negotiations, included a section on 'trade and investment'. This is a rather tortuously-worded and carefully constrained agreement for work on investment to continue in the Working Group on the Relationship Between Trade and Investment, as input into the objective of including to some extent investment in the new trade round. The cautious nature of this formulation is not surprising, given the history of international negotiations on investment liberalization, especially the MAI.³¹⁰ This also resulted in debates where different groups expressed conflicting opinions. The split between developed and developing countries on investment issues (in the WTO) was again demonstrated during the failed Ministerial Meeting in Cancun in September 2003.³¹¹

Some have said the MAI should be negotiated in the WTO as the leading trade regulatory body. However this has been greatly opposed³¹² and may not be practical because the MAI in order to be acceptable to all parties will have to contain some provisions that are not WTO compatible and this will create a lot of friction in the multilateral trading system.

They also argue that the areas of competence of the WTO are not wide enough to cover many facets of investment issues and pushing that a MAI be discussed in the WTO will only distort the issues.³¹³ In addition, it has been argued that an investment agreement in WTO will be damaging to development options and interests. Investment is not a trade issue, and thus bringing it within the ambit of WTO would be an aberration and could cause distortion to the trade system. It is certainly not clear, whether the principles of WTO (including national treatment, MFN), which apply

it be Justifiable on Economic Welfare Grounds World Trade Institute Berne online at <http://www.wti.org/res/documents/AWI2003Ferrarini.pdf> visited 2/12/04 pg 1 of 29

³¹⁰ Hinton Tony 2003 International Negotiations on Investment Liberalization *Australian Journal of International Affairs*, Vol. 57, No. 2, pp. 253–258, July 2003 Carfax Publishing online at http://web37.epnet.com/externalframe.asp?tb=1&_ug=sid visited 4/11/04 pg 3 of 7

³¹¹ Stephan Szepesi 2004 *Comparing EU Free Trade Agreements: Investment* In Brief No 6D – July 2004 European Committee for Development Policy Management (ecdpm) Publication available online at www.ecdpm.org and www.ileapinitiative.com pg 2

³¹² In November 1996, at a meeting of the heads of delegation at the WTO Indonesia presented a joint statement of eight developing countries (Malaysia, India, Egypt, Tanzania, Ghana, Uganda and Haiti) opposing the starting of any discussions on investment issues within the WTO because the WTO already had rules dealing with investment (which I examined in chapter 1) and these they feel are sufficient for now. See Khor, M *Vital Issues in the WTO: Developed and Developing Nations Differ on Need to Discuss Investment Pact Now*, The Business Times (Singapore) Friday, December 6, 1996a.

³¹³ Several developing countries believe that investment regime was inappropriate in a trade organization and would only divert useful time from other important things in the WTO. -Charlton Andrew, 2004 *Initiative for Policy Dialogue Background note for 'The IPD/Stiglitz Plan,' Part II Regulatory Harmonization: the Singapore Issues* online http://www0.gsb.columbia.edu/ipd/pub/IPD_Appendix_2_Final.pdf visited 30/12/04 pg 4

to trade in goods should apply to investment nor, that if they were applicable, that they would benefit developing countries.³¹⁴ This is because traditionally developing countries have had the freedom and right to regulate the entry and conditions of establishment and operation of foreign investments, and it is felt that they should retain this right.³¹⁵

Secondly, they feel that developing countries will be in a disadvantageous position if the negotiations take place within the WTO because they lack the necessary human resources and negotiating capacity³¹⁶ for an agreement of such magnitude. Thirdly, they believe that a WTO agreement will be subject to the dispute settlement mechanism, which allows for cross-retaliation, something developing countries would not want.³¹⁷

It has also been stated that the WTO should focus on accomplishing its current work programme rather than entertaining new issues, which will create additional obligations on developing countries. This was the position expressed in a report of the meeting of the G-15 summit level group (which now consists of 19 countries) in May 2001.³¹⁸ One of the issues greatly opposed by this group was investment. It was further argued that developing countries in the WTO did not have the capacity to negotiate these new issues and introducing them will only make their obligations more burdensome and overload the WTO Agenda.³¹⁹



Others have observed that negotiating a Multilateral Investment Agreement in the WTO in reality is bound to be a rigorous and divisive exercise because rarely have WTO members arrived at an

³¹⁴ Khor Martin 2003 “WTO Singapore Issues”: What’s at Stake and Why it Matters Third World Network online at <http://www.twinside.org.sg/title/cancun3.doc> visited 27/04/2005 Para 4 pg.3

³¹⁵ *ibid*- Khor Martin 2003 “WTO Singapore Issues”: What’s at Stake and Why it Matters Third World Network online at <http://www.twinside.org.sg/title/cancun3.doc> visited 27/04/2005 Para 4 pg.3

³¹⁶ Instead poor countries have been advised to push for the UN to adopt binding rules on the conduct of MNCs that invest in poor countries as the best way to ensure that their FDI promotes indigenous strategies for sustainable development, poverty alleviation and environmental protection. Lobe Jim 2003 NGOs Organize against Proposed WTO Investment Agreement online <http://www.globalpolicy.org/socecon/bwi-wto/wto/2003/0624ngoinvest.htm> visited 03/01/05

³¹⁷ Seid Sherif, 2002 p4 114-115; This is something the developing countries have not liked about the WTO the cross-retaliation is a tool the developed countries can exploit to the disadvantage of weaker countries and in the area of foreign investment it will give them and their MNCs too much power to the detriment of those countries that really need FDI for growth and development.

³¹⁸ This opinion was expressed in 2001 by the following countries; Algeria, Argentina, Brazil, Chile, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, Mexico, Nigeria, Peru, Senegal, Sri Lanka, Venezuela, Zimbabwe, and Iran and Colombia—Hardstaff, Peter and Rice, Tim 2003 More Market Access for Less Policy Space – A Bad Deal for Less Development online at <http://www.ActionAid.org.uk/wps/content/documents/baddeal.pdf> visited 19/04/2005

³¹⁹ Hardstaff, Peter and Rice Tim 2003 *More Market Access for Less Policy Space – A Bad Deal for Development* online at <http://www.ActionAid.org.uk/wps/content/documents/baddeal.pdf> visited 19/04/2005 pg 2

agreement that takes into account in a balanced way the interest of all the members.³²⁰ By nature, the negotiation of heavy commercial interests at the WTO precludes the possibility of any meaningful benevolent interests.³²¹

Another observation is that the current lack of consensus on investment among WTO members is likely to derail the negotiation of any meaningful WTO investment agreement with binding rules and dispute settlement, and also undermine progress on more important and meaningful WTO negotiations.³²²

In addition, some developing countries want the issue to be taken out of the WTO altogether. This implies that investment as an issue will not be negotiated, and (importantly) it would also no longer be discussed in the working groups. In fact, a number of developing countries have linked their willingness to continue discussing trade facilitation to a decision to drop the other the issue of investment entirely (in addition to the other two).

The EU by contrast has agreed to the three issues to be taken out of the package of agreements to be adopted at the end of the current round of negotiations, but want them to be kept in the WTO programme in one way or another; presumably this means that the working groups will re-start their work. Other developed countries also support the EU view³²³



Although stating that "a multilateral framework for investment in the WTO would not guarantee greater investment flows", the paper written by some developed countries proposing a multilateral investment frame work in the WTO, went on to say that failure to negotiate such an agreement would mean a missed opportunity to "shape the multilateral environment in which international investment can contribute to the development prospects of all our citizens".³²⁴

³²⁰ See World Trade Organization *Annual Report 1996 Special Topic: Trade and Foreign Direct Investment*, WTO, Geneva, Switzerland, 1996 pg.59; Mosoti V 2003 Non-Discrimination and its dimension in a Possible WTO...Pg 1014

³²¹ Mosoti V supra; See also Drahos Peter *When the Weak Bargain with the Strong: Negotiations in the World Trade organization International Negotiation* 8, 2003 pp.79-109

³²² Business Roundtable 2003 *A business Roundtable WTO Policy Paper: How the WTO can Promote the Benefits of International Investment* online at <http://www.brtable.org/TaskForces/TaskForce/document.aspx?q=6C25BF159F249514481138A74FA1851159169FEB56936B3> visited 26/04/2005

³²³ Hormeku, Tetteh 2004 *Wrangle Continues on the Singapore Issues: TNC and HOD Meetings Debate what to do about Trade Facilitation and How to Treat the Other Three Issues* Geneva July 5 2004, online at <http://www.investmentwatch.org/> visited 26/04/2005

³²⁴ Oh Cecilia 2003 WTO Talks on Investment- Developing Countries Still against Negotiations Third World Network Africa online at http://twnafrica.org/news_detail.asp?twmID=379 visited 27/04/2005

The inclusion of investment on the WTO agenda has also been justified on the grounds of trade relatedness of investment. However, the trade – investment link, other than what is covered under TRIMs Agreement, is by no means straightforward. The bulk of FDI flows continue to be market-seeking (or tariff jumping) type and actually substitute trade.

Therefore, after taking care of possible trade distorting investment policies under TRIMs Agreement, there is very little justification of including a full-fledged investment agreement in the multilateral ‘trade’ negotiations. FDI, like domestic investment, is a development and industrialization issue rather than a trade issue. Bringing it on the WTO agenda would unnecessarily diffuse the attention of WTO from its main purpose i.e. trade liberalization.³²⁵

Moreover, the discussions so far in the WTO show that there is no consensus on modalities of negotiations, nor even on the principle of whether there should be an investment agreement in WTO.³²⁶ Since consensus is very vital for any agreement to materialise in the WTO, as this consensus could not be reached to begin negotiations on investment, it was therefore dropped.³²⁷ This thus led to dropping the issue from the WTO 2004 DOHA round³²⁸ and a decision that it will not have another round of negotiations for investment and so a MAI in the WTO at this point is not possible.



Others have proposed UNCTAD as the forum for a possible MAI.³²⁹ It has been argued that UNCTAD has some comparative advantages over the WTO and even the OECD for some key reasons³³⁰ one of which is that UNCTAD is not a rule making body so discussions and the seeking

³²⁵ Kumar Nagesh 2003 *Investment on the WTO Agenda: A Developing Country Perspective and The way Forward for the Cancun Ministerial Conference* RIS-DP # 56/2003 online at http://www.ris.org.in/dp56_pap.pdf visited 17/04/2005 pg 12 of 34

³²⁶ Khor Martin 2003 “WTO Singapore Issues”: What’s at Stake and Why it Matters Third World Network online at <http://www.twinside.org.sg/title/cancun3.doc> visited 27/04/2005 Para 4

³²⁷ Stephan Szepesi 2004 *Comparing EU Free Trade Agreements: Investment* In Brief No 6D – July 2004 European Committee for Development Policy Management (ecdpm) Publication available online at www.ecdpm.org and www.ileapinitiative.com pg 2

³²⁸ Known as the July package, in 2004

³²⁹ It is argued that a multilateral regime the UN system will create certainty of applicable law and will result in making the legal climate for international investments more favourable. -Boncta Simpson Ebow P 1990 *Legal Relationships between Transnational Corporations and Host states* Quorum Books Pg 115

³³⁰ The other reasons include, UCNTAD’s framework is less likely to place developing countries in a less disadvantageous position in the discussions on multilateral rules; it has a more diverse membership and is a more open forum; It has a broader paradigm of trade and has expertise in dealing with international frameworks in those areas like technological transfer and competition which are relevant to investment; It

of consensus could be conducted in an atmosphere that does not carry the implications of rule making.³³¹

It has been stated that UNCTAD, did not favour an MAI (especially under the OECD), and if asked would not advise countries to accede to the OECD-MAI. UNCTAD favoured a multilateral framework on investment (MFI), and one based on the "positive list" approach of the General Agreement on Trade in Services (GATS) but whether another kind of Agreement should be negotiated was something governments will have to decide. This was UNCTAD's position in 1998 when the MAI was being negotiated in the OECD.³³²

On the other hand others believe that WTO is the right forum and since UNCTAD is not a rule making body, rules cannot be negotiated at UNCTAD. ³³³

It is my view, that since most countries in the World today are members of the United Nations then a UN agency will be the appropriate forum. UNCTAD- United Nations Conference on Trade and Development which has been greatly involved in analysing and monitoring investment regulations as well as MNEs/MNCs will be in the best position to implement such an agreement. Countries will be more inclined to sign up to the agreement and be a part of its negotiation if they are aware that trade sanctions will not be attached to it. This will also reduce the possibilities of the big trading powers using the MAI as a tool to impose their will on smaller WTO members. Moreover, agreements are binding based on the kind of weight and level of enforceability given to it by parties to it. Since the agreement will cover the interests of all stake holders in FDI regulation it will be taken seriously and will be binding and more enforceable.

5. EFFECTS THE MULTILATERAL AGREEMENT ON INVESTMENT WILL HAVE ON AFRICAN COUNTRIES

A basic question before entering into any negotiation on an Multilateral Agreement on Investment (MAI) is to determine to what extent there is a need for a new multilateral instrument on

already has a mandate and work programme for handling issues of a multilateral investment framework and years of research experience on the subject.-see Seid Sherif, 2002 pg 115

³³¹ Khor ,M 1996 pg 14;Seid Sherif 2002 pg 115

³³²

³³³ Opinions of Chilean and Argentinian Diplomats in Seid Sherif 2002 pg 115 -116

investment, and what its costs and benefits for developing (African) Countries may be.³³⁴ As African countries are major importer of FDI, the extent of the need as well as its cost and benefits must be well understood in order to avoid a deadlock and achieve much progress. Against that backdrop, this section will attempt to make an assessment of the relevance of MAI from a developing country (African) perspective. The pertinent question is what will be the implications/effects of a MAI on African Countries?

The MAI will have both positive and negative effects on African countries. The first positive effect the MAI will have on African developing countries is that poor developing African countries who are perceived as unstable and who do not have the power to negotiate BITs that can assist them with economic development will have the MAI as a basis for investment agreements.

It will also act as a guarantee to foreign investors of how their investments will be treated as well as what is expected of them in those countries. The MAI will also save them a lot of time and costs that are incurred in negotiating individual BITs and FTAs with different countries, when both parties can simply agree to be bound by the provisions of the MAI subject to slight amendments depending on the circumstances.

Further the MAI will lead to uniformity and coherence in investment regulations and this will outlive most BITs and FTAs, which are normally for a specified period of time and can be changed when a new government enters power.

However there is also the negative side, which is that countries will give up some of their authority as they will be bound by the provisions of the MAI and will not be able to treat investment in a manner less than that specified in the MAI. Further, any breach of the provisions of the MAI will amount to a breach of their international obligations, which has its own consequences.

FDI flows emerge because of differences in the levels of development and bundles of created assets. Indeed the theory of international firm explains evolution of a national firm into an

³³⁴ Kumar Nagesh 2003 Investment on the WTO Agenda: A Developing Country Perspective and The way Forward for the Cancun Ministerial Conference RIS-DP # 56/2003 online at http://www.ris.org.in/dp56_pap.pdf visited 17/04/2005 pg 11 of 34

international corporation in terms of monopolistic ownership of intangible assets that have revenue productivity abroad and which more than offsets the disadvantages of operating in an alien environment. These advantages include proprietary technology, globally reputed brand names, access to cheaper sources of capital, accumulated experience of organizing complex tasks, among others.³³⁵

From the start, therefore, MNE entrants enjoy an edge over local enterprises, if there are any existing at all, because of their monopolistic ownership advantages. The margin of the edge enjoyed by them is inversely related with the extent of development of local industrial capabilities and hence level of development. It is particularly wide in low-income countries.³³⁶

It is feared that the reduced flexibility to regulate FDI inflows in tune with their development policy objectives resulting from agreeing to a multilateral framework could lead to considerable loss of welfare in developing countries. While the Multilateral framework proposed in the past would reduce the policy space available to developing countries, they did not offer any thing in return for this to them.³³⁷



This notwithstanding it is important to add that there is always a price to be paid for any step taken in development. Africa will reap more benefits than limitations from a well-negotiated and balanced MAI in the appropriate forum as against numerous BITs and FTAs.³³⁸

Another issue that has been raised regarding the MAI and its effects is the one-size-fits-all approach that various attempts have taken towards drawing up such an agreement. This section will examine it briefly.

³³⁵ See Caves, Richard E. (1996) *Multinational Enterprise and Economic Analysis*, Second Edition, Cambridge: Cambridge University Press; Dunning, John H. 1993, *Multinational Enterprises and the Global Economy*, Reading:

Addison-Wesley, for expositions of theoretical approaches to FDI.

³³⁶ Kumar Nagesh 2003 Investment on the WTO Agenda: A Developing Country Perspective and The way Forward for the Cancun Ministerial Conference RIS-DP # 56/2003 online at http://www.ris.org.in/dp56_pap.pdf visited 17/04/2005 pg 12 pf 34

³³⁷ Kumar Nagesh 2003 Investment on the WTO Agenda: A Developing Country Perspective and The way Forward for the Cancun Ministerial Conference RIS-DP # 56/2003 online at http://www.ris.org.in/dp56_pap.pdf visited 17/04/2005 pg 16 of 34

³³⁸ These are my words based on the conclusions I have reached as a result of my research. See pages 7 and 54

6. ONE-SIZE-FITS-ALL FDI POLICY APPROACH; INAPPROPRIATE FOR COUNTRIES AT DIFFERENT LEVELS OF DEVELOPMENT

The volume of FDI a country attracts is greatly determined by its level of development amongst other factors. Literature on FDI flows has shown that countries at different levels of development receive different types of FDI.³³⁹ For instance, a country at the beginning of the factor-driven stage will attract resource-seeking or labour-seeking inward FDI and investments in capital and intermediate goods industries in subsequent stages. Naturally the need for policy framework dealing with FDI would depend upon the level of development of that nation. It is feared that the one-size-fits-all approach to FDI policy that is sought to be evolved through a Multilateral Agreement on Investment in the multilateral trading system (as well as in the WTO) cannot serve the best interests of countries at different levels of development.³⁴⁰

As observed earlier the host government policies have played an important role in extracting the benefits from FDI in developed and developing countries. The countries that pursued selective policies with respect to FDI, for instance, South Korea, Taiwan and China among other Southeast Asian nations (for instance, in channeling FDI into export-oriented and high technology activities) have had a greater success in achieving their developmental objectives with FDI inflow than those that pursued more open policies such as those in Latin American countries.³⁴¹ It is therefore feared by some developing countries that a multilateral investment regime will have the effect of taking away the ability of the host governments to direct FDI in accordance with their development policy objectives and the result therefore is that the overall quality of any FDI inflows received is likely to suffer.³⁴²

³³⁹ See Ozawa, Terutomo (1992), 'Foreign Direct Investment and Economic Development', *Transnational Corporations* 1(1): 27-54 cited in Kumar Nagesh 2003 Investment on the WTO Agenda: A Developing Country Perspective and The way Forward for the Cancun Ministerial Conference RIS-DP # 56/2003 online at http://www.ris.org.in/dp56_pap.pdf visited 17/04/2005 pg 12 of 34; Porter, M.E. (1990), *The Competitive Advantage of Nations*, New York: The Free Press.

³⁴⁰ Kumar Nagesh 2003 Investment on the WTO Agenda: A Developing Country Perspective and The way Forward for the Cancun Ministerial Conference RIS-DP # 56/2003 online at http://www.ris.org.in/dp56_pap.pdf visited 17/04/2005 pg 12 of 34

³⁴¹ Kumar Nagesh 2003 Investment on the WTO Agenda: A Developing Country Perspective and The way Forward for the Cancun Ministerial Conference RIS-DP # 56/2003 online at http://www.ris.org.in/dp56_pap.pdf visited 17/04/2005 pg 13 of 34-

³⁴² *ibid*

7. ENFORCEABILITY OF A MULTILATERAL AGREEMENT ON INVESTMENT IN THE GLOBAL TRADING SYSTEM

One great fear of the opposers of the MAI is the enforceability. Those who proposed a MAI in the WTO did this mainly for the advantage the Dispute settlement body (DSB) posed with regards to enforcement of the provisions of the MAI. However, opposers feared that the use of sanctions would be to the disadvantage of developing countries that feared that they would be victimised. On the other hand, if the MAI is not in the WTO (which for now seems to be the case as the WTO in the July package of 2004, decided not to include investment s in its rounds of negotiations)³⁴³, the big question that needs to be answered is how will this agreement be enforced and how will developing states be able to enforce breaches against the stronger partners in event of default.

Supporters of a MAI, such as the European Union, argue that a worthwhile agreement must maintain a high degree of ambition. It is worth recalling, in this respect, that as far as investment flows are concerned, all countries have an inherent self-interest to adhere to rules. In fact, while liberalization measures as regards trade in goods and services could have a short term negative impact on the balance of payments and on employment in the receiving country, liberalization and protection of investment, by generating inflows of funds, has a positive effect on the host country's Balance of Payment and employment in the short term as well as in the longer period. In addition, rules on investment would add benefits such as transparency and thereby provide the possibility to fight corruption and tax evasion, particularly in developing countries. In their opinion there will be a win-win result of an agreement on investment, and this should therefore be adequately underlined every time.³⁴⁴

³⁴³ See previous discussion on page 66-68

³⁴⁴ European Commission 1998 Discussion Paper: *WTO New Round: Trade and Investment* online at <http://www.corporateeurope.org/mai/eu/113invest.html> visited 20/04/2005 Para 10



CHAPTER 5

CONCLUSIONS

1. MULTILATERAL AGREEMENT ON INVESTMENT: THE JOURNEY THUS FAR

The OECD MAI failed because it gave more rights and little obligations to the investors and this did not consider the development for the host countries.³⁴⁵ There is a need to learn from the mistakes of the OECD in negotiating a MAI.

³⁴⁵ Most importantly, the MAI sought to ensure that companies investing abroad would receive compensation if they were nationalised as well as equal treatment with domestic firms without corresponding obligations and thus it was greatly opposed. – BBC News Tuesday, November 23rd 1999 Investment Puzzle for WTO online at http://news.bbc.co.uk/1/hi/special_report/1999/11/99/battle_for_free_trade/486411.stm visited 19/04/2005

Because African countries are in a dire need of foreign investment for national building they are eager to adapt policies that may limit their control of the investors once they come into their countries. They may also be at a weaker bargaining position and sign agreements that are not in their best interests. BITs and FTAs are currently the most widely used forms of investment regulation; however there is still a gap that needs to be filled in global investment regulation. Thus the need for a multilateral framework on investment arises. If the benefits of FDI are going to be felt in Africa and if poor countries are to be allowed to achieve their development goals through FDI, then there is a need for a well negotiated and balanced MAI to guarantee investors of good conditions and profits in their investments as well as creating the obligation to promote the developmental goals of the host countries.

This notwithstanding, there is indeed a need to regulate the flows of FDI across the globe and this will be best achieved by a multilateral framework. The WTO has been suggested as the appropriate forum but as has been observed, the WTO may not be the ideal forum for the MAI because of its twin pillars of MFN and National treatment which in the context of MAI, if applied mechanically would lead to adverse results which may lead to global inefficiency as well as cause harm to economic development in developing countries.³⁴⁶ Further, many global trade unions under the Global Unions Group, had taken a joint position that investment agreements should exclude provisions on expropriation and national treatment as they limit the scope to pursue development strategies.³⁴⁷ Moreover, the WTO has decided not to have further negotiations on investments for the meantime.

2. THE WAY FORWARD

³⁴⁶ This may be due to the fact that most developing countries are at different levels of development and a strict application of MFN and National treatment may not be in their developmental interest; This is something many scholars on the MAI in the WTO have commented on in their various write-ups. For instance see Raja Kanaga 2003 NGOs Voice Opposition to WTO Investment Negotiations online at <http://www.twinside.org.sg/title/twninfo25.htm> visited 26/05/2005

³⁴⁷ Raja Kanaga 2003 NGOs Voice Opposition to WTO Investment Negotiations online at <http://www.twinside.org.sg/title/twninfo25.htm> visited 26/05/2005

A MAI may not be the solution to all of Africa's investment and capital flow problems but it will go a long way in reducing its capital flow limitation and assist in attracting FDI in Africa.³⁴⁸ However there is a need for any multilateral framework on Investment to address the needs and interests of all the parties to it. It is important for it to be effectively negotiated, giving all the stakeholders an opportunity to air their opinions and suggestions on how to strike a mutually advantageous balance of rights and obligations³⁴⁹ between the diverging interest and priorities of various groups of countries.³⁵⁰ Most importantly is the right to regulate, which arose as a shield against expansive use of expropriation claims by investors that have threatened to encroach on a sovereign government's right to regulate in the public interest.³⁵¹

It is important to note that in negotiating a comprehensive, international investment regime, it is practically impossible to reconcile the conflicting interests of the major players. Thus the approach could be putting the issues that are considered very important to all the stakeholders on the negotiation table and those core principles on which agreement can be reached could form the multilateral framework on investment. Then each country could be empowered to introduce its own rules that elaborate those principles depending on its particular situation and proprieties.³⁵² This will achieve the dual propose of guaranteeing investors across the globe of the kind of treatment and protection they will get and allowing the host countries the flexibility to manage their affairs based on their propriety and development interests.

In view of this, I would like to make the following recommendations for investment regulation and the effective use of FDI for development and economic growth across the globe.

³⁴⁸ By creating a base or general set of rules that govern investment and will let investors know that they will be treated the same way everywhere in the world and that they will have the same level of corresponding responsibilities and obligations across the globe.

³⁴⁹ That will offer adequate protection to foreign investors while at the same time guaranteeing host states some control over their natural resources and the achievement of economic growth through foreign investment.

³⁵⁰ UNCTAD 2003 World Investment report 2003 FDI Policies for Development: National and International perspectives United Nations New York and Geneva 2003 pg 145

³⁵¹ UNCTAD 2003 World Investment Report pg.146

³⁵² This was the recommendation of regulatory openness suggested by Seid Sherif 2002 in Global Regulation of Foreign Direct Investment Ashgate Publishing Company page 195 which the author shares a similar view but wants it to be in the form of a multilateral framework i.e. binding rules that act as a basis for the countries to negotiate investment agreements and to treat investors in their countries.

3. RECOMMENDATIONS

An important aspect that needs to be settled is the forum where the multilateral investment regulatory framework will be negotiated. The WTO may not be the right forum for a MAI, because it will not afford the negotiation of an investment framework that caters for a balance between the interests of the host nations and the investor/home state.

Moreover, as the WTO decided in its July package not to negotiate investment and investment related issues in this round of negotiation, the UN organ UNCTAD may be the appropriate forum for a MAI. Since all the WTO members are members of the UN and it will be a better forum that is less dominated by developed countries and may be more democratic in considering the developmental interest of developing countries, my recommendation is that UNCTAD should be the forum in which the framework is negotiated.

The Agreement should be a framework that will be similar to the GATS setting. This is because it will not be realistic to get everyone to agree all the issues then the issues that are most important to the major stakeholder as well as those that have been identified by BITs should be put on the table and discussed. However, the negotiations should not be done in a hurry bearing in mind that there are some poor countries that will be mainly host countries, which do not have the technical capacity to take active part in such negotiations. They (as well as their interests) should be well represented and considered while drawing up the framework.

The frame work should leave room for countries to be able to adapt their national laws and situations to make policies and treat investors in a manner that does not fall short of the provisions of the agreement while still giving them the flexibility they need to consider their national priority. This is because the right to sustainable development is a human right recognised by the UN Declaration on the Right to development (1986), which guarantees a state of the right to formulate appropriate national development policies³⁵³. FDI can play a major role in a country's development but if not well managed it can also damage a country in many ways.

³⁵³ Art 2(3) of the UN Declaration on the Right to development (1986)

Thus in the interest of development of developing nations,³⁵⁴ any investment framework must give room for countries to tailor their investment rules to suit their specific needs and priorities and to protect those areas of their economies that are still developing as well as channelling FDI to the areas where they need them most.

A provision for joint ventures as a first option for FDI in Africa should be included in the framework. This will benefit the foreign investor through diversification of risks, provision of a local partner that can mediate with the local authorities as well as the ability to pull larger resources and technology. The benefits for the host state includes less profit being repatriated abroad, ability of the government to have direct or indirect control over the venture as well as a local entrepreneurial clan emerges through the acquisition of managerial and business skills from the foreign investor.³⁵⁵

There is a need to examine the policies that have been implemented so far and also design new ones to attract FDI to the countries that need it while preserving countries' developmental goals. Thus having a sound legal standard for multilateral application to rely on could be of particular significance.



The framework should not contain an open-ended definition of expropriation like the OECD MAI attempted to. This will give the MNEs too much right and greatly restrict governments' regulatory power. However it should guarantee the repatriation of funds from the host country with certain limitations i.e. where there is a balance of payment problem, a temporary halt of such transfers may be needed.³⁵⁶

The framework should include core labour standards and environmental protection standards that will be balanced and negotiated to suit all the major stakeholders, in the interest of poverty alleviation and global sustainable development. While also bearing in mind the different positions of different countries on labour standards by setting provisions for countries not to drop their

³⁵⁴ Who make up the majority in the global trading system

³⁵⁵ See Seid Sherif 2002, as this was a part of his suggestions and recommendations, which the author believes was very crucial to the positive use and impact of FDI across the globe.

³⁵⁶ This will be standard as the foreign investor needs to be sure he can take money out without undue limitations except in the even of balance of payment problems. See Seid Sherif 2002 pg 203

standards below what already exists and not extending national treatment to those companies who are maintaining labour standards lower than that applicable in the country they seek to enter.³⁵⁷

The interests of foreign investors and host developing countries do not always coincide, although they are not necessarily incompatible. While the foreign investor is interested in maximising profits, the host country usually wants development of its services and infrastructure, production of exportable goods and continuous technological development. The removal of a government's power to screen and select FDI proposals may result in increased flow of FDI into that country but the increase may not be in the sectors the host country would like the investment to go to. To avoid this, developing countries may need to retain a certain amount of power to determine the entry and conditions of operation of FDI in their territories. This however has its risks, which include corruption, arbitrariness and incompetence,³⁵⁸ thus it should be done with caution.

It is important that the Agreement should include clauses on restrictive business practices and corporate corruption and also clauses on technology transfer, employment, export generation, plus corruption and restrictive business practices. Further, the Investment Agreement should have balance of payments provisions and safeguards, and exceptions, which ensure that the agreement wouldn't damage development.

Also, right of government to regulate has to be accepted from the beginning especially during negotiation in order to avoid conflicts at a later stage.³⁵⁹

Another issue that should be considered during negotiation of the framework is enforceability, despite the fact that some states do not want the use of sanctions as a means of enforcing compliance to international trade/investment agreements, the UN can reserve the right to compel an erring party to the MAI to uphold its obligations in the event of a serious breach of the Agreement.

There is a need to begin to seriously consider the implications of the relationship between trade and investment for development and economic growth, if FDI is to have any positive impact on development in the future.

³⁵⁷ Seid Sherif 2002 pg 204

³⁵⁸ Seid Sherif, 2002 pg 183

³⁵⁹ CUTS ASIA 2002 pg 11/12

During the course of negotiating the MAI, some measure of caution must be exercised on behalf of vulnerable developing country, due to their high returns and vast markets, will be the target destination of FDI flows and will therefore have to manage the economic consequences of surges in investment and other repercussions, including possible balance of payment problems³⁶⁰.

It has also been suggested that while a MAI or such a framework is being negotiated (when eventually this decision is made), such a decision should be informed by a full account of what eventually finds its way into the MAI. The most central of concerns should be the level of flexibility that is left to governments and policy makers to channel foreign investment in a manner that accords with their development needs.³⁶¹

In a recent joint paper³⁶² Bernard Hoekman of the World Bank and Kamal Saggi of the Southern Methodist University have, after a comprehensive evaluation of the potential benefits of such international disciplines, come to the conclusion that in their view priority should be given to exploiting the potential offered by GATS before seeking to negotiate general disciplines on investment policies (FDI). They believe that once substantial further progress has been made to liberalize trade in goods and services, it will become much clearer whether the potential benefits of seeking general rules on investment policies are large enough to justify launching multilateral negotiations in this area.³⁶³

It has been pointed out as a result of research, that an important aspect of investment regulation is the availability at both national and international levels of insurance against non-commercial risks, which cover measures relating to several protection issues. National programmes to that effect have been operating for several decades in most capital exporting countries. It is important to add

³⁶⁰ Mosoti non discrimination pg 1018

³⁶¹ supra Mosoti pg1043

³⁶² titled "Multilateral Disciplines for Investment Related Policies"

³⁶³ WTO Working Group on Relationship Between Trade and Investment 2000 Communication from India WT/WGTI/W/86 on line at http://commerce.nic.in/wto_sub/Invest/sub_invest_w86.htm visited 20/04/2005 para 10; though interesting, it is important to add that this falls outside the scope of this work.

that in this regard the MIGA was established under the auspices of the World Bank to meet this need at the international level.³⁶⁴

A MAI under the UNCTAD will help create an investment framework that will go a long way towards harmonizing investment regulation and increasing even flows of FDI globally, in as much as it is a well negotiated and balanced agreement.



³⁶⁴ UNCTAD 1999 *Trends in International Investment Agreements: An Overview* UNCTAD/ITE/IIT /13United Nations New York and Geneva pg 90 of 135

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