
NEED OF A CORDIAL MULTILATERAL INVESTMENT AGREEMENT FOR THIRD-WORLD

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ABSTRACT

After the deliberations of the Uruguay round, on January 1, 1995, the agreement on Trade-Related Investment Measures went into effect. All parties of World Trade Organization (WTO) are parties to this agreement. The 'on paper' objective of the agreement is to recognize the distorting effect of the investment measures. It mentions that no party to this agreement shall apply any trade-related investment measure inconsistent with the principle of national treatment and prohibition of quantitative restrictions as given under Articles III and XI, respectively. However, the question persists: whether the agreement captures a justifiable solution for the problems of the third world. Various agreements of WTO claim to protect the interests of the nation-states by overseeing the implementation of this agreement. Authors like Paul Civello and Dallas DeLuca imply that TRIMS is an attempt to infuse coercive impact in the market by the global north. The agreement on TRIMS, General Agreement On Trade in Services (GATS) and other agreements and deliberations of WTO fail to provide any new protection for investors and reflect vague provisions for the achievement of the liberalization of trade. Foreign Direct Investment is a very important tool for the economics of every nation-state whether developed or developing. For achievement of the best practices to bring the representation of third world at par, there should be regulation which institutes a liberalized globe with equal negotiating powers. The present paper intends to understand the implications and elimination of this agreement through the altitude of developing states. The paper attempts to answer, "whether Multilateral Investment Agreement is a better option for the facilitation of free investment in global market?" This study analyzes the challenges pertinent to the WTO framework for international capital flows through the scholarly works and surveys of experts and certified authorities.

Keywords: Trade-related investment measure, General Agreement On Trade in Services, Foreign Direct Investment, Multilateral Investment Agreement, third world.

INTRODUCTION

An investment treaty aims for the attainment of the following protection:¹

1. Creation of an investment environment that would attract foreign investment in the host country
2. Protection of the interest of the foreign investors.

The wide breadth of 'protection' provided by investment treatment includes but is not limited to expropriation, fair and equitable treatment, full protection and security, most favored nation treatment, free transfer of capital, and umbrella protection. Foreign Investment has become an integral part of every economy. These transactions necessitate dialogue between foreign investors, whether directly or indirectly, and the government officials of the host country. A bilateral agreement for investment (BIT) concerns itself with the specific rules and commitments for the treatment of foreign investment. On the other hand, a multilateral agreement or a multilateral international instrument on investment aims at liberalization of the market entry in the global world while considering a regional sectoral or horizontal basis.² Any multilateral investment agreement results from a process of many negotiations for reciprocal concessions and includes the following features³:

1. A pros and cons list for the identification of the scope of the obligations of liberalization and treatment
2. methodology of negotiation, multilateral surveillance and dispute settlement mechanisms
3. inclusion of clauses for protection at the time of exit from the binding offers with compensatory obligations.

However, does the current regime accommodate problems faced by the developing countries participating in such transactions? There have been plenty of instances where transnational corporations (TNCs) tried to take advantage through manipulative transfer pricing. A predatory TNC with such destructive orientation would affect the growth of domestic industry, especially those companies which are new and small.

¹ 'Handbook on Obligations in International Investment Treaties,' APEC (20201).

² 'Bilateral and Multilateral Investments Treaties: What All Dealmakers Need to Know' (*Gibson Dunn*, 25 September 2015) <<https://www.gibsondunn.com/bilateral-and-multilateral-investments-treaties-what-all-dealmakers-need-to-know/>> accessed 2 October 2023.

³ *Ibid.*

CRITICAL ANALYSIS OF CURRENT REGIME

A. Evolution

The history of investment agreement can be traced way before the formation of modern state. In AD 991, for instance, The Constantine VIII and Byzantine Empire Basil II signed a *chrysobul*⁴ which granted the right to the merchant of Venice to trade in the ports and other places of Byzantine empire. The Byzantine Empire also signed an *embolum*⁵ with the Constantinople or right to quarter in the dwelling and trading. During this time it is believed by Authors like Jeswald W. that the basis of these grants was the idea of reciprocity of benefits. In AD 1296 King Erik while giving the grant to Hamburg merchants articulated the purpose as *ad meliorandum terram nostram cum mercaturis* ('for the amelioration of our territories through trade'). However, as the Colonialism started emerging new notion of *capitulary system* came in existence. This system is an offset of the practice of exploitation of the European power. During the early eighteenth century, many regions that were subject to the capitulary system started assuming these treaties as the basis of a complete extraterritorial system of freedom and immunity that applied not only to a small number of Ottoman subjects but also to all European nationals. These capitulations were a regularized insignia of the inferiority and slavishness of local institutions and individuals to European power, and they promoted the subjugation of much of the third world by the Western states.⁶

During the early eighteenth century, western countries started concluding commercial treaties amongst themselves because it would give better equality than those dealt with non-Western nations. At that time, emerging countries, for example, the United States, wanted to have a new international legal instrument with two objectives:

- (1) an extensive legal framework that can facilitate good relations with the big powers to secure national security and trade,
- (2) creation of commercial ties with various emerging countries.

This need for a comprehensive framework was sufficed by the 'friendship, commerce, and navigation treaty'(FCN) of which the United States. The FCN became a supreme exponent amongst the range of similar actions promoted by different forums. FCN can also be seen as a

⁴ Agreement for grant to merchants of Venice granting right to trade in areas of Byzantine Empire.

⁵ Agreement for dwellinf and trading between venice and Byzantine Empire

⁶ Salacuse JW, '4 A History of International Investment Treaties' (*Oxford Public International Law*) <<https://opil.ouplaw.com/display/10.1093/law/9780198850953.001.0001/law-9780198850953-chapter-4>> accessed 10 October 2023

post-war political step of the United State. The rationale behind this step was that after the severance of ties with the British Empire warranted a new trading system. At this time any other developing nation was too poor to resist the emergence of these systems. The USA would always use a resilient approach for persuading the other countries on account of its incredible economic and military power, notwithstanding the protection of international capital movement and legal enforcement.⁷ As per Michael Hunt, President Truman's post-war foreign policy was for guarding freedom from a military hazard posed by the Soviet Union. These policies were a source of spreading capitalism globally for establishment of its dominance.⁸ The doctrine of containment, which was a key element of full-proof Europe dominance strategy, was now the USA's most vital manifestation. However, containment in the European style, which enjoins military defence with financial assistance, would not be sufficient for the third world.⁹ During this time, the global south nations were overly underdeveloped, and did not have enough power to resist American political models. The primary goal for these countries was anticolonialism.¹⁰

The late 20th century saw decolonization of most of the countries and formulation of non-state actor. However, problem of liberalization and protection of international capital movement was still left to be resolved. The international institutes came up with many initiatives, these were:¹¹

1. The binding codes on Liberalization of Capital and Current Invisible Operations by the Organization for Economic Cooperation and Development (OECD). This code mandated the liberalization of inward and outward capital activities on a long-term basis;
2. The draft United Nations Code of Conduct on Transnational Corporations (1990). However, this could not reach completion.
3. OECD also published voluntary guidelines for Multinational Enterprises in 1976. With the emergence of Transnational Corporations(TNCs), these guidelines kept updating; and

⁷ Kenneth V. "The First Bilateral Investment Treaties: U.S. Friendship, Commerce and Navigation Treaties in the Truman Administration," 2012, University of California, pp 31-32.

⁸ Wrage SD, 'Ideology and U.S. Foreign Policy. By Michael H. Hunt (New Haven: Yale University Press, 1987, Xiv, 237p.).' (1988) 82 American Political Science Review 1037.

⁹ Supra 5, at 33p.

¹⁰ Supra at 6, at 160p.

¹¹ Sacerdoti G, 'Bilateral Treaties and Multilateral Instruments on Investment Protection'

<https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789041111111_02> accessed 10 October 2023.

4. OECD brought the draft Multilateral Agreement on Investment (MAI) for a comprehensive multilateral framework. However, in October 1998, negotiations for MAI were suspended with no consensus.
5. In 1995, as the GATT agenda along with the Uruguay Round Agreements, the subject of investment reopened. It brought a major development and a package deal as it established the World Trade Organization (WTO), and several agreements for investment. The important investment agreements introduced were
 - a. the Agreement on Trade-Related Investment Measures (TRIMs), which imposes limitations on Foreign Direct Investments (FDI) to some extent; and
 - b. the General Agreement on Trade in Services (GATS), which covers services for FDI activities.

Other agreements which have constant and explicit applicability to investment include

- a. the Agreement on Trade-Related Intellectual Property Rights (TRIPS), for standards and enforcement for transactions relating to intellectual property;
- b. the Agreement on Subsidies and Countervailing Measures for restrictions on some retail and subsidy movements; and
- c. the Agreement on Dispute Settlement Understanding where government-to-government disputes on investment issues are included.

B. Issues with WTO International Investment Frameworks

The General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMs) are the two main agreements that provide the World Trade Organisation (WTO) with a framework for international investment. The WTO largely focuses on business, but it also provides a framework for trade-related business.¹² A framework known as GATS intends to liberalise trade in services, which encompasses industries including telecommunications, finance, and professional services.¹³ The member nations are given a set of guidelines and promises about the opening up of their service sectors to international investment. TRIMs aims to stop investment policies that affect trade in products and have a

¹² 'WTO | Trade and Investment' <https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm> accessed 10 October 2023

¹³ 'WTO | Services - The GATS: Objectives, Coverage and Disciplines' <https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm> accessed 10 October 2023

negative impact on it. It seeks to do away with certain investment-related policies that impede or obstruct trade. The pledges made as part of the WTO application process frequently have an indirect impact on investment policy because they include the opening of markets for products and services:

The FDI performance of developing economies w.r.t outflows has not remained steady over the time. As per UNCTAD database, the percentage of FDI outflows from developing economies to global FDI outflows rose from 14.6% in 1995 which increased to 33.8% in 2014, and then dropped to 25.6% in 2015. Where percentage of developed economies experienced an increase from 52.3% in 2020 to 74.3% in 2021, emerging economies saw a decrease from 47.7% to 25.7%. The developed states, Americas (28.9%) and Europe (32.3%), have the prevalence of foreign direct investment outflows.¹⁴

TRIMS reduces WTO member states policy space by prohibiting the use of a number of investment-performance-related measures that allegedly distort trade but that have, however, been successfully deployed both by early Northern and late East Asian industrializers. For example, as part of targeted industrial policies, several East Asian countries actively encouraged foreign investment in certain sectors but stipulated that the majority of the firm be owned by national citizens, that certain local content and sourcing requirements were met, that technology was transferred, and that some R&D was conducted in the host country, with a certain percentage of local staff being employed in such processes.¹⁵ Moreover, they often imposed certain performance requirements such as export-import balancing requirements (which make foreign firms use domestic rather than imported inputs) which, together with domestic content requirements, played an important role in forging linkages to the local economy and thereby generating spillover effects. All these policies are now considerably restricted under TRIMs, making it more difficult for developing countries to be selective about foreign investment.¹⁶

With regard to GATS, the major concern is again policy space. The GATS imposes capital and exchange controls which represent a divergence from the liberation of capital movement based on macroeconomic considerations. Certainly, from the affairs of various polities in recent years, it appears that the rationale for the adoption of these capital controls was virtually

¹⁴ 'Foreign Direct Investment – UNCTAD Handbook of Statistics 2022' <<https://hbs.unctad.org/foreign-direct-investment/>> accessed 10 October 2023.

¹⁵ Khor M and Ocampo JA, 'THE UNSETTLED GLOBAL TRADE ARCHITECTURE'(2010)

¹⁶ United Nations Conference on Trade and Development (ed), *Elimination of TRIMs, the Experience of Selected Developing Countries* (United Nations 2007)

complete protection of the resilience of the financial system. Provided that this is the principal rationale, then the question remains, does the GATS offer any space for members to shift from their obligations as well as block movements of capital? While capital account transactions appreciate high flexibility, the controls on current account payments and transfers are more stringent. Current account payments are generally forbidden and whose legality at the WTO can only come from clearance by the IMF or by the balance of payments provision of Article XII. Members may impose restrictions on capital flows in several forms. Additionally, they may confine capital flows, covering current payments and capital activities, based on balance of payments and prudential considerations, with the prospect to levy barriers on capital movements at the request of the IMF. Furthermore, unlike other trade agreements, GATS seems excessively elastic, offering WTO members the space to determine which zones of their economies should be exposed to foreign competition. The WTO secretariat as well as GATS advocates have industriously supported this exponent. Comparable to other WTO agreements, poor countries often lack the financial influence and capability to negotiate fair trade agreements with industrialized countries. GATS is criticized a lot for maintaining a wide-ranging sweep. The GATS poses a grave menace to safeguarding public investments in numerous underdeveloped countries because of the notable discrepancies between WTO members and the corporate forces that represent the ranks of most industrialized nations in international trade negotiations and economic prudence. For instance, there is a critical need for a sustained and potent structure to assist African countries in helming any obligations as they struggle with the challenge of extending their sectors to GATS, especially in the health sector.¹⁷

Further, “restrictions are imposed on a country’s policy by the WTOs Agreement on Subsidies and Countervailing Measures (SCM) which prohibits, for countries with a per capita GDP exceeding U.S.\$1,000, all forms of export subsidies. Yet, export subsidies are among the major subsidy instruments used by developing countries and were deployed successfully by South Korea and Taiwan, for example. Now, with all forms of export subsidies being forbidden under the SCM, Southern countries ability to diversify their exports and to help their firms break into global markets is severely constrained.”¹⁸

¹⁷ Aginam O, “Predatory Globalization”: The WTO Agreement on Trade in Services, Migration, and Public Health in Africa’ (2010) 104 Proceedings of the ASIL Annual Meeting 139.

¹⁸ Bernhardt T, ‘North-South Imbalances in the International Trade Regime.’

NEED OF MULTILATERAL INSTRUMENT

The downfall concerning developing countries' FDI outflows is accounted to of two (among other) school of thoughts:

- a. how to rejuvenate trade multilateralism
- b. how to manage or mitigate macroeconomic vulnerability, which includes structural economic vulnerability faced by developing countries.

The advocates of the Multilateral Investment Agreement argue that because of the fragmentation of the system caused by the more than 3,000 bilateral agreements, universal standards would be selected in the discipline of investments as well.¹⁹ They analogize this position with the global trading system. The possibility of integration of trade and investment policy will have identical economic impacts. Despite its normative leverage, multilateral reasoning does not necessarily involve the deduction of non-tariff barriers. The 2011 World Trade Report exhibits that "deep integration" within the range of regional or bilateral agreements, (for example) concerning the deduction of the liberalization of services or technical trade barriers, oftens has no discriminative impact on the third world. The advantages of this integration cannot readily be forbidden to non-members. Generally, International Investment Agreements are unilateral in their orientation to the protection of international investors.²⁰ One advantage of an MIA is the elimination of power asymmetries between industrialized and developing countries.²¹ A comparison with negotiations in the WTO or the United Nations Framework Convention on Climate Change shows that by forming coalitions developing countries are quite capable of having a decisive impact on the course of multilateral negotiations. However, if the third-world countries persist and succeed in voicing anomalies to the regulation of FDI and the responsibility of investors in an MIA, it would be like a Pyrrhic victory: capital-exporting industrialized countries (and emerging countries) would pull back from the multilateral negotiations and would again concentrate on negotiating bilateral or regional accords. IIAs are mostly unilateral in their exposure to the safety of foreign investors. Power imbalances between industrialized and developing nations are one justification offered

¹⁹ 'Fragmenting Foreign Direct Investment Hits Emerging Economies Hardest' (*IMF*, 5 April 2023) <<https://www.imf.org/en/Blogs/Articles/2023/04/05/fragmenting-foreign-direct-investment-hits-emerging-economies-hardest>> accessed 30 January 2024

²⁰ Aiyar S and others, 'Geo-Economic Fragmentation and the Future of Multilateralism' (2023) 2023 Staff Discussion Notes <<https://www.elibrary.imf.org/view/journals/006/2023/001/article-A001-en.xml>> accessed 30 January 2024

²¹ 'International Economic Law', , *Cultural Heritage in International Economic Law* (Brill Nijhoff 2023) <<https://brill.com/display/book/9789004347823/BP000011.xml>> accessed 30 January 2024

for an MIA. Corresponding discussions in the WTO or the UNFCCC demonstrate that underdeveloped nations are reasonably competent to have a powerful influence on the direction of international negotiations by creating collaborations.²² However, if the developing nations are successful in ensuring exceptions to the framework of FDI and the responsibility of investors in an MIA, it would be a Pyrrhic victory because capital-exporting industrialized nations along with the emerging nations would shrink from the multilateral negotiations, and rather focus on securing bilateral or regional arrangements.

CONCLUSION

To conclude, the investment treaties, whether bilateral or multilateral serve dual purpose with regard to creation of environment of foreign investment which is cordial to host countries while protecting the investor of foreign investor. These treaties encompass myriads of protection like fair treatment, right against expropriation, fair treatment, security and many more.

However, it is crucial to understand whether the current governance framework of international investment address the problems faced by the developing countries. There have been affairs wherein manipulative practices by Big Nations or the TNCs tried to take advantage of inferiority of the third world through practices like, transfer pricing. This demands the need of a more balanced approach.

If we check the history of the development of International Investment Agreements it reveals how the bilateral arrangements has progressed and ultimately, emerged in a multilateral instruments. These instruments have, however, played a key role in shaping the global relations, yet they warrant an evolution pertinent to the contemporary challenges.

Currently, the main governor of the international investment framework is the World Trade Organization. The WTO's framework comprises agreements like GATS and TRIMs which play a noteworthy role for having legal enforcement for international trade and investment. Nevertheless, the challenges with regard to this international exponent can't be ignored. Concerns like policy space and potential limitation of underdeveloped and developing nations for certain approaches, should be addressed.

Moreover, the question of the need of multilateral consensus for international capital movements should be resolved. The supporters of multilateral instruments claims a friendly

²² Axel B 'Do we really need a Multilateral Investment Agreement,' (2013) German Institute of Development and Sustainability, <<https://www.idos-research.de/en/briefing-paper/article/do-we-really-need-a-multilateral-investment-agreement/>>Accessed on October 9, 2023.

universal standard should replace the increment of the bilateral agreements. However, while formulating such instruments this should always be considered that interest of developing nations is important and cannot be compromised in any sense.

Eventually, the landscape of global economic order for a non discriminatory investment treaties calls for a refined method of balancing the interests of all the parties involved from both the transacting states whether developed or developing.