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► **To cite this version:**

John Abrahamson. The Multilateral Development Instrument Proposal -An International Foreign Aid Treaty Framework to Address Poverty. 2023. hal-03935589

HAL Id: hal-03935589

<https://hal.science/hal-03935589v1>

Preprint submitted on 12 Jan 2023

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The Multilateral Development Instrument Proposal – An International Foreign Aid Treaty Framework to Address Poverty

*Dr. John Abrahamson**

Abstract

The Multilateral Development Instrument is a proposal for an international treaty framework to provide increased funding for current and future foreign aid projects, together with funding for direct payment assistance to families and individuals. Pairs of developed and developing countries would agree to adopt selected terms of the framework. This would combine funding from the developed country from a portion of taxation income from the largest multinational corporations, government aid contributions, and private donations. The funding would be used for current and future foreign aid programs together with direct bank account payments in the developing country. Treaty design would benefit from recent multilateral examples developed by the OECD, and analysis of related issues addressed in the Vienna Convention on the Law of Treaties. The proposal would provide key opportunities for developed involvement, including building communications infrastructure, development of mobile banking services, and provision of direct payments systems to assist families and individuals.

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Keywords

international development aid funding policy OECD multilateral treaty framework direct payments

1. Introduction

The key objective of the Multilateral Development Instrument (‘MDI’) is to increasingly engage developed and developing countries in a new framework to more effectively direct international assistance to benefit local populations in developing countries, funded by a combination of government aid, a portion of the profits from the largest multinational corporations which are not taxed in the respective parent country, and private donations. The MDI combines these contributions in an agreed framework to provide international assistance to families and individuals in developing countries. These objectives coincide with the expansion of foreign aid including direct payments made by governments to family and individual bank accounts for aid purposes.

The catalyst for the MDI proposal advanced in this article is based on observing the effectiveness of the multilateral framework basis promoted and implemented by the OECD in relation to taxation matters, including flexibility within the new multilateral frameworks, and the development of foreign aid using direct payments to address poverty in an increasing number of developing countries, including incorporation in the United Kingdom foreign aid program. This initiative would supplement funding for existing foreign aid measures based on a multilateral treaty framework for international cooperation and assistance. This is an example of a potentially simple implementation to direct contributions and a portion of currently untaxed revenue in developed countries towards existing and future international aid programs together with direct payments to recipients in developing countries. This is based on providing effective development assistance through the greater convergence of international assistance and international taxation systems. The related issue is to address the ‘resources curse’, where national wealth from natural resources developments in developing countries may not make significant contributions to addressing poverty.

The taxation component is based on contributing a proposed rate of 5% of the income currently derived in developed countries as participation exemption dividends from operations in the respective developing country. The scope would be limited to the largest multinational groups to provide the most cost-effective approach, using the same OECD threshold used for reporting measures to provide tax related information, based on consolidated group revenue of at least EUR 750 million.¹ The government aid component would be a supplement to existing assistance measures such as development of infrastructure, education, training, food, and medical assistance. The key to the MDI proposal is that the government aid contributions are combined with other funding components. The private aid component would allow private donors to contribute to direct payments to address poverty through the same multinational framework, benefiting from the increased benefit certainty by using the same agreement to direct payment systems and the related audit process.

The proposal could be implemented by means of the MDI as a form of multilateral instrument, where pairs of developed and developing countries agree to implement the arrangement on agreed bilateral terms within the new multilateral framework treaty. The principal requirements are that the developed country agrees to provide this revenue, and the developing country provides distribution to the recipient accounts. These family and individual accounts may already exist for direct aid payments.

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¹ Action 13 Country-by-Country Reporting, OECD, 2019 (Web Page) <<https://www.oecd.org/tax/beps/beps-actions/action13/>> (‘CbC Report’).

The OECD has successfully implemented agreements between countries within an international treaty framework. This was established to address specific issues in international tax planning in the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ('Multilateral Instrument' or 'MLI').² This multilateral treaty framework approach would be the key to developing the new MDI.

The new policy measures proposed in this article, including the use of a new multilateral agreement, and in particular, the expansion of direct payment systems, will require significant future policy and academic engagement. A key issue is that the use of direct payments may not be the only potential use of the new funding provided by the MDI. It should be open to the countries concerned to negotiate how to use the additional foreign aid funding.

2. Direct Distribution – Domestic Aid

(a) International Monetary Fund

Direct distribution mechanisms based on direct transfer payments to families and individuals was analysed by Sanjeev Gupta, Alex Segura-Ubiergo, and Enrique Flores of the International Monetary Fund ('IMF').³ The authors considered the use of direct payments for the distribution of wealth from natural resource projects. They commented that resource wealth may be associated with weak institutions and poor governance, and this had prompted calls for the direct distribution of natural resource income to the population instead of channelling all funding through national budgets.

The authors analysed direct distribution mechanism for a system of cash transfers to the population. They considered that the Alaskan model of distributions was innovative, and has generated strong support from the population. The use of resource revenues to establish or expand social safety nets and systems of direct cash transfers to the population was considered a reasonable approach to wealth transfers. Making these transfers conditional on certain interventions that increase the incentives for the poor to invest in themselves, such as keeping an up-to-date vaccination record or ensuring school attendance, was considered to be superior to unconditional transfers in this analysis.

The authors considered the role of both the public and private sectors to contribute to economic transformation of resource-rich countries. The government could design a strong fiscal framework, including an efficient regime to maximise resource revenues. The private sector could extract resource wealth in an efficient and sustainable manner, and pay royalty and corporate taxes to the government. Part of the resource revenues could finance public goods, as well as direct transfers to the households in the form of a modest direct distribution

² *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, opened for signature 7 June 2017 (entered into force 1 July 2018) ('*Multilateral Instrument*' or '*MLI*') <<https://treasury.gov.au/tax-treaties/multilateral-instrument>>.

³ Sanjeev Gupta, Alex Segura-Ubiergo, and Enrique Flores, *Direct Distribution of Resource Revenues: Worth Considering?* (IMF Staff Discussion Note, SDN/14/05, 2014).

mechanism or a social safety net. On this basis, direct cash transfers were considered to be appropriate as a portion of government distributions.

(b) Centre for Global Development and the World Bank

The use of direct payments was considered by Shanta Devarajan and Marcelo Giugale in a Centre for Global Development and World Bank analysis.⁴ They considered that several resource-rich countries had not translated their wealth into sustained economic growth and poverty reduction. They proposed transferring a portion of resource-related government revenues uniformly and universally as direct payments to the population, and considered how these direct dividend payments would look in practice.

The authors noted that the idea is not new, and that Alaska and Alberta have introduced such schemes. They considered that three main reasons had been cited to explain why less developed countries have refrained or should refrain from direct dividend payments: identifying people and transferring money to them may be technically difficult and costly; the political economy of non-democratic systems may act against the adoption direct payments; and governments need additional revenue to fund the provision of public goods, and can ill-afford to give away cash to individuals for private consumption when they still face unmet needs in vaccinations, primary education or basic infrastructure.

The authors then commented that these reasons may potentially no longer apply. Based on technological advances, they argued that it is now simple and inexpensive to biometrically identify every citizen in a country. On this basis, India as an example, was one-third of the way towards issuing unique identity cards to its 1.2 billion nationals. Some thirty-five African countries already identified and make cash transfers to some of their citizens as part of their social assistance programs, and these transfers that in many cases were de facto funded by revenues from extractive industries. In competitive elections, parties may find direct distributions a powerful tool to gather political support. Their analysis considered recent research that argued that direct distributions may increase the total amount of public goods that a government provides.

(c) Mobile Money Systems and Cash Transfers Aid

One key development was considered by Jenny Aker, Rachid Boumnijel, Amanda McClelland, and Niall Tierney, in a University of Chicago analysis. This was the expansion of mobile money systems, where mobile payment services can be extended to a large portion of the population of less developed countries.⁵ The authors considered that the introduction of mobile phone-based money transfer systems offered an alternative infrastructure for transfers, and potentially reduce the costs and leakage associated with social protection programs.

⁴ Shanta Devarajan and Marcelo Giugale, *The Case for Direct Transfers of Resource Revenues in Africa*, (Centre for Global Development, Working Paper, 2013) 333.

⁵ Jenny Aker, Rachid Boumnijel, Amanda McClelland, and Niall Tierney, *Payment Mechanisms and Antipoverty Programs: Evidence from a Mobile Money Cash Transfer Experiment in Niger* (University of Chicago, 2016).

These systems may also prove easier for recipients to collect their transfers provided that they have access to transfer agents. These transfer systems also increased access to informal private transfers, and served as an alternative savings device. The public sector could potentially lower the costs of implementing anti-poverty programs, and the poor could receive other benefits. The Better than Cash Alliance, for example, advocates government and non-government organisations to move to digital payments for payroll, government benefits, and humanitarian aid, with potential benefits including cost savings, transparency, and financial inclusion.

The authors noted that this approach has been echoed by a number of other organisations, in particular the Bill and Melinda Gates Foundation, which has made digital payments a key aspect of its financial inclusion strategy. The Foundation is investing in national financial inclusion initiatives where the largest number of people living in poverty stand to benefit from digital financial services, including Bangladesh, India, Nigeria, Pakistan, Indonesia, and East Africa. They concluded that the benefits of the program in countries with limited road infrastructure, low literacy rates, and high financial exclusion suggested the approach should also provide benefits in more developed countries.⁶

3. Direct Distribution – Extending to Direct Payments for Foreign Aid

The principal component of funding under the MDI would be foreign aid from developed countries. The MDI could initially be used to provide additional funding for international aid programs within the framework of current government international aid. This can include funding of key, emergency aid, education programs, capacity building, and key infrastructure projects. This foreign aid can also include contributions to international aid organisations such as the International Committee of the Red Cross and Médecins sans Frontières with recognised expertise in the respective developing country.

The new development in a formative stage relates to the use of direct cash transfers for foreign aid. The use of such cash transfers was considered by Henry Jackelen and Jamie M Zimmerman.⁷ They commented that recent breakthroughs in mobile technology, such as biometric IDs and point-of-sale devices that act as portable registers for banking transactions, offer a simple but radical way to reform foreign aid. Donor governments could deliver electronic payments directly to the world's poor. In relation to current aid approaches, they referred to analysis that it is hard to find other examples of public policies whose performance is assessed so little on the basis of results, and so much on the basis of expenses.⁸ Their analysis concluded that if donor governments were serious about measuring lasting change, they should

⁶ Bill and Melinda Gates Foundation, *Financial Services for the Poor* (Web Page, Undated) <<https://www.gatesfoundation.org/what-we-do/global-growth-and-opportunity/financial-services-for-the-poor>>.

⁷ Henry Jackelen and Jamie M Zimmerman, 'Money to the People, Delivering foreign aid directly to the world's poor by electronic transfer would cut waste and reduce corruption', *Slate* (Web Page, 25 February 2011) <<https://slate.com/technology/2011/02/foreign-aid-by-electronic-transfer-how-it-would-help-the-world-s-poor-cut-waste-and-reduce-corruption.html>>.

⁸ Jean-Michel Severino and Olivier Ray, 'The End of ODA: Death and Rebirth of a Global Public Policy', *Centre for Global Development, Working Paper Number 167*, March 2009 (Web Page, 23 April 2009) <<http://ssrn.com/abstract=1392460>>.

consider shifting foreign aid toward programs that deliver funds electronically directly to the poor.

Michael Faye and Paul Niehaus also considered development aid based on electronic payments to those in need.⁹ They commented that emerging market governments are estimated to spend \$100 billion on cash transfer programs each year, while official development assistance flows are in the range of \$130 billion per year. Their analysis recognised that electronic payments already exist, and that developmental aid can supplement these arrangements. They considered that the spread of low-cost digital payments will make it possible, for the first time in history, to send money directly to the extreme poor in the most remote corners of the world securely, efficiently, and in a scalable way. On this basis, the funding needed to end extreme poverty would be within reach, even under conservative assumptions, to give to each person currently living on less than \$1.25 per day today the funds needed to raise their income up to \$1.25 per day. Their three key observations were that 1) Poor people use money responsibly. Studies consistently find positive impacts on goods, such as assets, income, health, and education, and no evidence of systematic abuse or increased conflict. In particular, the transfers appeared to reduce the use of tobacco, alcohol, and conflict, 2) The uses and impacts of direct transfers varied widely. Some studies find impacts on education, earnings, or health. There was no uniform outcome, reflecting the fact that cash transfers give maximum flexibility to recipients to set their own priorities, and 3) Cash transfers have long-term impacts. While cash transfers were already widely accepted as a tool for social protection, for example to alleviate present suffering and hunger, they were also one of the few interventions that have been shown to have positive impacts years after delivery.

Laurence Chandy and Geoffrey Gertz of the Brookings Institution considered foreign aid by supplementing incomes.¹⁰ Their analysis was that providing every person in the world with a minimum income of \$1.25/day, in other words guaranteeing the right not to live in absolute poverty, was rapidly becoming feasible. In 2005, supplementing the income of each poor person in the world to bring their daily income up to \$1.25 would have cost \$96 billion, or 80 percent of the total volume of foreign aid disbursed that year. In 2010, with poverty less widespread and larger global aid volumes, they commented that the cost of such a global safety net would be just \$66 billion, or slightly more than half of all official aid. Their key observation included the development of direct cash transfers:

While the logistics of distributing cash to poor populations would not be without challenges, recent advances in biometric identification technologies—such as fingerprint and iris scanning—have greatly expanded the promise of implementing large-scale welfare programs in poor countries. Given the success of many cash transfer

⁹ Michael Faye and Paul Niehaus, 'Ending Poverty with Electronic Payments', GiveDirectly and Segovia Technology, 2015 *Brookings Blum Roundtable* <https://www.brookings.edu/wp-content/uploads/2016/07/FayeNiehausEndingPovertywithElectronicPayments.pdf>>.

¹⁰ Laurence Chandy and Geoffrey Gertz, 'Poverty in Numbers: The Changing State of Global Poverty from 2005 to 2015', *Global Views*, Policy Brief 2011-01, Brookings Institution, 13.

programs, significantly scaling up their use to provide a minimum income for all individuals living in poverty might be a fruitful new direction for donors to pursue.

This analysis has provided strong support for the principle that the families and individuals spend wisely for their own best benefit, and that direct payments provide the most direct benefit for those most in need of assistance. In considering this approach to increase incomes, however, it is important to consider this as a supplement to existing aid measures, and not as a replacement. Governments have a key role in developing countries in providing essential services such as hospitals, schools, irrigation, and transport infrastructure, and foreign aid role will always be relevant to assist in the development of this infrastructure.

A key observation is that the provision of direct payments is only one potential use of the new funding provided by the MDI. These arrangements should also not be seen as a universal panacea to address global poverty. It should be open to the countries concerned to negotiate how to use the additional foreign aid funding, and this issue requires engagement from experts in the provision of foreign aid to address poverty. The MDI should be understood as a source of new funding, and should not in any way reduce or replace existing foreign aid measures. It is also essential that the effectiveness of direct payments should also be monitored over time, to better understand the effects of factors such as eligibility conditions, and deeper economic analysis of the true costs and benefits of these arrangements.

4. Sharing Developed Country Corporate Revenue – Developed Country Taxation Systems And The Participation Exemption

The second component of income provided to funding under the MDI would be a portion of income derived by multinational corporations from their operations in developing countries which are not taxed in the developed country. A moderate rate of contribution of such income, for example set at 5%, has the potential to contribute substantially to the total funds for direct transfers, particularly in combination with government aid, private donations, and domestic transfers in developing countries.

There is an increasing trend in OECD member countries to provide a tax exemption for dividends derived by the multinational parent company under participation exemption provisions. Countries providing this exemption currently include Australia, the United Kingdom, the Netherlands, Germany, Japan, and the United States. There can be limitations on these exemptions, which can make the dividends or branch profits remittances taxable for the parent company, for example where these dividends are derived from tax havens or other low tax jurisdictions. Several OECD countries also provide tax exemptions for profits derived from foreign branches:

- In Australia the exemption for dividends is provided for foreign non-portfolio dividends based on a minimum 10% ownership in the foreign company.¹¹ There is also an

¹¹ *Income Tax Assessment Act 1997* (Cth) sub-div 768-A.

- exemption for income derived by the head office company from its foreign branches, with limitations based on the type of branch income.¹²
- The United Kingdom provides the foreign dividend participation exemption applying to 10% or greater shareholdings in subsidiaries.¹³ The United Kingdom also has an elective regime for exemption for foreign branch income. The company makes an election to exempt all branch profits and losses from United Kingdom taxation.¹⁴
 - The Netherlands participation exemption provide that there is no tax on dividends where the seller has held a participation of at least 5% in the subsidiary company, and the participation is not held as a portfolio investment.¹⁵ The Netherlands also provides the object exemption restriction from 2012, where the losses of permanent establishments will no longer be deductible, and profits will be fully exempt.¹⁶
 - The United States introduced an exemption system for certain foreign dividends from 2018. This exemption applies to dividends received by United States corporations from foreign corporations in which the United States corporation owns at least a 10% holding.¹⁷

The contribution would only apply to the largest multinational corporations, using the OECD threshold used for the country-by-country reporting measures. These measures require large multinational enterprises are required to prepare a report with aggregate data on the global allocation of income, profit, taxes paid and economic activity among tax jurisdictions in which it operates ('CbC Report'). The CbC Report is shared with tax administrations for use in high level transfer pricing and BEPS tax risk assessments. The threshold for these large multinational groups is currently where they have consolidated group revenue of at least EUR 750 million.¹⁸

5. OECD Multilateral Treaties – The BEPS Multilateral Instrument (MLI)

The proposed MDI as a framework for agreement between pairs of countries is based on the key development of the MLI which is used in international taxation. The MLI was part of the OECD Base Erosion and Profit Shifting ('BEPS') measures to address international tax planning, and achieved these measures by modifying large proportion of existing bilateral tax treaties to address tax planning. The representatives of 68 countries signed the MLI in June 2017. These measures included minimum standards applying to all participating countries, together with optional provisions which could be adopted by bilateral agreements within the MLI treaty framework.¹⁹

¹² Income Tax Assessment Act 1936 (Cth) s 23AH.

¹³ *Corporation Tax Act 2009* (UK) s 931D, *Finance Act 2009* (UK) s 34.

¹⁴ *Corporation Tax Act 2009* (UK) s 18A.

¹⁵ *Corporate Income Tax Act 1969* (Netherlands) art 13.

¹⁶ *Tax Package 2012 of 15 September 2011* (Netherlands).

¹⁷ *The Tax Cuts and Jobs Act*, Pub L No. 115-97, 131 Stat. 2054.

¹⁸ *CbC Report* (n 1).

¹⁹ *Multilateral Instrument* (n 2).

The OECD commented that the MLI was designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy, and the need to adapt quickly to this evolution. This was an innovative approach with no exact precedent in the tax world, however there were precedents for modifying bilateral treaties with a multilateral instrument exist in various other areas of public international law.²⁰

The MLI had four main sections, comprising hybrid mismatch arrangements, tax treaty abuse, avoidance of permanent establishment status, and improving dispute resolution. There are also administrative provisions concerning issues such as entry into force and amendments. It was up to each jurisdiction to inform the OECD which particular treaties are to be covered by the MLI, known as Covered Tax Agreements, and it was only where both jurisdictions party to the treaty give notice that the bilateral treaty will be affected.²¹

The flexibility of this multilateral framework is of great interest. Many of the provisions of the Multilateral Instrument provided options, or allowed a country to reserve the right not to apply particular measures, on a treaty-by-treaty basis. The individual countries analysed their existing treaty network, and then determined through negotiation which treaties were to be covered, and which particular aspects of the MLI were to apply on an individual treaty basis. The provisions were highly technical, and related to addressing specific international tax avoidance issues. In general terms, the key measures were as follows:

- *Hybrid mismatches* – These measures addressed tax schemes using transparent entities which were not taxed in one of the treaty countries, and dual resident entities which were treated as tax resident in both treaty countries.
- *Treaty abuse* – These measures included minimum standards that treaties were to eliminate double taxation without creating opportunities for non-taxation or tax avoidance, including treaty shopping schemes which used tax treaty countries as conduits for payments to low taxing countries.
- *Permanent Establishment status* – These measures were concerned with schemes to prevent taxable permanent establishments under tax treaties, including commissionaire arrangements where a person acts on behalf of one or more enterprises to which it is closely related, and schemes to split or fragment contracts in construction projects.
- *Dispute resolution* – These measures included minimum standards for dispute resolution in relation to tax treaty disputes. They included mutual agreement procedures, and the option to adopt mandatory binding arbitration.

Several of these measures had agreed minimum standards, such as the provisions dealing with countering treaty abuse. Opting out of these provisions was only possible in limited

²⁰ OECD/G20 Base Erosion and Profit Shifting Project, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15: 2015 Final Report (Web Page, Undated) <<https://www.oecd.org/ctp/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties-action-15-2015-final-report-9789264241688-en.htm>>.

²¹ Simons + Simons, ‘The Multilateral Convention to implement BEPS Tax Treaty Measures’ (Web Page, 1 December 2016) <<https://www.simmons-simmons.com/en/publications/ck0a8ukdsn3er0b85trv8dvcq/01-the-multilateral-convention-to-implement-beps-tax-treaty-measures>>.

circumstances, such as where a bilateral tax treaty already met the related minimum standard. The implementation measures are particularly significant where the MLI may serve as a model for other multinational treaty frameworks. The OECD is the depositary for the MLI, and supports governments in the process of its signature, ratification and implementation. This may be an effective ongoing role for the OECD in support of the proposed MDI.

There is a limited element of income redistribution in current OECD international taxation developments. The OECD is currently engaged in substantial developments of the international taxation system, known as Pillar One and Pillar Two.²²

- Pillar One would provide a taxing right to the marketing customer jurisdiction where the entity has a global turnover of more than Euro 20 billion and pre-tax profit margin/profitability over 10%. This essentially allows a country with customers, for example receiving digital services, to tax the related profits even where the management and transactions occur outside the country. This includes an Amount A for the residual profits allocated to the market jurisdiction where there was a relevant nexus to that jurisdiction.
- Pillar Two would provide a minimum global tax rate approach, also known as Global Anti-Base Erosion ('GloBE'). This would apply 1) an Income Inclusion Rule using domestic rules that impose top-up tax on a parent entity in respect of low taxed income of constituent entity, and 2) an Undertaxed Payment Rule to deny tax deductions to the extent the low tax income was not subject to tax. The minimum tax rate would be 15%.²³

The OECD has advised the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has agreed to this two-pillar approach, and that 136 member jurisdictions have agreed as of 8 October 2021.²⁴ This political agreement was endorsed by G20 Finance Ministers and Central Bank Governors on 13 October 2021.²⁵

The Pillar One and Pillar Two measures can allocate taxing rights to developing countries, however the amount may potentially not provide significant assistance. The Tax Justice Network, for example, commented that in relation to the Pillar Two proposals, the G7 countries

²² OECD/G20 Base Erosion and Profit Shifting Project, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy', 1 July 2021.

²³ Justin Cherrington, Jerome Tse and Amanda Kazacos, 'OECD Pillar One and Pillar Two Statement: The Cost of Reform', King and Wood Mallesons (Web Page, 17 August 2021) <<https://www.kwm.com/en/au/knowledge/insights/oecd-pillar-one-and-pillar-two-statement-the-cost-of-reform-20210817>>.

²⁴ OECD/G20, Base Erosion and Profit Shifting Project, *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Report, October 2021) <https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf?utm_source=Adestra&utm_medium=email&utm_content=Read%20more&utm_campaign=Tax%20News%20Alert%2014-10-2021&utm_term=ctp>.

²⁵ Italian G20 Presidency, Fourth G20 Finance Ministers and Central Bank Governors meeting, Communiqué, 13 October 2021 <<https://www.g20.org/wp-content/uploads/2021/10/G20-FMCBG-Communique%CC%81-Fourth-G20-FMCBG-meeting-13-October-2021.pdf>>.

alone, with just 10% of the world's population, would derive more than 60% of these revenues.²⁶

The principal advantage of the MDI approach is as a proposal to target direct assistance to families and individuals in need by providing the framework for pairs of countries to enter into arrangements under a new international framework. This approach should be much more effective than the related use of individual negotiations between countries because the MDI would provide the framework from which the respective pairs of countries can choose the terms they wish to apply.

6. The Multilateral Development Instrument Proposal

The MDI proposal is based on providing substantially greater convergence of the international tax and international aid systems, by combining government aid, a portion of taxation revenue, and private donations, to fund existing and future foreign aid programs in developing countries, together with funding for direct cash transfers. The MDI would provide the treaty framework of common template terms and conditions, and where pairs of developed countries and developing countries agree to adopt framework terms adapted to their own circumstances and objectives. The MDI would not be the only potential arrangement to provide direct payments to those in need, however building an international payments platform based on a multilateral treaty network should be analysed among the range of potential solutions.

The principal requirements may include that the developed country agrees to provide the related funding, and in respect of direct payments, where the developing country agrees to provide distribution of these amounts directly to family and individual recipient accounts. The framework would include collecting contributions from significant global entities in the developed country, applying these funds to direct distribution accounts in the less developed country, and third-party auditing in both countries to ensure that these arrangements are effective. The key potential benefits of this approach would include:

- *Flexibility* – It would be for the respective country pairs to agree on the direct payment system within the MDI framework.
- *Simplicity* – The MDI would essentially provide a payment framework, with pairs of countries agreeing to their contributions, direct payment systems, and audit processes.
- *Integrity* – A key provision would be agreement by respective country pairs on independent audit of contributions from developed country multinationals, and independent audit of the developing country payment systems.

(a) Legal Nature

²⁶ Tax Justice Network, 'Global minimum corporate tax: questions grow over OECD commitment to 'inclusive' reforms' (Web Page, 5 July 2012) <<https://taxjustice.net/2021/07/05/global-minimum-corporate-tax-questions-grow-over-oecd-commitment-to-inclusive-reforms/>>.

The MDI would constitute a binding agreement to enumerate commitments to which the parties have consented in order to create rights and obligations in international law. The MDI would be governed by international law as part of the definition of a treaty contained in Article 2(1)(a) of the *Vienna Convention on the Law of Treaties* ('VCLT').²⁷ The application of the MDI by contracting states would involve national law, such as the developed country taxation system with the collection of a portion of participation exemption income, apportioned to the developing country source, and the developing country law applying the direct payment distributions.

(b) Categorisation – Open Framework Treaty

Malgosia Fitzmaurice analysed international treaties, and commented on the creative manner of international treaty-making through the use framework and umbrella conventions which provide the general rights and obligations of the parties.²⁸ Nele Matz-Lück described a framework agreements as a legally binding treaty of international law that establishes broad commitments for its parties together with a general system of governance, while leaving the more detailed rules and the setting of specific targets either to subsequent agreements between the parties, usually referred to as protocols, or to national legislation.²⁹ One example of this approach is where the framework serves as legally binding guidance for national regulation, which is then adapted to the specific needs of the parties. The framework in these examples serves as an umbrella setting the general objectives and main principles, while allowing each party sufficient room to take national particularities into account.³⁰ A key observation is that framework conventions are used to establish larger regimes of legal regulation and institutional structures for more effective governance of an international issue.³¹

A key characteristic is that the MDI would be an open treaty, allowing state participation by signature and ratification at any date once the treaty is on force. The MDI would be unconditionally open to all states, and this would not require invitation by the existing contracting parties. States may therefore be initial signatories to the MDI, and may include agreement with initial paired countries at that time, and states may accede to the MDI at a later date. Contracting states would agree for the MDI to apply between paired developed and developing countries at any time within this framework, in step with the development of revenue collection and direct payment systems in the respective states.

(c) Formulation

²⁷ *Vienna Convention on the Law of Treaties*, signed 23 May 1969, 1155 UNTS 331, art. 2(1)(a) (entered into force 27 January 1980) ('VCLT').

²⁸ Malgosia Fitzmaurice, *Treaties*, *Max Planck Encyclopedias of International Law*, Oxford Public International Law (Web Page, February 2021) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1481>>.

²⁹ Nele Matz-Lück, 'Framework Agreements', *Max Planck Encyclopedias of International Law*, Oxford Public International Law (Web Page, February 2011) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e703#law-9780199231690-e703-div1-2>>.

³⁰ Nele Matz-Lück, 'Framework Conventions as a Regulatory Tool' (2009) 1(3) *Goettingen Journal of International Law* 439, 449.

³¹ *Ibid*, 450.

The procedures set out in the VCLT would apply to the MDI.³² This comprises the process of negotiation and adoption of the text of a treaty, which may take any form agreed by the parties. In the case of the text of a multilateral treaty adopted at a formal conference, this would generally be by way of the inclusion of the text in the final act of the conference. This would be followed by the formal procedure where states express their consent to be bound by that text, comprising the signature and then ratification of the treaty. There would generally be a variation to this process arising from the framework format. States can adopt the MDI, and then enter into bilateral arrangements with other country at a later date, once negotiations are concluded between the developed and developing state within the MDI as the framework agreement.

7. Objectives and Outline of Key Terms

The key terms of the MDI need to recognise the objectives applying in the respective pairs of developed and developing countries.

(a) Developed Country Objectives

Developed country objectives would be based on the provision of an effective foreign aid program within an international framework which does not require extensive negotiations with individual developing countries. This would be based on combining the contributions from key funding sources:

Government Aid – The MDI would provide additional funding for foreign aid programs, together with funding to alleviating poverty through direct cash transfers. This use of the MDI funding would provide a pathway for foreign aid programs to provide direct assistance to families and individuals.

Large Multinational Corporations – The proposal is based on the application of tax at a proposed rate of 5% of otherwise untaxed revenue in the developed country to the MDI payments system. A key element is that this applies only to the largest multinational corporations based in developed countries, under existing OECD tax rules, to ensure more simple and direct administration.

Private Aid Donors – The proposal provides an effective pathway for private aid donors in the developed country who benefit from the agreed bank transfer and audit procedures in the donor and benefit countries, and so derive assurance as to the effectiveness of these measures to target poverty using direct cash transfers.

(b) Developing Country Objectives

Developing country objectives would be based on obtaining increased foreign aid funding for current and future foreign aid programs, together with funding for direct payment systems

³² Fitzmaurice (n 24) para 23.

without extensive negotiations with individual developed country donors due to the use of the new multilateral framework:

International funding for the population in need of assistance – The framework is a way to encourage governments, large corporations, and private donors, to provide direct payment assistance without substantial new negotiations being required with each donating country. This approach would use an agreed international framework supported by international organisations such as the OECD.

Accepted direct payment systems – In an increasing number of both developed and developing countries, payments are being made directly to family and individual bank accounts. This may be based on existing direct payment systems, or the development of new payment systems. A key element of the agreement is that the system is acceptable if it is sufficiently targeted at alleviating poverty, without the developed country then seeking to micromanage the specific terms of these arrangements.

Encouragement of direct payment systems – The availability of aid funding under an agreed multilateral framework would provide substantial benefits to developing countries, which do not yet have these systems, to adopt these measures. This aspect may have the most impact on reducing poverty in the long term.

(c) Key Enabling Terms

On this basis, there would only be only a small number of key enabling terms for this model framework, as follows:

- *Nominated collection from Largest Multinational Corporations* – This would include contributions at an agreed rate, which is suggested as 5% of participation exemption dividends derived from the developing country, from the largest multinational corporations with their principal head offices in the developed country. This would also include the audit procedures to fairly allocate this income to the developing countries which were the ultimate source of this income.
- *Nominated Direct Payment Systems* – This would be agreement on the direct payment system used by the developing country, together with the opportunity to add new systems as they develop. It is not intended that these systems would be excluded from the MDI, rather an inclusive approach would be used to accept direct payment systems which substantially provided payments to families and individuals in need.
- *Fund Transfer Payment Process* – This would be based on agreement on the correspondent bank with offices, or correspondents banking arrangements, in both countries to provide the effective transfer the funds, and subject these transfers to agreed audit procedures to ensure the strongest integrity standards.
- *Communications* – It would be necessary to nominate the parties which are responsible for MDI related communications between the respective states. One approach, to greatly simplify the administration of the MDI, would be to conduct communications between the current Competent Authorities, which are government representatives currently nominated under the existing OECD based international tax treaty system.

- *Bilateral Amendments* – The MDI would require amendment in several circumstances, for example with changes in contribution rates from governments based on their respective taxation systems, the addition of new direct payment systems in the developing country to the agreed payment system, and changes in audit procedures. This would be facilitated by the exchange of agreement on amendments between the developed and developing country, and the lodgement of the amendments with the OECD as the registry for the MDI treaty parties.

8. MDI Design Perspectives – Vienna Convention on the Law of Treaties

The analysis of key provisions of the VCLT can provide key design insights for the development of new multilateral framework agreements such as the MDI proposal.

(a) Good Faith

Malcolm N Shaw considered the VCLT requirement for good faith,³³ observing that Article 31(1) declares that a treaty shall be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’³⁴ Mark E Villiger considered that the provision provides the crucial link between the interpretation of a treaty and its performance, and that good faith requires the parties to a treaty to act honestly, fairly and reasonably, and to refrain from taking unfair advantage.³⁵

(i) Developed Country – Effective Collection of Tax

The MDI envisages three streams of income comprising government aid, government taxation revenue from otherwise exempt foreign income of the largest multinational corporations, and private donations. Of these funding sources, identification of the taxation revenue amount is subject to several complexities of the developed country taxation system. A key design objective is that a simple definition of this income should be used which should not require further interpretation, together with a more general savings clause if the primary taxation exemption measures are amended. One suggested approach to this issue is to define the participation exemption income in a very specific way by reference to the related taxation law. In Australia, for example, the exemption for such foreign dividends is provided under Sub-division 768-A of the *Income Tax Assessment Act 1997*.³⁶

(ii) Developing Country – Broad Distribution of Direct Payments

The basis of a particular direct payment system in a developing country may change, for example by broadening or tightening the eligibility criteria based on the amount of family or individual income. A court or arbitration panel may, potentially, need to consider whether the

³³ Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 933.

³⁴ VCLT (n 17) art 31(1).

³⁵ Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009) 425.

³⁶ *Income Tax Assessment Act 1997* (Cth) sub-div 768-A.

MDI should continue to apply funding to the payment system where the payment criteria have significantly changed. The MDI could address this issue by specifying the developing country payment systems, and then also including payment systems with similar objectives.

(b) Application of Treaties – Intermediate Group Companies in Third States

One aspect of the MDI is that determination of the tax portion of the developed country contributions is based on establishing the amount of participation exemption income derived from the respective developing country. In practice, international income flows within large multinational groups can pass through several intermediate countries, which would not be parties to the agreement between the pairs of developed and developing states. This raises the issue of the extent to which such intermediate countries would be required to cooperate in providing information to assist in determining income allocations to the developing country.

One key concept is that international agreements generally bind only the parties to them.³⁷ *VCLT* Article 34 provides that a treaty does not create either obligations or rights for a third state without its consent.³⁸ One major exception to this rule applies under *VCLT* Article 38, where a provisions of the treaty in question has entered into customary international law.³⁹ An obligation may, however, also arise for a third state from a term of a treaty if the parties to the treaty so intend, and if the third state expressly accepts that obligation in writing, under *VCLT* Article 35.⁴⁰ Villiger commented that the parties to the treaty must intend the provision to be the means of establishing the obligation, and the third state must expressly accept that obligation in writing. He observed this Article was the cause for political controversy when the *VCLT* was originally drafted by the International Law Commission ('ILC'), and the Article was viewed as an important protection for developing countries.⁴¹

The application of these principles to MDI design is that the agreement would impose no obligations on third states which are not parties without their written consent. The MDI should apply a specific obligation all parties to the MDI to provide information requested by other treaty parties, for example to assist in determining the source of a multinational group's income.

In respect of states which are not parties, the required information can generally be obtained from the OECD BEPS Country-by-Country ('CbC') reporting.⁴² This information exchange between countries was principally designed for the purposes of the OECD BEPS project to address international tax avoidance. The same information, however, would be very effective for the MDI, as it shows income from each jurisdiction where the multinational group operates. From an MDI design perspective, the agreement should extend the use of such CbC reporting information for MDI purposes to determine the income derived from the respective developing countries.

³⁷ Shaw (n 33) 928.

³⁸ *VCLT* (n 17) art 34.

³⁹ *VCLT* (n 17) art 38.

⁴⁰ *VCLT* (n 17) art 35.

⁴¹ Villiger (n 35) 478-479.

⁴² *CbC Report* (n 1).

(c) Treaty Amendment and Modification

A related aspect of MDI design is the ability to adapt to changes in circumstances between respective developed and developing countries. In general terms, the process of treaty amendment refers to changes to the treaty affecting all parties, whereas modification refers to variations of certain treaty terms only between particular parties. On this basis, Article 39 of the *VCLT* provides that the rules for amendment of treaties are the same as for the conclusion and coming into effect of the treaty, except in so far as the treaty may otherwise provide.⁴³ Article 40 provides for amendments which may apply to all parties to the amending agreement.⁴⁴ Article 41 provides for modification of treaties between certain of the parties only, and would be the relevant provision where two countries agree to alter the terms of their agreement within the MDI multilateral treaty framework.⁴⁵

The nature of the MDI makes treaty modification more likely than with many other treaties, for example as developed country tax systems change including the terms of the participation exemption for foreign sourced dividends, and developing country changes to direct payment eligibility and the introduction of new direct payment programs. Shaw commented that treaty modification may adopt the same formalities as attended the original formulation of the treaty, however treaties may also be amended by other measures providing the changes are unambiguous and clearly documented.⁴⁶ Villiger observed that these measures refer to the treaty's object and purpose as a whole, otherwise the object and purpose of the treaty could no longer be implemented in practice, and would remain, at least in part, meaningless.⁴⁷

The MDI should provide a simple and effective mechanism for pairs of developed and developing countries to document their agreement to a change in terms, and then lodge these agreements with the agreed treaty administrator such as the OECD. This would establish that such modifications are compatible with the effective execution and purpose of the treaty, and would also publish the revised agreement for the benefit of other treaty members. These changes would be relevant as other countries consider their own bilateral agreements within the MDI framework, for example where new direct payment measures are introduced in the developing country.

This issue highlights a principal characteristic of the MDI proposal from a multilateral treaty design perspective. The MDI would be a multilateral treaty with the object and purpose of providing a framework for contributions for foreign aid to address poverty on an international basis, whilst not inhibiting the sovereignty of the respective country pairs to alter their developed country contributions, or developing country direct payment systems.

(i) Developed Country – Changes to the Taxation System

⁴³ *VCLT* (n 17) art 39.

⁴⁴ *VCLT* (n 17) art 40.

⁴⁵ *VCLT* (n 17) art 41.

⁴⁶ Shaw (n 33) 930-931.

⁴⁷ Villiger (n 35) 535.

The MDI would provide for agreement of the developing country to contribute otherwise untaxed income with a source in the developing country to provide funding for direct payments in that country. An irrevocable commitment to direct 5% of otherwise tax-exempt participation income would, however, likely result in an unacceptable limitation on the sovereignty of the developed countries to collect and spend their taxation revenue. There is a need for MDI design to make the government taxation contribution one funding component which can be varied on a unilateral basis. The freedom to modify the government taxation contribution should be incorporated in the MDI design process, based on a notification under the terms of the MDI.

(ii) Developing Country – Adapting Direct Payment Systems to Address Poverty

A similar design issue for the MDI is that general changes in the developing country eligibility criteria for direct payments to alleviate poverty, except in unusual circumstances, should not result in a unilateral decision from the developed country to limit funding. It would therefore assist the process of MDI treaty design for the general criteria for a direct payment system to be set out in an explanatory statement to the MDI, which emphasised that significant relief of poverty is the broad objective of the direct payments system, and specified that differences in criteria or conditions between payment systems should not be used to disqualify them providing this broad policy objective is met.

The principal of peer review, already adopted by the OECD for the MLI measures to address international taxation planning, would be a key MDI design feature. The essential process is that peer countries, also involving the developed and developing country pairs, would regularly review compliance. This peer review would include the broad acceptance of the direct payment system providing the payments system broadly met the objective of addressing poverty, notwithstanding differences in eligibility criteria and other conditions. This approach would present an opportunity to develop a broad consensus on direct payment criteria, which was then supported by the peer review approach and discussion of the related results in a forum such as the OECD.

(d) Boundaries of Arbitration

A significant issue in treaty design is the provision of effective measures for the arbitration of disputes between the treaty parties. The design issue is that proposed MDI would contain provisions for the compulsory settlement of dispute by arbitration with binding effect, and alternatively, provide a procedure for compulsory conciliation.

Article 65(1) of the *VCLT* provides the procedure to be followed where a party invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation.⁴⁸ Article 65(4), however, provides that nothing in these measures shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes. Villiger

⁴⁸ *VCLT* (n 17) art 65(1).

observed that the parties to a treaty are free to consent to other forms of the settlement of disputes.⁴⁹

States may make a reservation against treaty terms requiring compulsory dispute resolution. The effect of such reservations established with regard to another party modifies, for the reserving state in its relations with the other party, the provisions of the treaty to which the reservation relates, to the extent of the reservation, under *VCLT* Article 21.⁵⁰ Villiger discussed the further work of the ILC on the issue of treaty reservations, with the significant issues including who should definitely decide on the incompatibility and hence inadmissibility of a reservation.⁵¹

The terms of arbitration in the MDI may potentially result in state reservations, as a number of countries may not accept compulsory arbitration of disputes within the new multilateral treaty framework. Shaw commented that a reservation to a particular method of dispute settlement laid down in a treaty would not, however, normally be seen as contrary to the object and purpose of a treaty.⁵² The current MLI, as a multilateral treaty relating to taxation matters, addresses this issue by including specific terms for the compulsory arbitration of taxation disputes, however then making these procedures open to selection between pairs of countries. This design approach recognises that while some countries may agree to adopt binding arbitration, in several cases countries may determine this to be an unacceptable limitation on their powers, and that such determination are accepted within this framework.

The MDI would follow a similar approach, where compulsory arbitration would only apply where the respective developed and developing countries have agreed to these measures. A compulsory conciliation procedure, without a binding outcome can, in many cases, achieve a satisfactory resolution of disputes where parties are required to discuss their differences.

Other multilateral treaties include measures for compulsory conciliation. One example is the compulsory conciliation procedure in Annex V of the *United Nations Convention on the Law of the Sea* ('*UNCLOS*') which may apply where state parties have made reservations against compulsory dispute mechanisms.⁵³ Donald R Rothwell and Tim Stephens commented that the functions of the related Commission are to 'hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement'.⁵⁴ Although these *UNCLOS* procedures do not lead to a binding result, their significance is that they require the parties to negotiate, explain their reasons, and the outcome of these negotiations is reported. In relation to the MDI, the outcome of this conciliation procedure would be included in the peer review process, and related consideration of the issues by the other state parties.

⁴⁹ Villiger (n 35) 811.

⁵⁰ *VCLT* (n 17) art 21.

⁵¹ Villiger (n 35) 325.

⁵² Shaw (n 33) 921.

⁵³ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*UNCLOS*') annex 2 s 2.

⁵⁴ Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2nd ed, 2016) 499.

The principal observation applying to MDI treaty design is the essential need for flexibility. State parties should be able to amend the taxation terms and direct payment systems, and have the ability to change or cancel acceptance of these measures, within the framework of their MDI agreement, whilst these developments are subject to the peer review process in an agreed forum such as the OECD.

9. Development of Treaty Law

The MDI proposal presents several perspectives and challenges in the development of multilateral treaty law. In several cases, these developments have been addressed in recent multilateral conventions, including the OECD MLI.

(a) Bilateral Agreements within Multilateral Frameworks

The process of multilateral agreements, such as the existing MLI and the proposed MDI, may be seen as part of the continued development of new treaty forms. Pairs of states come to agreement on specific terms within the multilateral treaty framework, which provides a flexible approach to adapt the treaty arrangements to specific terms between states. In the case of the MLI, this related to the precise terms agreed between pairs of states to modify their existing bilateral tax treaties.⁵⁵ There are a range of treaty outcomes which can arise under this flexible approach, with pairs of countries adopting or rejecting terms where this option is allowed, such as whether to adopt mandatory binding arbitration. The MLI also includes core provisions which are required by state parties, where these core measures have resulted from an extensive international consultation process hosted by the OECD.

A further example of OECD treaties providing greater flexibility, within a multilateral framework, is *Multilateral Competent Authority Agreement* ('MCAA').⁵⁶ This is a multilateral framework agreement that provides a standardised method for the automatic exchange of tax related information between countries. The OECD commented that the design of the MCAA, as a framework agreement, ensures that each signatory has ultimate control over exactly which exchange relationships it enters into, and that each signatory's standards on confidentiality and data protection would always apply.⁵⁷

In the case of the MDI, the required flexibility principally concerns the changes in developed country contributions, and developing country direct payment systems. This issue can be addressed by referring to specific developed country taxation measures, and developing country direct payment systems, in the adoption by pairs of countries within the framework,

⁵⁵ *Multilateral Instrument* (n 2) art 19.

⁵⁶ *Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information* <<https://www.oecd.org/ctp/exchange-of-tax-information/multilateral-competent-authority-agreement.pdf>> on 22 October 2021 ('MCAA').

⁵⁷ OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, 'What is the Multilateral Competent Authority Agreement' (Web Page, Undated) <<https://www.oecd.org/tax/transparency/documents/whatisthemultilateralcompetentauthorityagreement.htm>>.

and then including application to subsequent measures with broadly similar objectives and effects. It is essential to provide the flexibility to allow treaty modification.

(b) Treaty Compliance and Peer Review

A key feature of the MLI is peer review of the BEPS minimum standards, where other states review compliance of their respective state counterparties within the multilateral framework agreement. The peer review process was described by the OECD in relation to the Action 6 BEPS measures to address tax planning to obtain inappropriate tax treaty advantages known as ‘treaty shopping’.⁵⁸ The OECD commented on the peer review process as follows:⁵⁹

The minimum standard on treaty-shopping included in the Report on Action 6 is one of the four BEPS minimum standards. Each of the four BEPS minimum standards is subject to peer review in order to ensure timely and accurate implementation and thus safeguard the level playing field. All members of the Inclusive Framework on BEPS commit to implementing the Action 6 minimum standard and to participating in the peer review, on an equal footing.

The core process of peer review was principally based on analysis by each country of its treaties with other countries which had agreed to apply the Action 6 minimum standard, and reporting on whether the treaty had been revised to address these tax planning issues. The OECD described the process and responsibilities of the state parties:⁶⁰

The first step of that review will be carried out through the preparation of a list that each jurisdiction of the Inclusive Framework will be asked to complete before 30 June 2018 and that will show all the existing comprehensive tax treaties on income taxes of that jurisdiction that will be in force and in effect at that time... It will indicate the date of signature and last amendment of each treaty, and indicate whether or not that treaty complies with the terms of reference of the minimum standard... This will require that jurisdictions that will have ratified the multilateral instrument analyse the effect of that instrument on each of their treaties covered by the instrument.

This peer review process included the review and the publication of the results by the OECD Secretariat, and a report on the implementation of the minimum standard on treaty-shopping would be sent to all treaty delegates.

This may be considered a ‘soft power’ approach to treaty implementation, where the country pairs separately report on compliance, and the combined report is then circulated between the treaty parties. The OECD is not an enforcement authority for the multilateral treaty, rather

⁵⁸ OECD, OECD/G20 Base Erosion and Profit Shifting Project, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6: 2015 Final Report (Web Page, 5 October 2015) <<https://www.oecd.org/ctp/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report-9789264241695-en.htm>>.

⁵⁹ OECD, OECD/G20 Base Erosion and Profit Shifting Project ‘BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Peer Review Documents’ (2017) 9 <www.oecd.org/tax/beps/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf>.

⁶⁰ Ibid 12.

acting as the treaty administrator which coordinates reporting on compliance, which is both prepared by, and issued to, all treaty members.

This approach would present a key benefit to the MDI design. The developed and developing countries in this approach would report on compliance of their respective counterparties, and this report would be published among the treaty parties to highlight compliance. This reporting and analysis method should also highlight practical considerations for further analysis and treaty modification.

(c) Role of Intergovernmental Organisations

A principal observation on the MLI is the importance of the OECD's role in obtaining input from its members, providing forums for discussion and development of the proposed agreement, and potentially most importantly, in maintaining the new multilateral arrangements including peer reporting. The experience of the sponsoring international organisation and its relationship to its members may be the key to success in establishing these new multilateral agreements.

The OECD would be the administrator the MDI, rather than a signatory, and on this basis the *VCLT* should therefore apply to the MDI as a multilateral treaty between states.⁶¹ This is the same basis as existing OECD multilateral treaties such as the MLI. This is a significant design element as the OECD would support the MDI, including hosting discussions, preliminary meetings, registration of modifications between respective country pairs, and support the peer review process, however it is the responsibility of the treaty members to comply with the terms of this agreement.

10. Implications for Developed Countries

There are several significant implications of the MDI treaty proposal for developed countries. This would include assisting in multilateral treaty formation following on from work on the OECD MLI, helping to develop investor focus on public benefits provided by locally based multinational corporations, and adopting step-based measures to promote broader international development objectives.

(a) Role in Formulation

Developed countries have the opportunity to promote the MDI as a multilateral framework for increased funding for foreign aid together with funding for direct payments. Australia had a significant role in the development of the MLI at OECD forums, together with Australia's role in the peer review process for the OECD BEPS agreements, and can offer extensive Treasury and Taxation office experience in multilateral arrangements.

There are opportunities to assist with development projects as key building blocks in a step approach towards a future multilateral MDI framework. This would potentially include

⁶¹ Shaw (n 33) 953.

providing telecommunications and financial technology infrastructure to provide financial services to individuals and families, such as phone banking and direct payment systems.

This development assistance should be closely aligned with specific project-based approach, and would enable concrete and direct benefits. These developments would provide the essential infrastructure to be incorporated in measures such as the proposed MDI and other future development measures.

(b) Multinational Groups

The MDI proposal includes the contribution of the otherwise tax-exempt participation exemption income of developed country based multinational groups at the suggested rate of 5%. When applied by the largest multinational groups meeting the minimum threshold requirement, this approach would provide these multinationals to demonstrate their direct support for the communities in the developing countries in which they operate. This approach would also be consistent with the increasing emphasis, at the investor level, on multinational groups adopting more ethical conduct, and providing more public benefits rather than focussing solely on profit-based performance.

This development includes the increasing number of investment funds offered to the public which have adopted a socially responsible investment strategy ('SRI'), generally based on investing in strategic shareholdings in ethical corporations. There is an opportunity to promote multinational groups that provide direct payment supports to families and individuals in developing countries. One example is Australian Ethical which has made ethics the key platform point for its investments from 1986, and whose Ethical Charter includes the alleviation of poverty in all its forms.⁶² This investment group had funds under management of AUD 6.07 billion on 30 June 2021.⁶³

Paul U Ali and Martin Gold considered the legal implications of Australian of SRI fund management platforms.⁶⁴ They commented that a trustee or other fiduciary that is empowered to invest the funds entrusted to it should exercise that investment power in a prudent manner. This duty of prudence, known as the prudent investor rule, arises at general law, and supplements the statutory duties of care, skill and diligence imposed by the *Corporations Act*⁶⁵ on the single responsible entities of managed investment schemes, and by the *Superannuation Industry (Supervision) Act*⁶⁶ on the trustees of superannuation funds. On this basis, these investment funds should assess prospective investments in the context of their impact on their whole investment portfolio.

⁶² Australian Ethical, 'The Ethical Charter' (Web Page, Undated) <<https://www.australianethical.com.au/why-ae/ethical-charter/>>.

⁶³ Australian Ethical, 'AEF FY20-21 Results Briefing' (Web Page, Undated) <<https://www.australianethical.com.au/shareholder/>>.

⁶⁴ Paul U Ali and Martin Gold, *An Appraisal of Socially Responsible Investments and Implications for Trustees and Other Investment Fiduciaries*, Mutual Funds Analytical Services Pty Ltd and Centre for Corporate Law and Securities Regulation, University of Melbourne, June 2002) 15 <https://law.unimelb.edu.au/_data/assets/pdf_file/0008/1723535/15-SRIfinalreport2.pdf>.

⁶⁵ *Corporations Act 2001* (Cth) s 601FC(1)(b).

⁶⁶ *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(b).

Ali and Gold commented that there are significant variations between the screening techniques commonly used by the providers of SRI screens and by the managers of SRI funds. The investment portfolios of these funds are commonly made using targeted security screens to filter potential investments in or out of a portfolio based on non-financial criteria. Positive screens are used to identify desirable investments for inclusion in a portfolio, while negative screens are used to reject investments based on undesirable characteristics. They observed that negative screens are more prevalent.⁶⁷ The majority of Australian SRI funds employ negative screens, where the majority of these funds exclude the securities of companies in the armaments, uranium mining/nuclear power, gaming, tobacco and alcohol sectors.⁶⁸

The contributions which would be made by a multinational group to individuals and families under the MDI proposal would potentially become a key factor in this analysis, where SRI fund managers assess the multinational group for inclusion in their investment portfolios. There would also be a significant potential to develop an accepted SRI industry approach which recognises the contributions made by a multinational group under the MDI, to enhance their ethical standing, and attract additional international investment funds.

(c) Promoting International Development Objectives

The MDI proposal can make significant contributions to international development objectives. For example, the Australian Government has a key focus on addressing global poverty in its international objectives. This is described in the 2017 Foreign Policy White Paper:⁶⁹

Global levels of poverty have been steadily declining since the early 1980s, driven by rapid economic development in Asia. However, in 2013 (the most recent year for which comprehensive poverty data from the World Bank is available) more than 10 per cent of the world's population, or over 750 million people, still lived in extreme poverty (defined by the World Bank as living on less than US\$1.90 a day). The challenge remains acute in the Pacific.

The United Nations estimates that globally 18,000 children die every day from poverty-related causes. Climate change, conflict, natural disasters and increasing pressure on resources threaten to slow the progress of poverty reduction over the next decade.

As a prosperous country, Australia has a responsibility to contribute to global efforts to reduce poverty, alleviate suffering and promote sustainable development.

To respond to the challenge of global poverty, Australia has joined all other United Nations member states in committing to the 2030 Agenda for Sustainable Development and the 17 Sustainable Development Goals (SDGs). These include goals to reduce poverty and hunger, improve health and education, advance gender equality and strengthen economic growth.

⁶⁷ Ali and Gold (n 47) 8.

⁶⁸ Ibid 22.

⁶⁹ Australian Government, Department of Foreign Affairs and Trade, '2017 Foreign Policy White Paper' 87 (Web Page, Undated) <<https://www.dfat.gov.au/publications/minisite/2017-foreign-policy-white-paper>>.

A key element of the Australian government approach is working with domestic and international partners.⁷⁰

The 2030 Agenda is not just for and about government — it also engages the private sector, civil society, academia, and international organisations.

This approach recognises that unilateral action alone may have limited impact on addressing poverty, whereas the most effective results may come from engaging with others in developing coordinated measures. The MDI would be an application of this approach, where an international treaty framework which was developed with other countries, and coordinated by international organisations such as the OECD, would make a very significant contribution to reducing global poverty.

Patrick Kilby considered the effectiveness of foreign aid projects to alleviate poverty and the foreign aid measures adopted by other countries. Kilby analysed United Kingdom Government support for direct payments to families and individuals by the Department for International Development (‘DFID’), now known as the Foreign, Commonwealth & Development Office (‘FCDO’). He commented on the effectiveness of these policies as follows:⁷¹

The policies tend to eschew sweeping statements about economic growth, but look at strategies that deal with inter alia social exclusion, urban poverty and the role of agriculture which is seen as the ‘heart of poverty reduction’ and key to the overall strategy...

As an example, in Bangladesh the British government has supported a ‘Cash for Education’ program that reaches 2.4 million children, which has increased primary school enrolment by up to one-third, and children stay at school for up to two more years. More education means increased future earnings for these young people, by up to one-quarter. In Ethiopia, five million people have been taken out of emergency relief and now receive predictable transfers through a national safety net. This move to direct payments for certain services is one way that DFID sees the poor being directly reached.

Kilby considered frameworks for future foreign aid including:⁷²

- a sharper country poverty assessment that is based on analysis of the depth and spread of poverty, and the nature of social exclusion, in particular contexts;
- an investment of resources in building the capabilities of the poor through more programs directly targeting the poor;
- a rural infrastructure support program that recognises the important role that governments play in developing and maintaining rural infrastructure, which is essential for creating economic growth in agriculture, and to provide jobs and higher wages for the very poor, who are usually found in rural areas; and

⁷⁰ Ibid 88.

⁷¹ Patrick Kilby ‘The Australian aid program: dealing with poverty?’ (2007) 61(1) *Australian Journal of International Affairs* 114, 121.

⁷² Ibid 124.

- an approach to aid delivery that focuses on downward accountability to the beneficiaries, in this case the poor, and having programs that are more inclusive and relevant.

The key to the MDI proposal is that the use of funding is flexible, initially providing increased funding for foreign aid projects, and in future also providing funding for direct payments as these systems develop.

Developed country governments have the opportunity to adopt the direct payments approach for specific projects coordinated with other countries such as the United Kingdom. Support of these direct payment systems in specific countries can offer a step approach to the development of a multilateral framework such as the proposed MDI.

There are also opportunities for a step approach in developing related communications and payments infrastructure, where foreign aid projects would also integrate with a future multilateral MDI approach. There is significant current potential for alignment of these projects with current aid objectives. One example is aid for regional telecommunications infrastructure. Philip Citowicki highlighted the Coral Sea Cable project to deliver greater internet access and coverage in Papua New Guinea and the Solomon Islands, and a similar project funded by New Zealand for the Cook Islands. Citowicki commented that the United States, Japan and Australia are working towards such an initiative for Palau.⁷³ On this basis there is also an opportunity for infrastructure aid measures of these types to be extended to promote regional mobile banking services as an essential part of direct payment systems. The future element to such development aid programs would be to include direct income support, particularly as more countries are adopting direct payment systems to alleviate poverty in their own domestic aid programs.

Broad international support of direct payment systems, such as the MDI, would assist in meeting these objectives, and the broader development of international aid policy, by providing support for payments made by developing country governments to those in need. The key is for developed countries to work together with developing countries to provide a standardised and effective direct payments framework.

11. Conclusions

The MDI proposal would provide funding for assistance to those most in need to supplement existing government aid measures. The proposal is based on combining government aid, taxation revenue from otherwise exempt multinational group income, and private donations to increase foreign aid funding, together with scope to provide funding for future extension of direct payment systems. Developing countries and international organisations such as OECD would have new opportunities to provide effective benefits.

⁷³ Philip Citowicki, 'Accelerating Trends: Australia's Aid Infrastructure Pivot', *Australian Outlook*, Australian Institute of International Affairs (Web Page, 8 October 2021) <<https://www.internationalaffairs.org.au/australianoutlook/accelerating-trends-and-australias-aid-infrastructure-pivot/>>.

The key observation is that the MDI proposal should not require a complex treaty. It is essentially an agreed framework for a payments system establishing the source, destination, correspondent banks and integrity provisions. This would facilitate multiple funding sources and encourage the further development of direct payment systems, based on agreement by the respective developed and developing countries concerned within the new framework.

This article is an introduction to the new MDI proposal. The broad scope of the proposal will require further consultation, in particular with those with a close understanding of poverty and developing countries. This includes engagement with developing country aid administrations which are currently using direct payments, analysis of the United Kingdom use of direct payments for foreign aid, and ensuring that the MDI does not reduce existing foreign aid programmes such as hospital, school, irrigation and transport infrastructure.

There are also opportunities for developed countries to adopt a step approach, by providing assistance with communications and banking infrastructure, and the development of direct payment systems, in a series of smaller scale projects as building blocks towards the new multilateral development approach to provide international assistance.