CHAPTER-4

AUTHORITIES REGULATING FOREIGN DIRECT INVESTMENT

4.1 Introduction

The growing economic activities in the era of globalization need a systematic institutional framework to regulate FDI and it stimulates relationship among states in all spheres. The mutual co-operation among the states shall be supervised by international organization which will provide effective institutional structures and encourage healthy competition at global level. According to Quincy Wright ‘International organization is an art of creating and administering general & regional societies composed of independent state to facilitate co-operation to accomplish human purpose and objectives’. ¹ In 20th century, international organizations like UNO, WTO, OECD, UNCTAD, World Bank, ILO, etc are playing a significant role for advancement of trade and investment relationship among the contracting state parties. The cross-border investment also needs a proper institutional structure to regulate and protect the interest of investors. At present, there are various international authorities as mentioned above are directly or indirectly governing FDI. These international authorities have been contributing for legislative framework to protect the interest of investors and host state’s economy. The authorities have responsibilities to strengthen the ties among the member states for economic co-operation in international regime. As we know FDI is regulated by many international rules and regulations which are incorporated in many treaties and conventions. These treaties and conventions are drafted under the auspices of world bodies which have taken the responsibility of developing the global economy by protecting the interest of both developed and developing states. This chapter has highlighted the key role played by the authorities in structuring legislative framework to protect FDI at international level. The world authorities must join their hands in framing FDI laws and there must be collective efforts from authorities and states to protect the interest of investors and host state economy. The authorities must exercise effective control on contracting parties in implementation of investment laws in international regime and the authorities must ensure the equal distribution of capital among the states which helps all the state to compete in global market and it will lead

¹Dr. Sant Prasad Gupta, International Organizations, (Ed, 2nd, Allahabad Law Agency, Haryana, 2009), at 10
to development of global economy. At present, the responsibility of framing MAI to protect FDI is on the shoulders of world authorities and same shall be fulfilled by them at any cost for development of global economy.

4.2 World Trade Organization (WTO)

WTO was established on 1st January 1994 during Uruguay Round trade negotiation. During the negotiation, US strongly argued for investment measures which would further liberalize the forum for FDI but majority of the GATT members rejected it saying that no such provisions will be incorporated which distorts GATT. However, finally TRIMs was adopted and it restricted the state parties from violating the GATT obligations.\(^2\) Along with TRIMs, GATS was also introduced by WTO to liberalise trade in service and to attract more FDI in service sectors and this was the first multilateral investment liberalization treaty.

4.2.1 WTO Working Group on Relationship between Trade & Investment

During WTO’s Singapore Declaration 1996, a ‘Working Group on Relationship between Trade & Investment’ was established and it initiated studies on the relationship between trade and investment. In 1998, the failure of MAI compelled WTO members to authorise WTO to play a significant role in framing international investment rules.\(^3\) During Doha Declaration in 2001, WTO members realised the necessity of multilateral framework to secure transparent, stable and predictable conditions for long-term FDI. The declaration guided the Working Group to focus on many investment issues such as minimum standard of treatment, expropriation of investments, fair compensation and to take decisions with respect to cross-border investments and said that all the issues will be considered during WTO Ministerial Conference 2003.\(^4\) The WTO Ministerial Conference 2003 took place at Doha where the developing states opposed certain matters such as investment issues, competition policy, transparency in government procurement and trade facilitation which led to the major breakdown of inclusion of subject of investment in Doha declaration and the same was supported by European Community and the US. Till today, no attempt was made to draft MAI by WTO members. All the rules and regulations which are

\(^2\)Andrew New & Lluis Paradell, Law & Practice of Investment Treaties- Standards of Treatment, (Wolters Kluwer Law & Business, New York, 2009), at 54
\(^3\)Supra Note 2, at 55
\(^4\)Doha Declaration 2001, para 20
governing FDI in the present scenario are BITs and RIAs among the states as per their convenience. Even though China did not sign BIT till 1982 but in later years it signed nearly 120 BITs in twenty years and stood in second place after Germany in signing BITs to allow FDI.\(^5\) In absence of multilateral framework, BITs are sheltering FDI for economic development of developing states.

When WTO came into existence, it concentrated only on trade development and gave significance to trade in service, but later it realised that the promotion of investments in trade is very much required as trade and investment are two faces of the same coin. The existing WTO instruments such as GATT, TRIMs, etc related to trade and investments are already discussed in chapter three. Many attempts were being made by the authorities to protect FDI but states always had different opinion. According to Doha Round of Ministerial Conference, the term ‘foreign investment’ includes only long term investments like FDI but not portfolio investments. Portfolio investment was excluded from the purview of FDI with an objective of protecting the interest of developing states because the portfolio investment can be taken back at any time by the investors and the same will damage the host state’s economy, example: economic crisis in Asian continent.\(^6\) Many developing states’ investment treaties specially the ASEAN bilateral investment treaties exclude portfolio investments from the scope of FDI but WTO instruments suggested for inclusion of portfolio investments within the definition of FDI. South-Asia states and other states including India, Australia, Indonesia, China and Thailand where investments were approved in writing and subjected to host state’s law to safeguard FDI effectively. Doha Round of WTO lay down that the developmental issues of FDI should be approached in a balanced manner to help the developing states to regulate FDI and achieve their economic goals effectively.

WTO being a trade development organization, promoted liberalization in trade regulations and laid down certain standards which shall be followed by the contracting states while allowing FDI.

\(^5\)UNCTAD World Investment Report 2007, at 58  
\(^6\)M.Sornarajan, *The International Law on Foreign Investments*, (Ed, 2\(^{nd}\), Cambridge University Press, Cambridge, UK, 2004), at 304
a) National Treatment

The host states must treat the foreigners as their own nationals and the facilities which are provided to their nationals shall be provided to foreign investors without any discrimination. The principle is well accepted by developed states but the developing states did not accept it as certain preferences shall be given to the domestic investors which could not be accorded to foreign investors. The principle further also states that the screening procedures in few host states which are detrimental to the development and same shall not be maintained. The WTO liberalization norms expects that all foreign investments shall be treated with uniformity but the developing states are not finding it in their favour, due to which conflict arose among them. The developing states will exclude foreign investment in certain sectors which are opened only for domestic enterprises with an intention to safeguard their domestic economy. India is also following the same policy and few sectors are not opened for FDI in the interest of local people and national security. The US & Canada are providing pre-entry national treatment to all MNCs as per their BITs, on the other hand the concept of National Treatment was well accepted by few developed state as specified above and the developing states were not ready for such regulations. Due to this, the principle of National Treatment was removed from OECD’s MAI. The developing states are subjecting FDI (MNCs) to the restrictions like use of local contents, hiring local management & local entrepreneurship, restrictions on export of products by MNCs which is a driving force behind FDI to protect their local enterprises from competitions. These restrictions raise the issue of preferential treatment which goes against the principle of national treatment. This proves that, the host states discriminate between local enterprises & MNCs and in these circumstances, the host state takes the defence of protecting the interest of domestic economy but at the cost of foreign investors. Because of all these practices, the principle of national treatment is not serving any purpose in protecting the interest of FDI at present and to overcome this situation, certain exceptions have to be provided.

Article XX of GATT can solve the above situation, but it is unlikely to happen because the uncertainties involved in interpretation of Article XX has been

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Supra Note 6, at 307
Supra Note 6, at 307
demonstrated in WTO jurisprudence as it is pointed out in Thai Tobacco case\(^9\) that few host states impose restrictions in the form of non-trade related issues such as protection of environment, national security, human rights, labour standards and at large the protection of domestic economy. It indicates that the states which cannot do directly are doing it indirectly under the clause of environmental protection which is well accepted and appreciated in international law.

**b) Most-Favoured Treatment (MFN)**

Most of the BITs which are concluded till date do not give recognition to MFN principle which says that all the states’ investment shall be treated equally without any discrimination. When BITs are signed by the states, it consists certain terms & conditions according to their favour and the relationship between them. According to this principle, the host state should not favour any particular state. If MFN principle is adopted, it may universalise all the BITs which are not accepted by states especially the developing states.\(^{10}\) The WTO also provides forum for resolving disputes related to FDI in various sectors provided the parties to BITs must be a party to WTO agreements.

**4.2.2 Role of WTO in framing Global Investment Treaty**

‘The investment is at the heart of the WTO’, a statement made by then Secretary of WTO in a report on Singapore Ministerial Meeting December 1996. This shows that WTO was keenly interested in cross-border investments for the development of global economy especially in the interest of developing and least developing states. After this, WTO established a Working Group on ‘The Line between Trade, Investment and Competition’ in 1997. During this period, WTO accepted the initiation of OECD to draft MAI. WTO in various aspects directly and indirectly had already dealt with FDI in some of its instruments like GATS and TRIMs. When OECD’s MAI completely failed, the world members thought that WTO in future would be the forum for developments in global investment field through establishment of multilateral framework on FDI under its guidance and in 1998 the European Parliament had recommended for MAI under the auspices of WTO.

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\(^9\)(1991)37 GATT BISD 2000  
\(^{10}\)Supra Note 6, at 308
within its system. But till today the task is not fulfilled inspite of WTO’s efforts in framing global investment treaty.

Along with few states, India also opposed negotiation on investments at WTO Singapore Ministerial Conference 1996 and Doha Round in 2001 on trade and investments. India opposed remarking that, WTO must concentrate only on trade because free movement of capital causes economic crisis which would affect the flexibility in policy framework of developing states. India supported BIT rather MAI to protect the interest of developing states. In 2003 during WTO conference, India strongly argued that ‘performance requirements shall continue to exist in investment measures as foreign investments shall ensure achievement of developmental goals and balance of payment.’

India imposed ‘performance requirement’ condition on Suzuki Motor Corporation of Japan in 1980 in Maruti-Suzuki joint venture saying that requirement of local content shall be increased to 75%. As a result of which, Suzuki started a vendor development programme where Indian auto component manufacturers helped to produce cars as per the design and specifications of Suzuki Company which helped domestic industries and Small Scale & Medium Scale Enterprises (SSMSEs) also to grow. The same system was adopted in case of General Motors where export obligations insisted the company to use local content to export its manufactured goods outside India. Indirect export obligation on Pepsi Foods Company encouraged developing contract farming which helped in transfer of technology and increased export of goods.

4.2.3 Dispute Settlement Mechanism

To settle the dispute among members, WTO framed Dispute Settlement Understanding (DSU) consisting of 27 Articles and four appendices. The DSU was framed and accepted in Uruguay Round negotiation during 1994. As per the

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13India strongly opposed negotiation on investment in WTO, Cancun Ministerial Conference held on September 2003
15BIT among Pepsi Food Ltd, Voltas(TATA) and Punjab Agro subsidiary of Pepsi
provisions of DSU, WTO established Dispute Settlement Body (DSB) having compulsory jurisdiction to resolve disputes.\textsuperscript{16}

a) Dispute Settlement Understanding (DUS)

Article XXII & XXIII of GATT provides for settlement of disputes under WTO agreement, WTO by exercising powers under these Articles framed DSU after WTO’s agreement came into force. Article XXII provides for settlement of dispute but has not laid down specific procedures for settlement of disputes in DSU.\textsuperscript{17} The provisions of DSU are discussed below.

b) Jurisdiction of DSB

Under Article I, DSB can exercises its jurisdiction pertaining to the dispute arising out of agreement of WTO, GATS, TRIMs and other 13 individual multilateral agreements on trade & service. DSU also exercises jurisdiction related to measures taken by regional and local government of WTO members affecting the agreements and is also applicable to the agreements listed in Appendix II of DSU.\textsuperscript{18} The procedures laid down in WTO agreements or DSU will be made applicable to settle the disputes with the consent of the parties.

c) Establishment of DSB

Under Article II of DSU, WTO has established DSB for administration of rules as mentioned in DSU. DSB will establish a Panel, adopts panel reports, adopts appellate body reports and imposes sanction on parties for non-compliance with DSB decisions. DSB consists of Chairman and the appellate body consists of 7 members appointed by DSB for a term of four years. The Panel consists of 3 or 5 members (WTO member), but these members will work in their individual capacity rather than as a representative of WTO members.

d) General Principles related to Dispute Settlement Procedures of DSU

i) Comply with Article XXII & XXIII of GATT and covered agreements

ii) To maintain balance between rights and obligation of members


\textsuperscript{17}Supra Note 16, at 52

\textsuperscript{18}Agreement related to sanitary, textile, clothing, technical barriers to trade, subsidiaries, financial services(GATS), Dispute settlement procedure (GATT)
iii) Achieve satisfactory in settlement of disputes

iv) Preference for mutual settlement of disputes between the parties

v) Dispute settlement mechanism is not contentious, parties shall act in good faith to resolve disputes

vi) To protect security and predictability of multilateral trading system, DSB adopts principle of security and predictability under Article III (2) of DSU

e) Consultation

DSU prefers consultation as a means of settlement of dispute. The parties to the dispute (States) must adopt effective consultation mechanism to resolve the disputes. Request for consultation shall be made to DSB and to the CTS, CTRIPS and related committees also. In consultation request, parties to the disputes must specify the relevant Articles of WTO agreement for consideration. The request must also contain reasons for dispute, identification of legal basis for the dispute and identification of measures at issue. After submission of dispute to the DSB, the panel will evaluate the issues or measures which are within the covered agreements and not otherwise.

WTO under Article V of the DSU provides service of good office, conciliation or mediation to the disputed parties. This service can be availed within 60 days from the date of request made for conciliation and before appointing a panel. From 1995 till August 2011, DSB has settled nearly 426 cases through request for consultation.

f) Panel of DSB

If conciliation process fails, the disputed parties can request for establishment of panel. The DSB shall call for 15 days advance meeting and after conveying the meeting, a panel consisting of 3 or 5 members will be created as agreed by the parties. The panel member must be from non-delegate members of WTO. If a developing state is a party to the disputes, it can make a request to appoint a panel member from other developing state. Once the panel is constituted, the dispute referred to it shall be discharged as per the rules of DSU. The panel will make an objective assessment of the facts and considers the evidence on the basis of which the

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19 Article III of Dispute Settlement Understanding  
20 Supra Note 16, pp 58 & 59  
21 Article VIII of DSU
order will be passed.\textsuperscript{22} The panel while executing its functions shall follow many stages such as, after the establishment of panel within a week it shall consult the parties and frame schedule for the proceedings, the parties shall submit their complaints & written rebuttals to the panel. While conducting the procedures, the panel must follow transparency, speedy disposal and legitimate approach in making deliberations. The report of the panel will be subjected to interim review to check its mistakes and if any mistakes are found, the same shall be rectified before passing the final decision. Once decision becomes final, panel submits its final report to DSB. Before adopting the panel report, DSB gives an opportunity to the parties to raise objections about the report and the same can be taken into consideration otherwise the report will be finally adopted by DSB within 60 days.\textsuperscript{23} The parties under Article XVI can refer the dispute to the Standing Appellate Body. The DSB must constitute appellate body consisting of 7 members who are experts in law, international trade and WTO agreements.\textsuperscript{24} The appellate body is restricted to consider only the issues of law involved in the panel report. Within 60-90 days, the appellate body proceedings shall be concluded and report shall be adopted by DSB and the same shall be accepted by the parties unconditionally. Till date DSB has decided 514 cases brought before WTO Dispute Settlement Body.\textsuperscript{25}

\textbf{4.2.4 WTO and Competition Policy}

The reduction of custom barriers in cross-border trade attracted the attention of WTO and other bodies to concentrate on competition law in international trade regime. In WTO’s Singapore Ministerial Declaration in 1996, it constituted a Working Group in co-operation with UNCTAD, IBRD and other international agencies to work on different perspective of competition policy in international trade. The WTO concentrated on competition policy to avoid distortions in competition process which affects international trade and competition policy with universal application which provide fair & equal opportunities related to trade. Article VIII & IX of GATT deals with competition policy and law related to trade. The objective of these Articles is to prevent monopoly which distorts trade.\textsuperscript{26} The anti-competition laws of the host state must prevent MNCs from distorting the local firms and it should

\textsuperscript{22}Supra Note 16, at 63
\textsuperscript{23}Article 15 of DSU
\textsuperscript{24}Article 17 of DSU
\textsuperscript{25}http://www.wto.org, visited on 1/12/16, @ 12.40p.m
\textsuperscript{26}Supra Note 16, pp 529, 530 & 531
discourage MNCs which upsets the sensitive sectors like retail market and agriculture in domestic economy. In India, the flow of FDI in retail market is slowly destroying the local retail sellers.

4.2.5 WTO and Less & Least Developed States

When we glance at the role of WTO in the interest of developing states, it is highlighted that the developing states can temporarily deviate from application of GATT rules for protection of new industries and to safeguard their foreign exchange. As a result of which, the least developed states have transitional period of 7 years and less developed states have 5 years which is an encouraging step by WTO to motivate the least developing state to be a part of WTO activities.27

4.3 Organization for Economic Co-operation and Development (OECD)

The roots of OECD goes back to the Post World War II, states realised their mistake which had led to the World Wars. The states thought that international co-operation must be encouraged to maintain the world peace. To achieve this objective, the international ‘Convention on the Organization for Economic Co-operation and Development’ was enforced in 1961 under which an inter-governmental organization called Organization for Economic Co-operation & Development (OECD) was established with 35 member states (most of the states are developed states) as signatories. The OECD is committed for world economy and provides platform for all the state governments to work together for co-ordinating national and international economic policies for economic co-operation among the states and the Headquarters of OECD is in Paris, France.28 It is celebrating its 50th anniversary with the aim of re-establishing a well-equipped public finance system as a basis for creating employments, rising standard of life and sustainable economic growth across the globe.

4.3.1 Origin

The origin of OECD lies in Organization for European Economic Co-operation (OEEC) which was to be established in 1948 by Mr.Robert Marjolin of France to implement the ‘Marshal Plan’ to help in re-construction of economic situation which was destroyed after the World War II. But this proposal was rejected

27Supra Note 16, at 594
28http://www.oecd.org, visited on 24/11/16 @ 4p.m
by Soviet Union and the organization was ready to fund its activities by taking financial aid from America. But the organization never worked out effectively. In 1961, the same organization was reformed as OECD for development of global economy.

4.3.2 Composition

The OECD consisted of Council, Secretariat and Committees to perform various task of economic co-operation and the functions of these bodies are discussed below.

The Council consisted of representatives of the member states & the European Commission. It meets regularly and the decision will be taken by the consensus of all the states, Secretary-General will head all the meetings of the Council. The Ministerial Meeting will be held once in a year where it discusses the key issues and issue directions to the Secretariat to implement the decisions.²⁹

The Committees will be constituted consisting of representatives of member states to discuss the new ideas and review of progressive policies related to finance, education, trade, taxation, science and employment. There are nearly 250 Committees, Working Groups and 40,000 senior officials from various states are functioning to fulfill its objectives.³⁰

The Secretariat consisted of Secretary-General and to assist him Deputy Secretary-General are appointed. It consists of staffs which include lawyers, economists, scientist and other professionals to discuss about various matters. It also establishes a link between the states and Secretariat.

4.3.3 Convention on Protection of Foreign Property

In 1962, OECD draft of ‘Convention on Protection of Foreign Property’ was introduced but it was revised and approved by OECD in 1967. This draft consisted of the opinion of capital-exporting states about the minimum standard of treatment. OECD’s Council by approving the principles of protection of foreign property gave a strong foundation to prepare an agreement related to protection of foreign investment.

²⁹http://www.oecd.org, visited on 24/11/16 @ 5p.m
³⁰http://www.oecd.org, visited on 24/11/16 @ 5p.m
Article I of OECD draft convention which was prepared in 1967 read as follows:31

‘Each party shall at all times ensure fair and equitable treatment to the property of the nationals of all the states. It shall accord within its territory, the most constant protection & security to such property and it shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures’.

The fact that nationals of few states are accorded with treatment that are more favourable than those provided to others as per the convention which shall not be regarded as discrimination against nationals by reason only of the fact that such treatment is not accorded to them. It means MFN treatment is allowed with certain exceptions in a given circumstances. OECD Convention supports the ‘Hull Rule’ with respect to the requirement for payment of adequate and effective compensation but this convention like any other conventions did not see the day light as OECD members did not accept it as a multilateral legal framework to protect foreign investments but the convention became a guideline for many BITs.

4.3.4 Declaration on Investment and Multinational Enterprises

OECD made many efforts to frame multilateral legal framework to protect investments. In order to fulfill its aim, OECD’s declaration on ‘International Investment and Multinational Enterprises’ 1976 was drafted. This declaration was drafted in response to the New International Economic Order (NIEO)32 and nearly 20 member states of OECD liberalized their regulations related to capital transfer and investments in service sector.33 At present, as mentioned earlier the MNCs are the driving force of FDI which helps for economic development of developing states. The MNCs are under obligation to protect the natural resources and environment in host state. If MNCs are damaging the environment of host state, they are bound to compensate the same. As per the convention the MNCs are bound by CSR rules. The OECD Guideline on MNCs in 2011 imposes obligation on them which says that MNCs are bound by the environmental standards of host state, if MNCs involved in damaging the environment, they are liable to pay compensations. As per this

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31Supra Note 2, at 30
32In 1974 UN General Assembly passes NIEO declaration for international economic system in order to address many economic issues such as monetary system, transfer of technology, etc
33Supra Note 2, pp 23 & 24
guideline, the MNCs are bound by the local laws of the host state related to protection of environment.

4.3.5 Efforts to frame Multilateral Agreement Investment (MAI)

The trend of globalization & harmonisation of international FDI laws on one side and mushroom growth of BITs & RIAs on the other hand started creating regional disparities which made OECD members to think about drafting multilateral framework to regulate FDI. In 1995, OECD members agreed to negotiate MAI which was opened for members, European Communities and non-member states also. OECD’s MAI like any other international conventions contained provisions related to non-discrimination and transparency provisions. But one should keep it in mind that these principles sometimes will have bad impact on domestic affairs than facilitating international trade & investments and on the other hand few states often make reservations to non-discrimination principle in order to protect their FDI through BITs. At the end of World War II, the developing states were asking for preferential and non-reciprocal treatment as a legal basis for their BITs. But the developed states were promoting minimum standard of treatment to protect their FDI in host states.

The negotiation for MAI started in 1990s along with the establishment of WTO where US and Western European states proposed to frame liberalised provisions to protect FDI, but it was rejected at WTO forum by member states and later the task was given to OECD. A Working Group was established by OECD to consult its members, non-members and NGOs. To protect the interest of industrialised states and labour section, the Business & Industry Advisory Council (BIAC) and Trade Union Advisory Council (TUAC) respectively attended OECD negotiations. The OECD’s MAI pro-investment provisions which were more favourable to investors (developed state) became a reason for opposition which was raised by developing states. The reason for failure of MAI was that the members of OECD fought and perceived their weak sovereign power on one side and on the other hand the environmentalist, labour unions and socialist stopped its success and criticised the treaty on its substance and procedures. They also criticised that, MAI would encourage MNCs which would control the domestic economy of host state. Subsequently, the business state lost interest in negotiation of treaty and the

34 Supra Note 11, at 63
35 Supra Note 11, at 69
developing states were unprepared for global competition as a result of which MAI’s liberal policies were not accepted by the developing states.

During the negotiations, the OECD members proposed to finalise MAI in 1997 which was later postponed to 1998 but in May 1998 meeting, France was reluctant to finalise MAI as it was not ready to open its telecommunication and cultural market for US investors and The Helms Burton Act\(^{36}\) of US which codified disincentive to foreign company doing business in Cuba and their property was confiscated by US citizens and due to these reasons few states did not agree for MAI draft.\(^{37}\)

The OECD Investment Committee investigated for three years about possibilities of MAI, OECD established a Negotiating Group in September 1995 to draft MAI. Since being an independent treaty, it was opened for non-member state also. The Negotiating Group started working on draft by isolating themselves from OECD Standing Committee which was the second major source of opposition by member states. The task to prepare final draft of MAI in 1997 was assigned to the Negotiating Group. However, the final draft was ready in 1996 but was opposed by outsiders like NGOs, environmentalist, labour union etc. France expressed its apprehension that US may dominate their culture sector, US and other state demanded for more exceptions in proposed MAI thereby, weakening the provisions of MAI.\(^{38}\)

I Key features of MAI

a) Long-term commitments

MAI expected long term commitment from OECD’s members which was not well accepted by them. It imposed conditions saying that after signing MAI, the member states shall not withdraw from MAI for 5 years. As per the proposed provisions, the investment policy must be liberal to attract and protect FDI even after fifteen years of its withdrawal from the proposed treaty. The state will be under an obligation to protect FDI even after its withdrawal from MAI which increased the

\(^{36}\)Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996

\(^{37}\)Supra Note11, at 69

\(^{38}\)Saman Zai-Zarifi, ‘Multilateral Agreement on Investment’, (Eds, Beveridge, Globalization and International Investment, Ashgate, 2008), pp 279-298 at 281
confidence among investors to invest but the proposed MAI simultaneously neglected the interest of host states especially, the developing economies.  

b) Breadth of coverage

MAI proposed for broad definition of foreign investments including direct and indirect investments like real estate, securities, contractual rights, lease & mortgage, property rights and every kind of property or assets which are under the control and ownership of foreign investors. But at the time of final draft, a very inclusive list of foreign investment was included and there was an issue whether portfolio investment can be included into FDI or not which could not be resolved by it.

c) Uncertain protective measures

During the drafting stage, the proposed MAI included three major provisions: a) commitments related to international environment & labour standard, b) commitment of states not to reduce their existing environment & labour standards, c) private investors to observe protective labour standards as mentioned in OECD guidelines to MNCs. But during the final stage of adoption of MAI, the above mentioned commitments of developed states were not included and this move of drafting committee of MAI distorted the confidence of developing states. As a result of which most of the developing states did not accept MAI as it was more favourable to MNCs than protecting the interest of developing economies.

Looking at the above MAI provisions, it is understood that MAI was more favourable to foreign investors than protecting host state’s interest. Finally, the proposed draft of OECD’s MAI which was started to achieve a comprehensive multilateral framework was failed and suspended in October 1998 without concluding it.

OECD came out with MAI draft with the objectives of framing liberal multilateral investment agreement which had a broad scope, long duration, liberal economic policies and the regulation on investors and states. But at the same time, it failed to consider certain factors such as sustainable development, labour protection,
human rights and cultural issues of states which were the drawbacks of MAI draft as it was not addressed properly.

d) Non-discrimination

The principle helps in integration of global economy without discrimination among investors of different states and supports the principle of National Treatment & Most-Favoured Nation Treatment which protects foreign investors. As per these principles, the foreign investors shall be treated on par with the citizens of host state and no less favourable treatment will be given when compared to domestic investors. The non-discrimination principle was criticised by many states saying that it may stop certain important protective policies related to labour and environment of host state as the environmental policies varies from business to business and from state to state. The critics suggested that non-discrimination policies shall be made applicable after analysing the domestic regulations on foreign investors. The principle was accepted at the initial stage by the Negotiating Group but later it was not included in the final draft.

On the basis of nationality requirement, MAI included provisions which would have reduced the control of host state on MNCs. Many developing states object saying that their domestic company cannot compete with MNCs and they also criticised that the prohibition on performance requirement and investment incentives provided to help MNCs to utilise the host state resources to maximum but to our shock these MNCs are not contributing for development of society and economy of host state.

MAI also removes employment requirement restriction which frees MNCs from employment quota of employing host state's nationals. The other reason for failure of MAI was on the basis of principle of non-discrimination, the MAI tried to prohibit states from imposing trade restrictions Example: US laws imposed ban on foreign investors doing business with Cuba, Iran and Libya. The Negotiating Group did not give any clarification on ‘conflicting requirements’ issue which says that the clause would protect only those laws which are not contradicting the international laws. But it failed to address the issue mentioned above.

42 Supra Note 38, pp 279-298 at 284
43 Supra Note 38, pp 279-298 at 286
e) Top-Down implementation

MAI was a top-down implementation rather than bottom-up means it included all actors unless it is specially excluded, unlike GATT where it targeted specific subject like trade. The trade unions alleged that, the OECD members submitted 700 individual exceptions to MAI, especially US, Canada and Australia submitted many exceptions related to transportation and land matters. These individual exceptions were made to protect the interest of individual developed states.

MAI also had ‘General exception’ clause which had helped the state to abstain from MAI application in case of security interest including the situations such as armed conflict, international emergency to fulfil international obligation in non-proliferation of weapon, production of arms & ammunitions and maintenance of peace and security.\footnote{Supra Note 38, at 290}

The above top-down approach gave more priority to investors and created many problems for domestic economy of host state and this problem was not addressed properly during negotiations.\footnote{Supra Note 38, pp 279-298 at 288 & 289}

II Goals of MAI

The purpose behind drafting MAI was very ambitious and included the following:\footnote{http://www.oecd.org, visited on 20/10/16, @ 5p.m}

i) To achieve liberalized investment protection agreement

ii) To provide effective dispute settlement procedure

iii) To address environmental and labour issues

iv) To address social issues

III Proposed provisions of MAI Draft

The Negotiating Group after the long process of negotiation between 1995 and 1998, the draft was prepared on 22\textsuperscript{nd} April 1998.\footnote{http://www.oecd.org, visited on 20/10/16, @ 5p.m} The preamble of the draft highlighted that for economic co-operation, the foreign investment is very much required which creates employment opportunities and improves standard of life. The
member states must create equal, free and transparent investment regimes to develop
global trade. Draft had contained 12 chapters which are discussed below.

Chapter-1 dealt with general policy consideration

Under this section, the MAI proposed to impose general obligation on
members to abide by the responsibility to accord protection to FDI & investors and to
take necessary measures to create favourable environment for investments. The state
parties must take the responsibility to frame liberalised investment policies to attract
more FDI.

Chapter-2 dealt with scope and application

The proposed provisions covered investment made by the investors which had included both natural person having a nationality of OECD contracting parties and the MNCs which are established by the parental companies registered in the contracting states. The proposed draft defined investment with wider interpretation which had included every kind of investments into it.

After defining the term ‘investment’ with broad interpretation, the Negotiating
Group further proposed to work on the definition of investment to include indirect investment, intellectual property, concessions to investment, public debt and real estate as investments.

Chapter-3 in detail discussed about the standard of treatment for investors and their investments

It had provided temporary free entry, stay of investors and their managerial officers and it had also removed barriers for recruitment of key managerial personnel on the basis of nationality requirement in host states. The requirement as to local employment and performance requirement, the member states said that, MAI should not encourage FDI which are affecting the domestic economy, national security and interest of local producers. The provision indicates that the foreign investment shall be accorded equal treatment & protection which are available to the domestic investors. These principles more or less are incorporated in every legal framework

48Preamble of the Draft, http://www.oecd.org, visited on 20/10/16, @ 5p.m
49MAI Draft, April 1998, pp 7 & 8, http://www.oecd.org, visited on 26/11/16 @ 11p.m
50MAI Draft, April 1998, at 11, http://www.oecd.org, visited on 26/11/16 @ 11p.m
51The Negotiation Group made deliberation to include each and every investment into the term
‘Foreign Investment’
52MAI Draft, April 1998, pp 13 & 14, http://www.oecd.org, visited on 26/11/16 @ 11p.m
like BITs, RIAs, etc. But the question is, to what extent it will be implemented by the host state.

MAI also gives significance for rule of transparency in investment policies framed by the state parties. As per the rule, the laws of the contracting parties must be made available to the public, the contracting parties must reply to all the queries of other party and the information can be sought by any parties but there was a restriction that if the information related to investment is confidential or if disclosure of such information would prejudice to the interest of investors or enterprises then there was no obligation on the part of the contracting parties to maintain transparency related to their investment.53

In India, the rule of transparency is very much maintained and there is no compulsion on investors to disclose information about their investment to the public. The researcher has personally experienced this, investors (individual or MNCs) were not ready to disclose the amount of investment and the companies where they have invested.

In the proposed draft, there was a provision available for temporary entry and stay of investors & their family for confirmation of documents and the same cannot be denied on the basis of labour or economic needs. The proposed provision of the draft had also pointed out that there was no compulsion on the MNCs to appoint the managerial staff from the particular state/nationality. It had also spoke about the performance requirements on MNCs, which pointed out that the host state shall not impose restriction on quantity of exports, use of local products, restriction on imports, employment restrictions, etc on investors to protect its domestic economy.54 All these above provisions were in favour of investors than protecting the interest of host state, as a result of which the developing states did not participate and accept MAI.

Chapter-4 dealt with protection of existing and future investments

It lay down that the host state shall accord security to the investment and investors through fair and equitable treatment and adequate compensation in case of expropriation of foreign property at host states. The draft adopted the principle of international law in expropriation of foreign property stating that there must be a public purpose to acquire property and as per the due process of law. While fixing the

53MAI Draft, April 1998, at 13, http://www.oecd.org, visited on 28/11/16 @ 4p.m
54MAI Draft, April 1998, at 16 & 17, http://www.oecd.org, visited on 28/11/16@ 8p.m
amount of compensation the market value of the property at the time of expropriation shall be paid without any delay and the host state must make all the arrangement to transfer the amount freely.\(^{55}\) As per the draft, the host state was liable to pay compensation if investors suffered any damage due to civil war, insurrection, emergency, revolt.\(^{56}\) On this point, the developing state did not accept to give protection to investors from developed states where the proposed draft also had adopted the doctrine of subrogation which was a weapon in the hands of developed states to exploit developing states.

**Chapter-5 proposed for settlement of investment disputes**

The investment dispute between state-state, state-investors are proposed to settle by means of consultation, conciliation, mediation and as a last resort international arbitration. There was a provision for temporary relief also. The parties had the option to refer investment dispute to ICSID arbitration.

**Chapter-6 highlighted the exceptions and safeguard measures**

The safeguard measures are adopted by the draft to protect FDI. On the basis of this clause, the host state had right to take any necessary action at the time of conflict or emergency in the interest of public or national security.

**Chapter-7 dealt with financial services**

Financial services like insurance, banking and other related services must be provided. According to this chapter, the contracting parties shall take measures related to financial services for the protection of investors and the same must ensure the integrity and stability in domestic economy.\(^{57}\)

**Chapter-8 proposed for maintaining transparency and non-discrimination principle in taxing statutes**

It proposed that the host state while imposing tax, shall not discriminate between investors. During the delegation, the contracting parties stressed on avoidance of double taxation by concluding DTAT.\(^{58}\)

\(^{55}\)Supra Note 11, at 72

\(^{56}\)MAI Draft, April 1998, at 57, http://www.oecd.org, visited on 28/11/16@ 8p.m

\(^{57}\)Supra Note 11, at 72

\(^{58}\)MAI Draft, April 1998, pp 86 & 87, http://www.oecd.org, visited on 28/11/16@ 8p.m
Chapter-9 dealt about state specific exceptions

Specific exceptions were proposed in the draft to protect the interest of developing states especially least and less developing countries. As per the proposal, it was highlighted that the states had right to take exception from application of measures related to national treatment, MFN treatment and exception in allowing FDI in a particular sectors.\(^{59}\)

Chapter-10 discussed about International arrangement

The relationship with other international agreements in protecting FDI and respecting the obligation on the contracting parties imposed under other existing international agreements specially IMF and OECD’s MNCs Guidelines.\(^{60}\)

The above provisions of the proposed MAI were not agreed by the contracting parties for one or the other reasons, but it is adopted by the states in BITs/RIAs in the current scenario. The MAI draft had also proposed for environmental safeguard where it is highlighted that the host states have right to take measures to protect the environment and public health also. This provision was included to promote OECD’s Guidelines to MNCs and provisions of NAFTA.

While drafting MAI, the contracting party’s consensus on the following matters:\(^{61}\)

i) MAI should adopt broad definition of FDI including Portfolio investments.

ii) Liberalization purpose should be achieved through National Treatment and MFN treatment principles.

iii) Stand-still, roll-back and up-front provisions may be subjected to nation-specific exceptions or reservations at the time of accession to MAI.

iv) State and investor disputes shall be referred to international arbitration for amicable settlement.

v) The legally non-binding OECD’s Guidelines on MNCs should be associated with MAI.

\(^{59}\)MAI Draft, April 1998, pp 89-92 http://www.oecd.org, visited on 28/11/16 @ 8p.m
\(^{60}\)Supra Note 11, at 74
\(^{61}\)OECD Documents on MAI Rules 1996, Supra Note 11, at 73
During the negotiations the following issues were stressed but not addressed properly.\(^{62}\)

i) Whether the possibility of long list of nation-specific exceptions and reservations to the national treatment & most favoured treatment obligation diluting the liberation purpose of MAI can be reduced?

ii) Whether MAI should include an exception clause for protection of national culture?, which was supported by France.

iii) Whether MAI should include general exception for Regional Economic Integration Organizations (REIOs)?, which was supported by European Union and the same was opposed by US and Japan.

iv) Whether MAI should contain specific and binding rules on investment incentives, privatization, state monopolies, corporate practices, competitions and taxation?

The United States proposed to include labour and environmental standards of NAFTA in MAI, which was opposed by other states. These above stated issues became reasons for failure of proposed MAI. The OECD’s Secretariat during the negotiation proposed to establish a ‘Committee on Capital Movement and Invisible Translation’ for implementation and monitoring OECD’s codes of liberalization of capital movement and of current invisible operations. The Code related to liberalization was adopted in 1961 and updated by OECD’s Council. But the non-OECD member states did not accept to implement MAI because of which MAI did not see the day light. Learning from the past experiences, if world organization wants to frame MAI in future, first it must take all the states into its confidence to protect and balance the interest of both host & home states, if it is able to do it then the flow of FDI will gradually increases and will lead to development of global economy in future.

**IV Reasons for failure of MAI**

The OECD’s MAI broad pro-investment provisions related to environmental safeguard, specific exception clause which ware more favourable to developing states and the same was opposed by the developed states. The reason for failure of MAI was

\(^{62}\)Draft text of MAI April 1998
that the members fought and showcased their sovereign power and on the other side the environmentalist, labour union and socialist stopped its success and criticised the treaty on substance and procedural aspects. They also criticised that, MAI would always encourage MNCs which would control the domestic economy of host state. Subsequently, the business states lost interest in framing MAI. The following are the consequences of negotiation of MAI:

i) The interest of developing, least developing and transitional states were neglected.

ii) The business community in European Union opposed the insertion of some issues related to protection of environment and workers’ rights.

iii) It created two different blocs such as strong states integrated on one side and weaker states on other bloc. Many developing states lacked sufficient administrative capacity to take part in MAI negotiation under the guidance of OECD. Later many states thought MAI shall be concluded at least in near future under the auspices of world organization where majority of states will be its members, specially the developing states. In this situation, WTO will be the apt body to negotiate MAI in future. The developing states were reluctant to join MAI negotiations because of fear of dominance by developed states.

FDI is a driving force behind industrialization and economic development of states. WTO proposed for MAI which was not accepted as different types of FDI are accepted by the states such as underdeveloped states allows resource seeking FDI or labour seeking FDI and at subsequent stage, it attracts capital seeking FDI. Different states prefer different types of FDI which cannot be regulated by one uniform MAI at present. There are many issues which evolved during the negotiation like, MAI may prevent host state from extracting profits as per their policy framework as MAI rules are uniform in nature. When compared to MAI, BITs provide more flexibility to parties to include favourable clauses as per their conveniences, MAI spoke about rights of investors but nothing discussed about their responsibilities to protect host state’s economy, MAI did not provide for labour mobility, no proper provisions for settlement of disputes and it did not reach the expectations of developing state either.

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63 Supra Note 38, at 280
64 Supra Note 11, at 70
65 Supra Note 11, at 76
on conceptual grounds on policy framework. It neglected the welfare of developing states where it reduced their flexibility in policy framing and it did not support reciprocity in FDI regime. As a result of these reasons, the developing states refused to participate in MAI negotiation.\textsuperscript{66}

Inspite of 200 pages of draft, MAI did not change the governmental policies which had threatened the flow of foreign investments. NGOs at Canada, who wanted to oppose NAFTA, simultaneously opposed MAI stating that MAI would pose greater threat and damage to the developing states than NAFTA.\textsuperscript{67} These NGOs created websites to oppose MAI and Anti-MAI rallies & demonstrations took place at different places. US Labour union, AFL-C10 and 300 organizations joined their hands in rallies. MAI had nothing new about liberalized policies on foreign investments or had many new distortions but had new dispute settlement procedures and applicability of the provisions without reservations, broader definition of FDI which was a weapon in the hands of foreign investors to sue the host state governments as a result of which the developing states did not agree for MAI.\textsuperscript{68} Another reason for failure of MAI negotiations was that US based companies established MNCs in developing states where low wages labour was available as a result of which many US nationals lost their job and it was objected by labour unions in US.\textsuperscript{69}

The Negotiating Group too responded to the political criticism raised by member and non-member states. During the response, the members strongly opposed the treaty and France refused to participate in further negotiation\textsuperscript{70} which was followed by 2 years campaign against the draft of MAI and ultimately, the draft lacked internal support and the economic rivalry among the states was also one of the reasons for failure of MAI negotiations. The points of criticism about the flaws in MAI are as follows:\textsuperscript{71}

i) The draft of MAI was more favourable to international economic interest at the cost of civil society which threatened the weak economy states from participating in global competition relying on MAI.

\textsuperscript{66}Supra Note 12, pp149,150 &151
\textsuperscript{67}Edward M. Graham, Fighting the Wrong Enemy- Anti-Global Activities and Multinational Enterprises, (Institute for International Economics, Washington DC, 2009), at 7
\textsuperscript{68}Id at 80
\textsuperscript{69}Supra Note 67, at129
\textsuperscript{70}Supra Note 38, pp 279-298 at 282
\textsuperscript{71}Supra Note 38, pp 279-298 at 282 & 283
ii) The Negotiating Group instead of relying on economic and political situations, concentrated more on technical aspects of investment needs of the state.

iii) The initial draft document of MAI was kept confidential and was not available to public, to their shock, it was not even made available to the US Congress which initiated the draft of MAI.

iv) The MAI at the time of negotiation did not consider the international environmental and trade policies which were to be considered by OECD members.

v) MAI draft did not give significance to labour issues and same was opposed by NGOs and the negotiating Group was not prepared for the same criticism.

Due to the above mentioned criticism, the chance of review and amendment of MAI draft was dropped in October 1998. Another reason for failure of OECD’s multilateral investment framework was that it proposed for uniform foreign investment codes which many states did not have as they preferred only limited acquisition of interest in specific sectors of the domestic economy of host states to allow FDI.

To conclude, the OECD made all possible efforts to draft uniform & codified set of FDI laws to maintain balance between the interest of investors and developing states, due to internal political conflicts it was not achieved by OECD. The MAI draft did not propose for sustainable development of economy in actual practice which was the major drawback of MAI.

4.4 International Court of Justice (ICJ)

International Court of Justice being a world court has resolved many disputes between the states related to various matters and it has made significant contributions in development of international investment laws. The first investment dispute filed before ICJ was Anglo-Iranian Oil Company Case in 1952.\textsuperscript{72} In this case, the Iran Government before becoming an independent state had entered into agreement\textsuperscript{73} much before 1930 with UK Company to invest in Oil Company which was under the control of UK. After decolonization, Iran became an independent state and nationalized the Oil Company by exercising its sovereign rights on natural

\textsuperscript{72}Anglo-Iranian Oil Co Case (UK v. Iran) ICJ Report 93
\textsuperscript{73}In 1933 agreement between Iran government and Anglo-Iran Oil company
resources.\textsuperscript{74} Iran also made a declaration that it accepts the jurisdiction of ICJ in future disputes. After nationalization, UK filed a case before ICJ but the court held that it lacks jurisdiction as the agreement was made before 1930 declaration and it cannot decide the dispute.\textsuperscript{75}

The next case came up before ICJ was \textbf{Norwegian Loans Case}.\textsuperscript{76} In this case, France contended that Norway had breached it obligation under a series of bond. The ICJ held that it has no jurisdiction to decide the dispute as the declaration of Norway accepting the jurisdiction of ICJ was made after the treaty signed between Norway and France.

Again during 1970 in \textbf{Barcelona Traction Case},\textsuperscript{77} Belgium alleged that the acts and omissions of Spanish courts in placing Barcelona Traction into bankruptcy constituted a denial of justice and an expropriation of the Barcelona Traction shares held by Belgian nationals. Spain objected the ICJ jurisdiction on the basis that Barcelona was not entitled to exercise diplomatic protection on behalf of Canadian company, even if it owned by Belgian shareholders. But however, the ICJ ultimately determined that it has no jurisdiction to decide the case. The court laid down the principle that ‘where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorises the state of the company alone to make a claim’. In determining that it did not have jurisdiction, the court highlighted that this had been an intense capital system and interest concerning the protection of foreign investment and the states were more relied on BITs to protect their FDI.\textsuperscript{78}

Finally in \textbf{Elettronica Sicula S.P.A (ELSI) Case}\textsuperscript{79} in 1982, the FCN treaty between Italy and US provided jurisdiction to ICJ on merits of the case. Elettronica Sicula S.P.A (ELSI) produced electronic components in Italy and was a subsidiary of two American corporations. ELSI’s Board of Directors decided to stop the operations and liquidates ELSI to minimize the loss. In order to protect employment, the local Mayor issued a requisition order under which the town took temporary control of ELSI’s factory. ELSI appealed this order subsequently under a bankruptcy petition.

\begin{flushright}
\textsuperscript{74}U N General Assembly Resolution on permanent sovereignty on natural resources  
\textsuperscript{75}Supra Note 2, at 36  
\textsuperscript{76}(1957)ICJ Report 9  
\textsuperscript{77}(1973)67 AJIL 259  
\textsuperscript{78}Supra Note 2, at 37  
\textsuperscript{79}Judgment on 20\textsuperscript{th} July 1989
\end{flushright}
The requisition order was later annulled by the Italian court and the trustee in bankruptcy brought a suit for damages, arguing that the requisition order had caused the bankruptcy case. The US claimed that the requisition and the delay in overturning it interfered with the American corporations’ management and control of ELSI as well as their interest in it and causing the bankruptcy.\footnote{Supra Note 2, at 38}

The above discussion says that ICJ can exercise its jurisdiction in investment disputes only if the dispute between two states and individual investors cannot invoke its jurisdiction. As a result of which, it could not contribute much for the development of foreign investment laws.

\section*{4.5 World Bank}

The World Bank being an international financial authority consisted of two great institutions International Bank for Reconstruction & Development (IBRD) & International Development Association (IDA) came into existence in 1944 during Bretton Wood Conference. The Bank has other three financial institutions which includes International Finance Corporation (IFC), MIGA and ICSID. The headquarters of the Bank is situated at Washington DC, USA and has 189 states as its members. The goals of the World Bank include a) elimination of poverty and b) promote prosperity & improve the income of the people.\footnote{http://www.worldbank.org, visited on 29/11/16 @ 11a.m} The Bank has put a lot of effort in framing international laws to protect and to promote FDI. As per the data source of UNCTAD between 1970 and 2015, the flow of FDI in 2007 was highest with 3.064 trillion in the world, out which the flow of FDI into India was 44,208,019,072 in 2015.\footnote{http://www.data.worldbank.org, visited on 29/11/16 @ 11.30a.m} The World Bank has introduced the following measures to provide better protection to FDI at present.

\subsection*{4.5.1 Insurance Protection & FDI}

The concept of foreign investment insurance was developed before World War II to cover political risks related to foreign investment in host states. Many capital-exporting states established national agencies to provide insurance coverage for foreign investments against the risk such as expropriation, restrictions on transfer of funds and other political risk. In order to propound and encourage investment insurance, in 1985 the World Bank introduced Multilateral Investment Guarantee
Agency (MIGA) to encourage FDI flow among member states and Third World Countries in the form of insurance coverage, technical assistance and policy advice.\textsuperscript{83}

The insurance scheme will have impact on BITs in three ways: a) to decide whether to offer investment guarantee or not for which the insurer will look into BITs. In some cases signing BIT is a condition precedent to operate insurance mechanism. In MIGAs, operational regulation provides that the FDI will be protected only if BIT is signed between host and the home state covering political risk. b) International Investment Insurance often provides for subrogation clause in treaty and allow the insurer (who pays the claim to the investors) to settled his right with the host state and c) the foreign investment insurance regularly covers the contract of insurance but it also addresses certain issues such as responsibility of host state to protect foreign investors.\textsuperscript{84}

\textbf{4.5.2 Insurance Protection for FDI through MIGA}

The Foreign investment always faces non-commercial risk in host states. The governments of all the states realised the need for protection of their investors through insurance coverage which led to the creation of Multilateral Investment Guarantee Agency (MIGA) by enforcing a convention on April 12\textsuperscript{th} 1988. More than 141 states participated and became members of the convention.\textsuperscript{85} MIGA is providing insurance to FDI against the non-commercial risk as an alternative to national political risk agencies and the same has encouraged the provisions for private insurance for long term investments. By providing insurance protection, the MIGA is giving confidence to investors to feel that their investments are secured against non-commercial risk because it causes more threat to the safety of investment when compared to commercial risk. The unpredictable nature of political decision & social change in host state will have bad impact on FDI which de-motivates investors. In such situation, the MIGA insurance protection to FDI plays a key role and will encourage the flow of FDI. This is a commendable step initiated by World Bank. By the end of 1996, MIGA issued 223 guarantee contract covering investment from 24 member states which increased the flow of FDI to $15.2 billion in 1996.\textsuperscript{86} The investors can seek insurance coverage provided both host and home states must have ratified the

\textsuperscript{83}Supra Note 2, at 40
\textsuperscript{84}Supra Note 2 at 40
\textsuperscript{85}Supra Note 11, at 47
\textsuperscript{86}Supra Noted 11, at 48
MIGA Convention. On the other side, in case of non-member state, MIGA can make alternative arrangements by arranging sponsors guarantee for investment. The MIGA Convention covers four types of risks such as a) expropriation through legislation or administrative action b) breach of investment contracts by the host state government c) actions of the host government resulting in restrictions on currency transfer and d) war and civil disturbance.\textsuperscript{87}

a) Scope of MIGA

MIGA guarantee is limited and is available only to the eligible investment by eligible investors. The eligible investor means natural or legal persons who have invested equity interest, medium-term loan, long term loan, equity holders of foreign enterprises concerned and re-invested earnings from existing investments.\textsuperscript{88} In order to avail insurance facility, there is a pre-requisite that the application for guarantee shall be filed prior to making investment in any project at host state. It means, at the initial stage of investment projects, the application for MIGA insurance must be filed by the investors. Insurance coverage will come into picture only if risk is caused by the members of MIGA convention otherwise not. The application must be approved by the government and the period of protection will be provided on an average basis of 15 years and the conflict between individual investment and host state economy shall be clarified by MIGA from time to time for better protection. When foreign investor suffers loss due to non-commercial risk, they have to seek administrative remedies from host states and if they fail to settle, they can knock the door of MIGA and collect compensation. Once compensation is paid by MIGA to the investors, the doctrine of subrogation will be applicable and MIGA will step into the shoes of investor and take action against host state.\textsuperscript{89} This mechanism will reduce the political interference of host state in FDI activities. When MIGA decides to take action against host state, it can refer the matter to international arbitration.\textsuperscript{90} Apart from insurance service, MIGA also facilitate investment promotion services for member states like policy reforms which encourages free flow of foreign investment in prospective host states, to facilitate the conclusion of international investment treaties and helps to negotiate multilateral investment treaty in near future. The main objective of

\textsuperscript{87} Article 11 of Convention establishing Multilateral Investment Agency 1985
\textsuperscript{88} Supra Note 11, at 48
\textsuperscript{89} Supra Note 11, at 49
\textsuperscript{90} Article 57 of Convention Establishing Multilateral Investment Guarantee Agency 1985
establishing MIGA is to achieve higher degree of de-politicisation of international investment disputes with the help of insurance provisions.

According to the World Bank Report on ‘MIGA Developmental Results’ the expected projects which were supported by MIGA insurance guarantee signed during the fiscal year 2015 with total investment reached to $9.8 billion out of which $2.8 billion investments provided transportation for 176 million people, created direct employment to 13,868 people and $ 243 million yearly taxes and fees were generated. This shows that the MIGA efforts have made good impact on economic growth, promotion of FDI and economic sustainability.91

4.5.3 World Bank Guidelines on FDI

Apart from protecting private foreign investments by insurance coverage under MIGA, the World Bank showed keen interest in promoting and protecting FDI for development of global economy and developing states. When MIGA Convention was adopted in 1985 it did not include the principle of minimum standard of treatment applicable to foreign investment which was requested by Germany. The reason for non-inclusion was the existence of controversial opinion about such principles, which MIGA did not take any risk to include minimum standard of treatment. As result of failure of MIGA to include this, the initiative for the preparation of ‘Legal Framework for the Treatment of Foreign Investment’ took place in 1991 in a meeting of Joint Ministerial Committee of Board of Governors of the IMF and the World Bank. The meeting had the Task Force consisting of General Counsels of the entire bank group institutions and was chaired by Bank’s General Counsel.92 The Task Force was assigned to prepare a set of guidelines having potential and to influence the development of international law on FDI and guiding more on judicial and other work in development of principles on FDI and the same would be the basis for the state to frame their laws on FDI. The main objectives of the Task Force was to a) identify the basis of legal system reflecting the norms which will be accepted widely in state practices and to create appropriate hospitality and environment for FDI, which will be accepted widely by all the states and b) the next object of the Task Force was to conduct survey and to collect data regarding BITs, multilateral instruments, declarations, resolutions, arbitral awards, international and national investment codes.

91http://www.miga.org/development results, visited on 30/11/16 @ 1p.m
92Supra Note11, at 90
The Task Force collected the above mentioned data and analysed the data. On the basis of the analysed data, the Task Force prepared draft guidelines with explanatory report and the same was circulated to the Executive Directors of the World Bank, IFC and MIGA in May 1992 which was followed by a series of discussions and consultations by the Development Committee for considerations in September 1992. The guidelines were adopted by the Development Committee which said that the guidelines on FDI shall ‘serve as an important step in progressive development of international practices in the field of FDI.93

a) Content of the Guidelines

The World Bank Guidelines on FDI is divided into five parts such as Part I-Scope and application, Part II-Admission, Part III-Treatment of FDI, Part IV-Expropriation of foreign property, Part V-Settlement of investment disputes. The guidelines framed by the World Bank consisted of both emerging rules of customary international law and standard practice as identified by the World Bank. These guidelines are in the form of policy advice which advises the government of host states about the treatment of FDI and the same goes beyond the general principles, reflects the emerging and settled standards under contemporary international law.94

Guideline-I

It deals with the scope and application of guidelines on foreign investments which assists states in framing domestic laws on FDI. The guideline has not defined the term of ‘Foreign investment’ but has defined actors related to foreign investment such as ‘state’ which covers subdivisions, agencies & instrumentalities and nationals which includes natural & juridical person who enjoys nationality of a particular state. The guidelines include all types of direct and indirect investments in the form of funds, equipment, technology services, equity contributions, concessions, portfolio investments, MNCs and are also applicable to the investments made from the fund which flows from abroad.95 Guideline I upheld national treatment principle, without any discrimination between foreign and domestic investment in few circumstances. It also laid down that there shall be a fair competition to create sound investment

93 Supra Note 11, at 91
94 Supra Note 11, at 92
95 Supra Note 11, at 93
environment, there is no need of extension of special privileges to FDI which will have negative impact.96

**Guideline II**

This part speaks about the entry of FDI into host states, which is important for host state’s economic development and to increase competitiveness in global market. At the entry level, the host states must follow liberalized policy to attract FDI. The regulations on entry of FDI shall be based on the legal system but the same should not lead to corrupt practices. The guidelines encourage automatic route for FDI. The guideline authorises the host state to exclude foreign investment in certain sectors in certain circumstances like if there is a threat to national security, the sectors are opened only for domestic investors, investment contrary to public interest, violate fundamental rights of people, investments having adverse impact on host state environment and public health. The guideline also imposes obligation on host states to maintain documents containing information about legislations, regulations and procedural requirements for entry of FDI which help foreign investors to have complete picture about the facilities available for them in host states.97

**Guideline III**

This part includes the general and particular standards applicable to repatriation process of profits from FDI which says fair and equitable treatment of foreign investment which shall be adopted by the states. It should accord full protection and security with respect to the ownership, control, profits, IPR, etc, on the ground of nationality and there shall not be any discrimination. In case of expropriation of foreign property, the host states must give fair compensation to investors and they are also entitled for compensation for the loss caused due to civil war in host states.98

**Guideline IV**

This part deals about expropriation of foreign property both partially and fully by the host states. The expropriation shall be in good faith for public purposes without any discrimination between the investors on the basis of nationality. In case of

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96 Supra Note11, at 94  
97 Supra Note 11, pp 96 & 97  
98 Section 10 of Guideline III
expropriation a fair and adequate compensation shall be given, the adequate compensation shall be determined on the basis of market value of the property after taking into consideration of all the necessary circumstances. The guideline has provided different methods of valuation on the basis of different types of properties which will help the state parties to adopt in their domestic laws. Once compensation is determined, it shall be given in the currency originally imported by the investors or any currency as accepted by the investors or in any other currency which is fixed by IMF and the same shall be given without any delay. But the host state can make reasonable delay in payment of compensation by giving a reason on the basis of shortage of foreign exchange. The state parties can adopt all these guidelines in their BITs, RIAs to protect and promote FDI.

**Guideline V**

Guideline V provides provisions for settlement of investment disputes. Section 1 of the guideline provides for settlement of disputes between foreign investors and host state through negotiations. If negotiation fails, dispute can be referred to domestic courts provided that it shall be agreed by the investors in BITs. But looking at the present scenario, it provides for an alternative mechanism such as conciliation or arbitration, for this effect a clause shall be inserted in BITs. This provision is supported by ICSID Convention to settle international investment disputes.

To conclude, Guidelines on FDI by the World Bank has helped and guided many BITs and RIAs which are the basis for many investment codes in host state. Thus, the World Bank has played a vital role in promoting and protecting FDI which has to be appreciated by the world members. Along with this, the World Bank is also providing financial aid to those states which are not ready to accept FDI under the apprehension of exploitation of their natural resources and damage of their economy.

**4.6 United Nation Conference on Trade and Development (UNCTAD)**

In 1960, UNO declared this decade as ‘The United Nation Decade of Development’ as there was a necessity to create awareness among states about the global necessity to remove the disparities between developed & underdeveloped states.
and it was a blessing in disguise to the developing states. In 1964, in order to develop international trade, UNO established UNCTAD as a permanent organization of UNO with the objective of achieving minimum 5% of annual growth rate for developing state and urged the developed states to join hands in fulfilling the objectives.\textsuperscript{104} During this period, it has realised that developing states needed huge investments for their economic development and which helps in import of capital goods, technical know-how from developed states. UNCTAD has its headquarters in Geneva and has a Trade Development Board which consists of four organs namely a) Committee, b) Manufacture, c) Shipping & invisibles and d) Finance related to trade.\textsuperscript{105} UNCTAD was established as an organ in 1994-95 by a Resolution of General Assembly which provided for organizing international conference on trade & development once in three years. UNCTAD’s World Investment Forum 2010 which consisted of many stakeholders of FDI such as investors, state, MNCs in Ministerial Round Table and the IIA Conference 2010 where efforts were made by the members to reform investor-state dispute settlements. Along with this, the UNCTAD Investment Committee, OECD Investment Committee, joint meeting and regional conversation of OECD and UNCTAD made efforts to reform investor-state dispute settlement.\textsuperscript{106}

4.6.1 Functions \textsuperscript{107}

i) To promote international trade and to promote economic development of underdeveloped states

ii) Frame principles and policies regarding international trade and suggest to implement principles

iii) To facilitate co-ordination of activities of UNCTAD among developing states

iv) To initiate actions for negotiations of multilateral trade arrangements

v) It served as center for trade and other issues faced by developing states

4.6.2 Development of Finance

The UNCTAD 3\textsuperscript{rd} Conference held at Santiago in 1972, the LDCs stressed on growing financial deficit & indebtedness and passed a resolution asking IMF to

\textsuperscript{104}S.S.M. Desai, \textit{International Economies- International Economic relations}, (Ed, 1\textsuperscript{st}, Himalaya Publishing House, 1990), at 268

\textsuperscript{105}Id at 268

\textsuperscript{106}World Investment Report 2011, at 101

\textsuperscript{107}Supra Note 104, at 270
provide schemes for development of finance and to provide remedies to overcome the indebtedness but UNCTAD failed to fulfill it and the same was followed in subsequent years till 1996.

UNCTAD 2\textsuperscript{nd} Conference in 1968 which was held in New Delhi, India concentrated on promoting international co-operation and self-reliance among LDCs, for economic co-operation G-77 Ministerial Meeting was held at New York in 1982 and UNCTAD decided to introduce Global System of Tariff Preference (GSTP). Again in 1984, it organised two more meetings to negotiate tariff and non-tariff concession.\textsuperscript{108} UNCTAD 8\textsuperscript{th} Conference established a new standing committee on ‘Economic Co-operation for Development of States’ to conduct study and to submit report.

UNCTAD- Reforming International Investment Governance

World Investment Report 2015 presented 5 key challenges in investment governance which are as follows:

i) Safeguarding the right to regulate: It shall consist of minimum standard treatment as it is enshrined in other investment principles.

ii) Reforming investment dispute settlement: Promote establishment of international investment court by replacing the existing investor-state dispute settlement mechanism.

iii) Promoting and facilitating investments: To create ombudsman to facilitate investments and option to opt for joint & regional investment promotion provisions.

iv) Ensuring responsible investments: The host state must include clause or measures on MNCs for compliance of domestic laws and CSR provisions.

v) Enhancing the systematic consistency of the international investment agreement regime: Establish link between IIAs and bodies of international law, consolidating all IIAs network.

The UNCTAD must play a key role to facilitate IIAs in protecting FDI. At the same time, it shall meet and consult various member states. UNCTAD World

\textsuperscript{108} M.L. Jhingan, \textit{International Economics}, (Ed, 6\textsuperscript{th}, Vrinda Publication Pvt Ltd, Delhi, 2009), pp 487& 488
Investment Report 2015 highlights sustainable growth to regulate and protect foreign investment. The policies shall focus on various cases such as transparency, multilateral system, etc.

UNCTAD’s Annual Survey of ‘Changes to National Laws and Regulations Related to FDI’ indicates that during 2008 nearly 110 new FDI related measures were introduced, of which 85 were more favourable to FDI. Compared to 2007, the percentage of less favourable measures for FDI remained unchanged.109

At the domestic level, the liberalization of national laws governing investments have kept pace with the rapid expansion of transnational regime, during 1991-2004, there were many amendments, nearly 2006 of 2156 amendments to national investments laws were made according to the liberalization direction of UNCTAD report 2005.110

4.6.3 World Investment Reports

The UNCTAD has taken the task of collecting data about flow of FDI across the globe and prepares report about policy framework and provides statistical data about flow of FDI. The World Investment Report is released every year by UNCTAD which is available in its official website. The research thesis has highlighted some of the data of World Investment Reports in the following section:


According to the report, the triad countries such as Japan, United States and European Community during 1980s utilized FDI to maximum extent and economically developed during this time. The report reveals that FDI rapidly increased when compare to world trade which had proved that FDI became engine for growth of world economy. In the year 1979, FDI was just $57 billion, in 1988-89 it reached $196 billion. During the period of 1983-1989 FDI increased to 29%, world trade export to 9.4% and world GDP 7.8% was increased.

The reason for increased flow of FDI in 1980s was the developed states’ outward of FDI is increased by breaking the position of UK and US as major investors in the world. Among the developed states Japan was the state whose FDI
was increased to 62% in 1989. The reason for this growth is the currency value of Japan (Yen) against other currencies in acquisition of assets in abroad is less expensive when compare to acquisition of domestic assets. During the period, the developed states’ inflow of FDI growth was at annual average rate 46% since 1985 and reached a value of $163 billion in 1989. The outflow of FDI from developed states increased to $187 billion in 1989. The UK, US and Japan became largest states for outflow of FDI. Among these states Japan surpassed the UK.

b) World Investment Report 2009- Investment for Agriculture Development

The contract farming by MNCs and investing FDI in agricultural sector was given more significance during 2008.

c) World Investment Report 2010- Investment in Low Carbon Economy

During this period, the developing and transition countries attracted more than half of the world FDI inflows. Low-carbon economy means less pollution environment. The MNCs are part of both problem for environment and solution for climate change. The inflow of FDI during 2009 in South, East, South-East Asia was declined due to reduction in cross-border merger & acquisitions.

d) World Investment Report 2011- International Production & Development

The report concentrated on CSR standards. In 2011, most of the states especially in west Asia, states removed restrictive measures and introduced liberalised investment policies to help the flow of FDI. The report suggested that CSR rules must be adopted and MNCs must be bound them which will promote good corporate governance.


In 2011, many states continue to frame liberalised industrial policies to attract FDI, simultaneously they adopted restrictive and regulatory measures in agriculture and pharmaceutical sectors. The process of disinvestment and nationalization became more stringent. The new generation of investment policy must include three things such as a) incorporating investment policy with development strategies b) adopt sustainable developmental goals in investment policies and c) ensuring policy relevancy & effective implementation.
f) World Investment Report 2013-Global Value Chain-Investment & Trade for Development

The report concentrated on the development of policies which included synergistic trade and investment policies and institution, regional industrial development compact, sustainable export processing zone and encourage more Greenfield investments by creating and maintaining good environment for trade & investment. Investment policies need to have industry specific perspective. During 2012, nearly 53 states adopted 86 policies. 75% of the policies related to liberalization, facilitation and promotion measures were adopted. The report suggested for sustainable development friendly policies related to health safety, labour rights, human rights and environmental safeguards. Encourage IIAs to promote and facilitate FDI.

g) World Investment Report 2014- Sustainable Developmental Goals

In 2013, the flow of FDI to all the major developing states has increased. Greenfield investments are increased in Less Developing Countries (LDCs) in energy and basic infrastructure projects. In 2013, the shares of restrictive regulatory policies are increased to 27%. In this report it is stated that African region attracted more FDI in consumer oriented industries including food, IT industries, finance, retail and tourism industries. In 2013, the FDI flows into South-East Europe were increased due to privatization of state owned enterprises in service sector. In 2013, the restrictive FDI policies were increased from 25% to 27%.

h) World Investment Report 2015- Reforming International Investment Governance

In 2014, 80% of the FDI policies of states were liberalised to promote and to protect FDI. In 2014, nearly 31 international investment agreements were signed with the objective of sustainable development. In 2014, nearly 42 investor-state disputes were filed which caused loss to developing states as the investors were from developed states. It suggested for establishment of investment ombudsman for investment facilitation.

i) World Investment Report 2016- Investors Nationality & Policy Challenges

During 2015, the flow of FDI was increased to 38% (1.76 Trillion) which was the highest since the economic crisis from 2008-09. Flow of FDI into manufacturing
sector was increased as a result of 50% merger & acquisition took place. In 2015, 85% of the investment policy in the regions was in favour of investors. 70 investment cases were filed between investor–state, out of which 40% cases were decided against developed states. As per the report in 2016, 10-15% of FDI is decreased but it continued to increase in South East Asia.

4.7 United Nation Commission on International Trade Law (UNCITRAL)

It has the following functions for progressive harmonization and unification of law on international trade by following means:

i) To co-operate and to encourage co-operation among states in the field of trade.

ii) Promoting wider participation in existing international trade conventions and accepting uniform principles.

iii) Promoting the acceptance of uniformity in international trade laws and its codifications.

iv) Collecting and disseminating information related to international trade.

v) Maintaining liaison with UNCTAD, the economic & social and other UN organs & agencies concerned with international trade.

vi) Any other task to fulfill its above mentioned objectives.

4.8 World Association of Investment Promotion Agencies (WAIPA)

Another international non-governmental institution which was established by the states is WAIPA. The objectives for establishing the agency is to promote co-operation among the investment promotion agencies from various states while framing FDI policies according to their municipal laws and the interest of domestic economy, to maintain co-operation, exchange of information, share their experience in attracting FDI. Nearly 59 states’ Investment Promotion Agencies were gathered and established WAIPA in 1995 and this effort was well accepted and appreciated by UNCTAD as a collective step headed for framing multilateral investment agreement and it is established in Swiss as a legal entity. By the end of 1997, nearly 89 investment promotion agencies joined and became member for this world association which encourages the developing economies to become members.111

111Supra Note 11, pp 32 &33
a) Objectives of WAIPA

i) To assist investment promotion agencies to advise their governments in
   framing effective investment promotion policy strategies.

ii) To help capital-importing states to pool their common interest in
    regulating and promoting FDI.

iii) To help globalization process to attract FDI into host states.

iv) To avoid harmful competitions among investment promotion agencies of
    states.

v) To recognise and increase fiscal incentive packages, but at the same time,
   it should not distort or burden the host states.\textsuperscript{112}

4.9 Asian Infrastructure Investment Bank (AIIB)

In order to meet the changing needs in Asian continent and to facilitate the
development of infrastructure in Asian continent states, AIIB is established and
headquarter is at Beijing. This regional bank is an example of constructive co-
operation among economies to increase the space available for infrastructure
financing. The Bank is consisted of 57 prospecting founding members. Recently on
29\textsuperscript{th} June 2015, India and 49 other founding members signed Articles of Association
which determines each member’s share, lend initial capital and operated by the end
2015 as it is said in AIIB press statement. India is the second largest shareholder with
a stake of 8.52 \% and voting share of 7.5 \% along with China and Russia in first and
third place respectively, this voting share is on the basis of country’s economy and not
on the basis of contribution.\textsuperscript{113}

4.10 Asian Development Bank (ADB)

To meet the developmental needs of Asia region, in 1950s the Asian continent
states in Ministerial Conference on Asian Co-operation which was held in 1963
suggested for establishing a bank similar to the World Bank. A Working Group was
constituted and it submitted its report in 1965. On the basis of the report Asian

\textsuperscript{112} Supra Note 11, at 33
\textsuperscript{113} ‘The Hindu’, Tuesday, 30\textsuperscript{th} June 2015, at 1
Development Bank was established by signing a charter in 1966 having its headquarters at Manila in Philippines.\textsuperscript{114}

4.10.1 Objectives

i) To promote private and public investment for economic development of the region

ii) The optimum utilization of natural resources for economic development

iii) To provide technical assistance for economic development

iv) Co-coordinate with UNO and other international organization to promote investments

4.10.2 Functions

a) Financial assistance

ADB provides grants and loans to members to fund their economic activities. It grants loan for the development of financial institutions, to private enterprises, to strengthen financial institutions and to public sector enterprises at the rate of 6.53\% of interest.

b) Technical assistance

ADB has created Technical Assistance Fund to provide technical assistance to all the members through institutions, private firms and agencies. The objective behind providing technical assistance is to prepare regional development projects and to help in creating new institutions on regional basis related to agriculture, industry and public administration. It provides advisory services also.

4.10.3 Progress

When ADB came into existence it was decided that only small states must be given preference in getting financial assistance but when China became its member, it took financial assistance and breached the decisions of ADB Charters and the same was followed by India. India has taken financial assistance for the development of power sector, roads, ports, etc. From 1966 to 2000, India has borrowed nearly $5.8 billion loan from ADB.\textsuperscript{115}

\textsuperscript{114}\textsuperscript{}Supra Note 108, at 491
\textsuperscript{115}\textsuperscript{}Supra Note 108, pp 493 & 494
4.10.4 Drawbacks

As most of the members of ADB are economically poor, the financial assistance is not adequately fulfilled, developed states are not ready to help developing states. There has been an increase in loan sanctions but disbursement has always been less and the most important lacuna is that, it will fund only huge project than funding small community based projects.

4.11 Conclusion

To conclude, the international authorities especially the World Bank and OECD have done a commendable job by issuing guidelines and basic principles to govern FDI. The present BITs and domestic policies of FDI are based on them. There is a necessity for a separate world forum as demanded by the developing states which can exclusively handle FDI and related matters for its better and effective protection. All the authorities once again must join their hands and take initiative to frame multilateral framework with uniformity to promote FDI across the globe. There must be a proper forum to discuss and decide the issues of conflict among the states and to overcome the problems faced by developing states. The international financial institutions must give more preference to less & least developed countries and lend financial assistance to all their projects may be big or small. The developed states must come forward to transfer advanced technology to under developed states to improve their industrial sector which automatically improves their economic conditions which may enabled them to compete in global market along with other states, which will serve the purpose of globalization. In regional regime, the investment policy must maintain non-discrimination principle to protect the interest of poor states and all the states must be abide by their regional investment agreements without giving scope for its violation. As it is highlighted in World Investment Report 2016, the FDI Policy must be liberalised to attract more FDI especially into developing regions. The UNCTAD must maintain proper statistical information about FDI and share the same with contracting states for improvement of FDI policies. The regional investment blocs must maintain uniformity in implementation of investment policies in order to remove the regional economic disparities which are created by RIAs. Both developed and developing states must have common interest to frame multilateral agreement on investment having scope for protection of FDI and the domestic economy of host state. The present BITs & RIAs must adopt the guidelines.
framed by the World Bank to maintain balance between investors’ interest & host states and there by promoting the sustainable developmental goals of UNCTAD. The domestic investment policies must give importance to national security consideration while screening the flow of FDI as it is mentioned in World Investment Report 2015.