CHAPTER-8

CONCLUSION & SUGGESTIONS

‘Sustainable development is the pathway to the future we want for all. It offers a framework to generate economic growth, achieve social justice, exercise environmental stewardship and strengthen governance’

Ban Ki Moon,
Secretary General,
United Nations Organization

8.1 Brief Review of Chapters

First chapter deals with introduction about the concept of FDI, theories and the key issues related to FDI in the current scenario. The chapter has discussed about the objectives of the study, scope of the study, statement of problem, research questions, statement of hypothesis and the methodology adopted. There is a conflict among the states related to the concept of ‘FDI’ and is interpreted differently by various institutions. Few have interpreted with wider definition and others are given the narrow meaning. The chapter has also highlighted the burning issues in connection with FDI in the present scenario such as violation of human rights, environmental degradation, violation of workers’ rights, destroying the local producers and damaging the cultural rights of indigenous people. In order to meet the challenges of globalization, the domestic FDI policies must adopt international investment policy standards as laid down by UNCTAD which gives scope for sustainable developmental goals. The chapter gives a bird’s eye view about the research topic.

Second chapter explains about the historical development of international investment laws, its origin and evolution. The historical study of investment law is categorised into three sections, pre-colonial era, post-colonial era and global era. The chapter also deals with how the general principles and customary principles of international law contributed for growth of investment laws in international regime. It explains about the contributions made by many states by signing many treaties which became a foundation for the present BITs and RIAs to protect FDI. The international conventions like The Hague Convention, Convention on Protection of Foreign Property related to foreign investment were drafted, but due to lack of co-ordination among states they did not see the day light. During historical period, more significance was given to protection of foreign investment, slowly the situation...
underwent a drastic change and the importance was given to host states and their development. The investors’ rights were protected by using military power or diplomatic process by which the capital-exporting states were interfering in internal affairs of host states and it was opposed by the later. The customary principle of international law was followed to accord protection to investors. In general, during historical period the foreigners’ trade and property was well protected by signing FCN treaties which became a foundation for present BITs.

Third chapter has analysed the various international investment instruments which are in the form of treaties, agreements, investment measures and schemes enforced by member states to protect FDI. It has critically analysed the various principles such as national treatment, MFN treatment, minimum standard of treatment and fair & equitable compensation which are developed through investment instruments by the signatory states. The chapter also deals with the economic incentives especially tax incentives provided by host state to attract FDI and the problem of double taxation faced by the investors which are discussed in detail. The double taxation is a burning issue at present which can be handled by signing DTAT. The chapter has pointed out that the regional investment agreements have created regional economic disparities which can be removed only by framing MAI. The developing states through investment treaties are imposing certain restrictions on FDI, which have to be reduced to certain extent to encourage the flow of FDI. The host states must maintain a balance between the protection of domestic economy and interest of investors by adopting the principle of sustainable development.

Fourth chapter has dealt with international authorities like WTO, UNCTAD, World Bank, OECD and their role in protecting & governing FDI in international regime. The chapter has also discussed about the conflict of interest between developing & developed states with respect to framing multilateral investment agreement. The proposed MAI was more favourable to foreign investors as a result of which it was not accepted by many developing states. The OECD made all possible efforts to draft uniform set of codified FDI laws to maintain balance between investors and developing states but due to internal political conflicts, it was not achieved. MAI draft proposed for sustainable development of economy but it was not agreed by developed states which was a major drawback of MAI. In the present day circumstances, we need an international forum which can frame definite laws related
to FDI at international level. The investment insurance schemes initiated by MIGA must widen its scope to include even the small projects where FDI is invested. There is a requirement of a separate forum which can govern FDI at international regime exclusively.

Fifth chapter explains about the settlement of investment dispute mechanism by international arbitration or conciliation or negotiation. The investment dispute between two states can be referred to ICJ or it can be resolved by ICSID arbitration tribunal. If disputes between investor & states or between two private individuals occurs, it may be resolved through ad-hoc arbitration. The option is always available to the investors to choose the proper forum to resolve their disputes which is supported by ‘Fork in the Road’ principle. As the local courts of host state lacks transparency, the investors always prefer arbitration mechanism to get adequate relief for the loss suffered by them due to host states. There are no proper guidelines laid down in international regime with respect to expropriation of foreign property, process of expropriation and the amount of compensation to be paid to the investors by the states. The process of annulment of arbitral award is not serving any purpose and the cases decided by ICSID where most of the awards are in favour of MNCs of developed states which have created apprehension among developing states, hence they prefer domestic courts to decide investment disputes which is not preferred by investors.

Sixth chapter has dealt with the regulation of FDI in India which explains how laws are developed during the ancient period to protect foreign trade & property. Since 1990s, the liberalised industrial policies are adopted by the government which opened the Indian economy for foreign companies with the aim of attracting more FDI which is very much required for economic development. The chapter also explains about the authorities which are regulating and managing FDI by framing liberal FDI policies through single window office. India has become a favourable destination for FDI because of transparent and prompt administrative mechanism. The chapter also discusses about the sectors which are opened and prohibited for FDI, the key issues related to flow of FDI, statistical data about FDI, BITs signed by India and the chapter in detail has also discussed about the impact of FDI on Indian economy with reference to decided cases.
Seventh chapter deals with the empirical study in Karnataka related to FDI and the facilities provided by the government to attract FDI in Karnataka. The chapter also explains about the role of Karnataka Udyog Mithra (KUM) in facilitating the flow of FDI and the statistical data about FDI in various sectors. The chapter consisted of the overall responses for questionnaire from customers, retail sellers and investors in Bengaluru.

8.2 Testing of Statement of Hypothesis

The research work started with the assumption that FDI is supported and well protected by international investment instruments which are making the flow of FDI easy. At the initial stage of the research, it was assumed that FDI is inevitable for economic development of developing states like India. As the research work progressed, the above mentioned assumptions are proved correct to some extent and some are disproved. In this section the statement of hypothesis are tested on the basis of data collected through doctrinal and empirical study.

- **The growth of international investment treaty helps in flow of FDI which are beneficial for economic development of host states in the present day situations.**

The international investment instruments including BITs, RIAs are the most effective means which are adopted by the states and the investors to invest. These BITs and RIAs are the replica of customary and general principles of international laws which are followed by the states. Treaties have incorporated the principles such as national treatment and MFN treatment to protect the interest of investors and on the other hand it has incorporated preferential treatment principle to protect domestic producers of host state. Many treaties have included clauses like arbitration clause, umbrella clause to provide justice to the parties during the settlement of investment disputes and these clauses will not give any scope for ambiguity. As per the data collected, many BITs are terminated by the states which have created a threat in international regime that FDI is not protected effectively and many BITs are terminated before the completion of its period. Some economies are totally depending on FDI for their economic development example least developed state in African continent and to some extent India is also depending on FDI. FDI plays a key role in
economic development which is already proved by China since many years. This hypothesis is proved to be correct.

- **Multilateral investment treaty can replace the existing bilateral treaties to provide better protection to FDI at international level as it maintains uniformity and stability in its applications and removes regional disparities created by regional investment agreements.**

  BITs and RIAs are implemented as per the terms & conditions of the parties which differ from state to state or from region to region. To overcome this, multilateral agreement investment having uniform and stable investment principles which has to be followed by every states and the termination of treaty can be avoided by MAI as there will not be any scope for termination which happens with respect to BITs. As per the theoretical data collected, the regional investment treaties like ASEAN, NAFTA, APEC and SAARC are concentrating only on flow of FDI within their own regions and helps in development of a particular region. These regional agreements are creating regional economic disparities which can be removed by MAI, as MAI will be uniformly applicable to every contracting party without any discrimination. The hypothesis is proved correct as regional investment treaties are creating regional disparities in the world.

- **Under international laws, the procedures for settlement of investment disputes as per international arbitration under ICSID is protecting the interest of states than protecting investors which discourages FDI.**

  The research has emphasised on many cases related to the role of ICSID in protection of FDI. Being an international forum to decide investment disputes, the Centre has adopted the principle of independent arbitrator & rule of transparency in resolving the disputes. If arbitrator is an independent person, he can act neutrally and can protect the interest of both the parties. The cases decided by ICSID Centre are in favour of investors due to which many awards of the Centre are subjected to annulment procedures. When compared to permanent arbitration forum, the ad-hoc arbitration has become more popular among the investors as it is proved in non-doctrinal study conducted in Bangalore International Arbitration Centre. Many are suggesting that there must be a provision for appeal against the arbitration award which is opposed to the ADR system as ADR system is developed for speedy disposal
of the cases. In such situation, the International Investment Court must be established to resolve the disputes. This hypothesis is proved to be wrong as ICSID is more favourable to investors from developed states.

- **Economic incentives such as tax holidays, export & import subsidies of host state are attracting more FDI into developing state’s economy.**

  Many states have adopted incentive method to attract FDI where host states provide economic incentives like tax holidays, exemption from charges, providing subsidies, etc as explained in the thesis to attract more FDI. But these incentives are creating disparities between foreign investors and domestic investors which have to be addressed properly in international regime. These incentives must be given on the basis of sectors or the amount of investment and sometime the incentive method will have negative impact on domestic economy because states will lose its revenue. This hypothesis is proved to be correct in the existing situations.

- **India’s liberal and investors friendly policy has made her a top destination for FDI at international level.**

  As per the statistical data collected, the hypothesis is proved to be correct because till 1990 the flow of FDI was very less as a result of which India was depending upon international debt to meet its domestic economic expenditure. During 1990s the liberalised industrial polices which opened the industrial sector for private investors due to which more FDI entered into India. At present, India’s transparent and liberal FDI policies made India as one among the top 20 states of the world in flow of FDI. As per the data collected from investors, who prefers to reinvest in India proves that they are satisfied investing in India.

- **FDI in retail sector gives more options in goods and sells good quality of goods to the consumer.**

  The empirical study with respect to this hypothesis which says that the entry of Malls into retail business in Bengaluru has given more options for the consumers to purchase goods and the quality of goods is high when compared to the quality of goods sold in Kirani shops which is proved by the results. As per the data collected, 60% of the consumers said that goods sold in Malls will have better quality when compared to goods sold in Kirani Shops.
• FDI in retail sector has permitted big giants like WalMart, Supermarket, Hypermarket and other Malls to enter the market in retail business in Bengaluru have damaged the business of Kirani shops.

The hypothesis is proved to be correct. The entry of Malls in retail sector in Bengaluru has destroyed many small Kirani shops. 94% of local retail sellers are affected by entry of Malls in Bengaluru while 6% local retail sellers are not affected as they improved the mode of sale. FDI in E-commerce has badly affected our retail sellers. The data proves that 68% of Kirani shops are affected by this and 32% are not affected by E-commerce FDI. As per the data collected, 77% of the Kirani shops are opposing FDI in retail sector and just 23% Kirani shops are inviting FDI in retail sector whose business is not affected by the entry of Malls in Bengaluru.

8.3 Findings

• The definition of FDI includes all types of investment which are in the form of capital, MNCs, Technology transfer, foreign institutional investment but does not include portfolio investment.

• In the past, foreign investment & properties were well protected by FCN treaties. They did not think about host state. But in the present scenario, the principle of international law says that the interest of both investor & host state must be protected and the world authorities are encouraging sustainable development.

• Investors and the states prefer BITs than MAI to attract FDI as the signatories can terminate BITs as per their will and wish. But due to conflict of interest between developing and developed states, the proposed MAI was not adopted by the contracting parties. The host states do not have a single foreign investment law, they are divided into statutes, regulations and decisions of Investment Promotion Board or Investment Agency.

• Foreign investors prefer ad-hoc arbitration than international arbitration under ICSID to settle their investment disputes which is an easy mode.

• FDI Authorities in India are functioning effectively and facilitating FDI, as a result of which flow of FDI has increased steadily since 2013 specially after initiating ‘Make in India’ programme which is able to attract more FDI in manufacturing sector and India has adopted sector oriented FDI.
FDI in retail sector is destroying the domestic retail seller. The Malls are providing various brands of product and as expressed by the consumers in Bengaluru, the quality of goods are also high. The Malls are selling foreign goods as a result of which local products are not being sold in markets.

The foreign investors both MNCs & individual investor did not give full data about their investment especially about the sectors where they have invested and the amount of investment as they considered it a very confidential.

The contracting parties must effectively incorporate the investment treaty provisions in FDI policies to protect investors’ interest.

International law lack sanctions, as a result of which many international investment principles are not followed by states especially by developed states. To overcome this, an international investment body shall be established and it must exercise control on every states. The body must have power to impose sanctions on state for breach of international laws.

8.4 Suggestions

Establishment of World Investment Organization

To develop a uniform multilateral FDI laws we need a strong Global Investment Organization with compulsory membership of all the states. This global organization must build a strong foundation to draft Global Investment Treaty without giving any exceptions to any member states. Once it is established, it will be easy to negotiate, conclude and implement the global treaty where all the states will represent their interest. It should also provide for institutional framework for development of Global Investment Treaty where linkages will be provided with World Bank Group. It should also provide for linkages with regional organization to maintain balance between global and regional organizations. It should provide for an investment policy review procedure both for member states and member regions and the Global Investment Treaty must look into FDI from various aspects such as taxation, labour rules, environmental issues, domestic enterprises, local producers’ interest, etc. This global investment forum could assure the implementation of liberalization commitments undertaken by its member states and member regions. The global authority must provide rule making expertise to make more liberalised and effective provisions to protect the interest of both host states’ economy and FDI. Unlike WTO,
the world investment organization must strictly impose sanctions on breach of global investment treaty.

- **Future MAI must incorporate provisions to protect the interest of both investors and host state**

  The MAI must provide larger transition periods for developing states which will have more time to fulfill their liberalization commitments to attract FDI and restrictions on FDI must be removed to encourage free flow of FDI. Multilateral investment instrument should provide for common legal standard and basic principle to frame fruitful domestic investment laws. It shall provide common market for investment on the basis of treaty standards and non-discrimination principles and the common market should also provide for limitation of structural, technical and fiscal barriers which are not included at present in investment treaties. The future MAI must provide both tax and other economic incentives, otherwise it cannot protect the interest of foreign investors. The future MAI must incorporate uniform set of investment principles which will be applicable to all the states with binding force. MAI will remove the regional economic disparities created by RIAs. Once MAI is implemented, it will remove the threat of termination of investment agreement and there shall not be any provisions for withdrawal from the membership of MAI.

- **States FDI laws must stimulate flow of FDI into economy**

  States need to adjust their domestic laws to compete in integrating world economy and increasing FDI flows have encouraged many states to enact new competition laws. Economic incentives and promotion strategies to be adopted by host states to attract FDI. The host states along with liberalized policy must also have upgraded technology and skill, raise local procurement, secure more re-investment of profits, better protection of environment and consumers. These factors will ensure more benefits from FDI performance. The liberalized policies must be supported by Anti-Competition laws which will prevent foreign affiliates from crowding out viable local firms and prevent MNCs which upset sensitiveness. Recognise the nexus between investment and competition policy, increase in FDI stimulates to enact new competition policy. Host state laws must also concentrate on performance requirements, incentives, technology policies and competition policies as it will affect the developmental objectives. Host states must take action against tax avoidance to
support domestic resource mobilization to encourage productive FDI for sustainable
development. The host state laws must maintain balance between the interest of
investors & domestic players and states must have uniform investments code as per
which sectors will be commonly opened for FDI in all states. To regulate FDI
performance, the investment incentives shall be linked with SDGs to make policies
more effective and reduce market failures. Governments should carefully assess their
incentive strategies and strengthening their evaluation and monitoring process. The
host state must generate nexus between FDI policies and industrial policies to increase
international co-operation.

- **Host state must stop disinvestment of FDI**

  Host state must impose restriction on investors to stop disinvestment of FDI
  projects. In 2014, due to the process of disinvestment, the flow of FDI into developed
economies declined by 28% to $ 99 billion and flow of FDI into US was declined to
$92 billion due to single large scale disinvestment. The disinvestment crisis also had
impact on flow of FDI into Europe where FDI fell by 11% to $89 billion which was
equal to 1/3 of FDI flow in 2007.

- **Establishment of International Investment Court**

  As pointed out by UNCTAD in World Investment Report 2015, International
Investment Court must be established to replace the existing investor-state dispute
arbitration mechanism as appeal mechanism is not provided in international
arbitration and not doing justice in resolving investment disputes. Individuals shall be
given access to International Investment Court.

- **Appeal mechanism in international arbitration proceedings**

  To avoid errors in arbitration proceedings and to reduce annulment of
arbitration awards, appeal provision must be included in international arbitration
especially in ICSID Convention.

- **Establishment of Arbitration Ombudsman**

  To check the validity of arbitration proceedings and to redress the grievances
of disputed parties, arbitration ombudsman shall be created in international regime to
supervise the arbitrators.
• **Investment Policy must stimulate Sustainable Developmental Goals**

  The National Investment Policy must facilitate and promote investments in infrastructure, renewable energy, food security, health, water & sanitation and education sectors (priority sectors) where it gives more scope for human development to achieve Sustainable Developmental Goals as it is highlighted in World Investment Report 2016. FDI Policy must maintain balance between protection commitments and regulatory mechanism for sustainable development. The international investment governance must ensure the achievement of Sustainable Developmental Goals.

• **India must adopt and effectively implement FDI Policy to protect both foreign investors and domestic players**

  FDI is making India an emerging economy in global market. There must be Public Private Partnership (PPP) for effective management and supervision of FDI in infrastructure sector. Preferential treatment shall be given to foreign investors depending upon the sectors where they invest, which includes tax preferential treatment like income tax concessions, import-export preferential treatment, banking and foreign preferential treatment, it indicates preferential treatment can be provided but it shall be only in selected sectors which will not affect the domestic producers in India.

• **Harmonization between FDI Policy and allied laws**

  Indian FDI policies must synchronize with allied laws such as Competition Act, Industrial Policy, Environmental standards, Arbitration Act, Companies Act, Anti-corruption laws for effective regulation of FDI.

• **Encourage FDI in agriculture sector**

  India must initiate liberal policy to attract FDI in agriculture sector to remove food scarcity and to improve infrastructure facilities and to allow new technologies related to agriculture. FDI shall be allowed in co-operative farming. India should allow FDI in co-operative farming where it should follow ‘Amul Co-operative Model’ among villagers in protecting the perishable items.

• **Establishment of Investment Court in India**

  India is in need of a separate investment court which will exclusively handle foreign investment cases, as regular courts are overburdened and they cannot dispose
international investment dispute quickly. To overcome this, a separate wing has to be created in High Courts of all the states. Mr. T.S. Thakur, former Chief Justice of India, urged that, to attract FDI into India, judicial system must be effective and to gain investors’ trust, judiciary must be independent & impartial in its role. Legal Counsels must be specialised in Foreign Investment Laws.

- **India must give preference to import substitute FDI**

  India should allow FDI as import substitute in those sectors where import of goods is more, goods shall be manufactured with the help of FDI & foreign technology which will help to reduce India’s imports and save foreign exchange.

**8.5 Conclusion**

FDI has positive effect on development of economy by creating job opportunities, improving standard of life and consumer is a king. On the other hand, FDI has negative impact on environment, health, domestic market, labour rights and human rights. Investors while seeking protection should know that they have certain responsibility towards host state. In order to protect the interest of all the states, there is a necessity to reform investment treaty strategy, in the reform process all the stakeholders must give an opportunity to place their opinion, political analysis, technical co-operation and there must be a platform for exchange of experiences and consensus building.

To attract more FDI, investment incentives must be closely aligned with Sustainable Developmental Goals. The UNCTAD in World Investment Report 2013 suggested that set of Sustainable Development Goals for 2015-2030 must concentrate on poverty reduction, food security, human health, education, climate change mitigation and other objectives within the purview of economic, social and environmental issues. High product prices and increase profits attract more FDI but it is not feasible in developing states like India. At present, inspite of liberal policies, the flow of FDI is reduced because of less cross-border M&A, decline in local demand, decline in expected return in projects related to natural resources, stop of round-tripping of FDI, small size of domestic market, limited natural and human resources and global financial crisis. States must facilitate for fast communication of information related to FDI and there must be fair distribution of profits between host and home state.
Mr. Montek Singh Ahluwalia, Indian Economist said that FDI is not a threat to small shops, Retail sector is the second biggest employment creator and it has nearly created 44 million jobs in India and also said that quality of jobs in traditional retail business is low and the modern retail sector improves quality of labour. But as per ‘The BusinessLine’ newspaper, which pointed out that if Malls comes in India, 8 million people will lose their jobs. The US Census Bureau information found that the growth of ‘Hyper market’ has negative impact on small stores in US market. The entry of FDI in agricultural sector may have benefits like better back-end infrastructure & cold storage chain, Government can generate funds, jobs and improve standard of life by stimulating the economy. Consumers will get more choice and goods will be available at affordable price, farmers will get healthy returns and less wastage of agricultural goods because of availability of cold storage facility by entry of FDI.