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Editorial Office: Faculty of Law, Sriwijaya University, Jalan Srijaya Negara, Palembang, South Sumatra 30139, Indonesia.
Phone: +62711-580063Fax: +62711-581179
E-mail: sriwijayalawreview@unsri.ac.id| sriwijayalawreview@gmail.com
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International Organisations Efforts in Regulating Foreign Direct Investments in the Host States

Mohammad Belayet Hossain[a]

[a] *School of Law, Universiti Utara Malaysia, Malaysia and School of Law, Chittagong Independent University of Bangladesh, Bangladesh. Email: galib@ciu.edu.bd*

Article

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Abstract

Despite various efforts made by the international organisations over the decades, the idea of concluding an international agreement on foreign investment is still some way off. Due to the protest from the developing states, at this moment, international organisations do not have this item on their active agenda. The objective of this paper is to provide a thorough understanding of the law of foreign investment and the interplay between law and politics in regulating foreign investment. This paper examines two questions, namely, what are the efforts of the international organisations of regulating foreign investment? How has the law been interpreted over the years? This paper will critically analyse various international instruments using a doctrinal research method in order to find out their effort to regulate FDI in host states. The findings of this study show that contribution made by the UN and other international organisations may not have led to a triumphant conclusion of a universal instrument. However, they have spelt out the main principles of law governing the treatment of foreign investment under international law.

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INTRODUCTION

‘Globacolisation' is a combination of two words: globalisation and colonisation. Indeed, foreign investment has made a positive contribution to developing the economy of many developing and least-developed countries over the last few decades. At the same time, it is also true that the developed states and powerful multinational enterprises became greedier to make a profit in the name of democracy, such as human rights. If we analyse the history of the last few decades, we will see that even a country was invaded by the dominant developed nations just to fill up their hunger for natural resources. At present, Venezuela is in the pipeline of invasion due to its huge natural resources, which has become a curse instead of blessings. Therefore, to fulfil the purpose of globacolisation, the developed states required the weaker host states to liberalise their national laws and enact laws in favour of foreign investments. In doing so, these states have opened their door for

the developed states and multinational enterprises to enter into their sovereign territory and allow them to take control of the countries' internal affairs. Thus, the purpose of globacolisation, have been served over the last decades.

The FDI is regarded as an indispensable aspect of economic development and without proper regulation; the essence of economic development would be defeated.[1] This study is necessitated since there had been no in-depth studies on FDI laws and policies. There are only a few academic studies on FDI in general, but there has been a severe dearth of extensive legal research on the laws and policies related to FDI.[2] Furthermore, almost all the works done so far on FDI are from an economic perspective.[3] Therefore, this study will significantly contribute to the legal knowledge and filled in the gap by consolidating the literature in FDI laws. This study will also benefit many parties, such as government; management of multinational companies; developing and LDCs; as well as academics. The government would benefit from the outcome of the study by improving FDI legislation. The MNEs would benefit in order to avoid a negative impact on the socio-economic development and national interest and ensure a positive contribution of FDI in host countries. In recent years, many developing and LDCs are also concerned about regulating FDI.

This paper aims to provide a thorough understanding of the law of foreign investment and the interplay between law and politics in regulating foreign investment. With changes like international economic and political relations, the debate on the law of foreign investment has moved on. Due to globacolisation, various attempts were made by the United Nations (UN) and international institutions to adopt a comprehensive agreement to regulate foreign investments. However, the Organisation for Economic Co-operation and Development (OECD) tried in the late 1990s to conclude a Multilateral Agreement on Investment (MAI), but it resulted in failure. The World Trade Organisation (WTO) then decided to include foreign investment in its agenda for the Development Round of trade negotiations through the Doha Declaration of November 2001. However, in July 2004 this Organization also decided to set aside the project. For the WTO, it was a complex area, since an unwieldy number of differences of opinion among the WTO members existed as to the nature, scope and desirability of the conclusion of an international treaty on such a matter under the auspices of the WTO. Thus, the law of foreign investment is currently at a crossroads.[4]

ANALYSIS AND DISCUSSION

The Involvement of International Organisations

The failings of the UN in the 1970s and 1980s to come up with a final or definitive word on foreign investment law left the door open for other international organisations in an attempt to regulate foreign investments. Some of the international bodies, which tried to become involved, are the

[1] Nazneen Ahmed and Dev Nathan, *Improving Wages and Working Conditions in the Bangladeshi Garment Sector: The Role of Horizontal and Vertical Relations*, 2014.

[2] M. Rafiqul Islam, BITs of Bangladesh, *The Daily Star,* accessed February 18, 2019, https://www.thedailystar.net/law-our-rights/news/bits-bangladesh-1668619.

[3] M. Rafiqul Islam.

[4] Mohammad Belayet Hossain, 'International Economic Law and Policy: A Comprehensive and Critical Analysis of the Historical Development', *Beijing Law Review*, 9.4 (2018), 524.

World Bank; the Organisation for Economic Co-operation and Development; the International Labour Organisation; the World Trade Organisation.

The 1976 Declaration of the OECD on International Investment and Multinational Enterprises includes Guidelines for Multilateral Enterprises. As the next step in this direction, the OECD sought to conclude once again a Multilateral Agreement on Investment (MAI) in 1998.[5] Article III of the draft MAI contained provisions concerning the treatment of investors and investments. On the protection of investment draft, Article IV made a more robust provision in favour of foreign investors. Critics described the draft MAI of the OECD as a 'Global Bill of Rights' for foreign investors. It was seen in some quarters as an instrument based mainly on the assumption that capital has little or no social obligation in the new global economy.[6] The new OECD Guidelines are more balanced than the draft MAI – they include provisions designed to: achieve sustainable development; protect the environment[7] and human rights.

When there was a momentum towards adopting guidelines or codes of conduct for transnational corporations or multinational enterprises (MNEs) in the 1970s, the International Labour Organisation adopted its own Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977 (the MNE Declaration), amended in 2000. The non-binding Declaration offers guidelines to MNEs, governments, and workers' and employers' organisations in areas relating to employment, training, working and living conditions, industrial relations. Many of the principles of the ILO's MNE Declaration are reflected in the revised Guidelines of the OECD. While the OECD's Guidelines remain as guidelines, the provisions of the ILO's MNE Declaration have been reinforced by certain legally binding international labour conventions and recommendations.

Although efforts were made during various GATT Rounds of Trade Negotiations to include investment onto the international trade agenda, the WTO itself had been engaged in analysis and debate about the relationship between international trade and investment since 1997. It was only at the Doha conference that the WTO committed itself to include investment as part of its main agenda.[8] At the end of the Uruguay Round of multilateral trade negotiations, the Agreement on Trade-Related Investment Measures (TRIMS) was concluded. The 1994 WTO Agreement deals with certain aspects of foreign investment. It prohibits governments from requiring foreign investors to purchase inputs locally or to sell their output domestically rather than exporting it.

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[5] Witherell, W.H. "The OECD Multilateral Agreement on Investment," 4(2) Transnational corporations (August 1995), pp.1–14.

[6] For instance, see a summary of the debate in the Commission on Sustainable Development in Environmental policy and law, vol. 28 (3–4), 1998, p.129.

[7] Birkah Latif, Syamsuddin Muhammad Noor, and Juajir Sumardi, 'The Impact of the Development of Trade Practices on Enforcement of International Environmental Law The United Nations Conference on Trade and Development (UNCTAD)', *Sriwijaya Law Review*, 3.2 (2019), 137–51 <https://doi.org/10.28946/slrev.Vol3.Iss2.226.pp137-151>.

[8] In 1982 the US put the regulation of foreign investment onto the agenda at a GATT ministerial meeting. The investment was a significant issue in the Uruguay Round and resulted, among other things, in the adoption of the TRIMs Agreement.

The Role of the World Bank

The World Bank has had a long-standing interest in promoting foreign investment for economic development and has associated itself with several initiatives in this area.[9] Among the initiatives is the Convention for the Settlement of Investment Disputes of 1965, the Convention Establishing the Multilateral Investment Guarantee Agency of 1985, and the 1992 Guidelines on the Treatment of Foreign Direct Investment.

The International Convention on the Settlement of Investment Disputes between States and nationals of other states (ICSID) was concluded in 1965 with the aim of (a) establishing an international centre for the settlement of investment disputes; (b) encouraging states to refer investment disputes with foreign private investors to an international arbitration tribunal. Under Article 25(1), the Centre has the jurisdiction to deal with any legal dispute arising directly out of an investment. According to Article 26, consent of the parties to arbitration under the ICSID would normally be deemed consent to such arbitration to the exclusion of any other remedy. The adoption of the ICSID signalled that other positive developments relating to the law of foreign investment could also take place outside of the UN framework and away from politics.

In addition to legal certainty, potential foreign investors need some sort of guarantee of their investment when they invest in developing countries. Although many individual developed countries have their respective internal system of investment guarantee for those investing in developing countries and investment risks could also be covered through private insurance, it was thought desirable to have an international system of investment guarantee against non-commercial risks, such as expropriation, nationalisation and other political risks. Therefore, as a measure complementary to already existing national and regional investment guarantee programmes[10] and private insurers of non- commercial risks and supplementary to the activities of the World Bank Group, the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) was adopted in 1985. Article 2 of the Convention outlines the objectives and purposes of the Agency. Article 11 of the Convention outlines the risks that may be covered by the guarantee of the Agency. The risks covered include problems associated with: currency transfer; expropriation and similar measures; breach of contract; war and civil disturbance. The guarantee would apply to the foreign investment made in a developing country by a third-country national (whether natural or juridical or whether from a developing or developed country).

In 1992, the Development Committee adopted a set of Guidelines on the Treatment of Foreign Direct Investment. Neither the Bank, the IMF nor the MIGA has the competence to adopt any legally- binding instrument for the international community or to modify the existing rules of international law on the subject matter. The 1992 Guidelines seek to achieve what the OECD Draft Convention could not do in 1967.[11] Part IV makes the definition of expropriation somewhat broader and includes situations such as unilateral termination of contracts that would perhaps not

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[9] Shihata, *The World Bank in a Changing World: Selected Essays,* Dordrecht: Martinus Nijhoff, 1991.

[10] Many developed countries have their agencies to provide insurance coverage to their nationals who wish to invest abroad. See for a list of such schemes, see Akinsanya, A. 'International Protection of Direct Foreign Investment in the Third World', 36 ICLQ (1987), p.67.

[11] Rubin, S.J. 'Introductory Note' to the 'World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment', 31 *ILM* 1363 (1992), p.1363.

have been deemed as straightforward expropriation under traditional international law. Since the CTC was unable, as predicted, to adopt an internationally agreed code of conduct on the TNCs and was eventually disbanded, the 1992 Guidelines remain an essential document on the law of foreign investment. Indeed, the consensus now emerging is that the protection of FDI is potentially beneficial to developing countries. The World Bank Guidelines are helpful in this regard.

The International Convention on the Settlement of Investment Disputes (ICSID)

Foreign investors wish to have legal certainty when making investment decisions. One of those certainties is to have a credible mechanism for the settlement of investment disputes. The perceived wisdom is that if foreign private investors are assured that in the event of a dispute between them and the state in question the dispute can be referred to an independent international tribunal, they would be encouraged to invest in that state. Foreign investors would generally be unwilling to invest in countries where the judiciary is not fully independent, and the political situation is unstable.

However, such investors would be encouraged to invest in such states if the state in question has agreed through an international agreement to settle an investment dispute with potential foreign investors. Accordingly, the International Convention on the Settlement of Investment Disputes between states and nationals of other states (ICSID) was concluded in 1965 with the aim of establishing an international centre for the settlement of investment disputes and encouraging states to refer investment disputes with foreign private investors to an international arbitration tribunal.

Under this Convention, the Bank is the host of the International Centre for the Settlement of Investment Disputes, which is similar in many respects to other international arbitration centres in existence. Arguably, the very idea of submitting investment disputes to the Centre ran counter to the ideas behind the *Calvo doctrine*, the notion of state sovereignty, the PSNR and especially the NIEO. It was perhaps one reason why no state was obliged to become a party to the Convention or to submit any particular dispute to the Centre or any conciliation or arbitration body. All the Convention is designed to do is offer yet another platform for the settlement of investment disputes between a state party to the Convention and private foreign investors, should they wish to avail themselves of this opportunity.

Although an agreement to refer investment disputes to the Centre by a state could be perceived as demonstrating a lack of confidence in its judiciary, the idea behind the Convention is to build confidence in private foreign investors and to provide a credible dispute settlement mechanism for such investors. The foreign investors require maximum protection of their investment in a host state, but most importantly, they require protection against expropriation and protection through the dispute settlement mechanism. Usually, these protections are guaranteed through FDI legislations and BITs. Nowadays, due to globalisation and fall of communism, there is a unilateral assertion of protection against expropriation through national legislation or BITs. Regarding investment dispute settlement, foreign investors have various options to choose from; but

settlement through ICSID has become the most preferred means of settlement.[12] In the case of undesired government intervention or barrier to enforce investment contract, the foreign investors require impartial legal certainty of settling investment dispute. Due to this, most often host states adopt laws or policies to the satisfaction of foreign investors or capital-exporting countries at the compromise of exhausting of local remedies in dispute settlements.

In the absence of any specific FDI dispute settlement mechanism, another way is to settle it through bilateral negotiation by the contracting parties, *i.e.* through BITs. Usually, there are two types of dispute settlement texts available in the investment treaties. These are investment disputes and disputes relating to the interpretation or application of the agreement. In BITs, the contracting parties mutually decide the method of settling investment-related disputes. When any host state signs a BIT, it is giving consent to the foreign investors to invoke remedies through arbitration, which mainly refers to the international arbitration system, such as ICSID. However, many BITs have provision for amicable settlement or recourse to the local courts. There is no global consensus on this issue. Apart from the BITs, there are also individual agreements, where parties mutually select a specific dispute settlement mechanism by inserting an arbitration clause. So as it appears that dispute settlement matter may fall under the BITs or may be dealt with discreetly, depending on the agreement between the contracting parties.[13] In some BITs, there is a choice between local courts or arbitration in default of an amicable settlement. Sometimes the exhaustion of local remedies is a condition, and in other cases, the simultaneous application of two methods is required, such as litigation in local courts and international arbitration.[14]

In *Saipem v Bangladesh* case[15], based on a BIT between Bangladesh and Italy, claims arising out of the actions of the State-owned entity Petrobangla and of the courts of Bangladesh allegedly aimed at sabotaging an ICC commercial arbitration proceeding and the subsequent non-enforcement of the award concerning the breach of a contract concluded between the claimant and State-owned entity for the construction of a long-distance gas pipeline. The ICSID has decided in favour of Saipem, which was based on indirect expropriation in the light of an expropriation provision.[16]

In Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd case[17], an international arbitration court turned down US oil giant Chevron's age-old claim of around $240 million from Petrobangla. Chevron had filed the case arguing Petrobangla has been illogically deducting over the years from Chevron's earnings from gas sales. Petrobangla claimed the amount to be $70 million, instead of $240 million. After avoiding the arbitration for

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[12] International Centre for Settlement of Investment Disputes is an international arbitration institution established in 1966 for legal dispute resolution and conciliation between international investors. The ICSID is part of and funded by the World Bank Group, headquartered in Washington, DC, in the United States. See https://icsid.worldbank.org/en/ for more details.

[13] Jan Ole Voss, *The Impact of Investment Treaties on Contracts between the Host States and Foreign Investors* (Martinus Nijhoff Publishers, 2011).

[14] Nakib, M. N. (2014). Regulating Foreign Direct Investment for Development: Bangladesh in context.

[15] (2007) ICSID Case No. ARB/05/07, Decisions on Jurisdiction and Recommendations on Provisional Measures, para 122.

[16] *Bayindir InsaatTurizm TicaretVeSanayi S.A. v Islamic Republic of Pakistan*, (2005) ICSID Case No.ARB/03/29, Decision on Jurisdiction, para 121.

[17] ICSID Case No. ARB/06/10.

three years, Petrobangla went to the ICSID and submitted that the deduction was fair and legal. Chevron has been arguing that the four per cent wheeling charge is applicable only if it uses Petrobangla's pipeline to supply gas to other parties. However, it has been supplying gas from the three gas fields–Jalalabad, Moulvibazar and Bibiyana–to only Petrobangla. Petrobangla argued that it has been deducting the four per cent charge as per the Gas Purchase Sales Agreement (GPSA) with Chevron. After hearing the argument of both side, ICSID gave the verdict in favour of Bangladesh. It concluded that Petrobangla had been rightfully deducting the wheeling charges and it has the right to continue charging Chevron for the same.

Of course, the states are free to agree to submit investment disputes to international commercial arbitration or other arbitration or conciliation centres. However, by becoming a party to the Convention states would, as the perceived wisdom goes, stand a better chance of attracting foreign investment from those investors wary of losing their investment in the state in question through expropriation, nationalisation or other actions of the government of that state. Thus, ratification of the ICSID would serve as some sort of an insurance or assurance to potential investors that they would always have recourse to this independent dispute settlement mechanism should the government of a state undermine the property rights of the foreign investors. Under Article 25(1) the jurisdiction of the Centre would be as follows:

> "The jurisdiction of the centre shall extend to any legal dispute arising directly out of an investment, between a contracting state (or any constituent subdivision or Agency of a contracting state designated to the centre by that state) and a national of another contracting state, which the parties to the dispute consent in writing to submit to the centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

According to Article 26 consent of the parties to arbitration under the ICSID would normally be deemed consent to such arbitration to the exclusion of any other remedy. Similarly, once a dispute is submitted to the ICSID Centre, diplomatic protection by a contracting state would also be ruled out. The provision in Article 42(1) is perhaps one of the most important ones because this article stipulates the law applicable to a dispute submitted to the arbitration tribunal of the ICSID Centre:

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

Thus it was quite a major departure from that position to agree to the provisions of the ICSID just outlined, especially at a time when a vast majority of developing states was asserting within the UN that any dispute arising out of expropriation or nationalisation should be resolved by applying the national laws of the states concerned and by resorting to the local remedies provided for in the national laws and constitutions of the host states. The adoption of the ICSID signalled that other positive developments relating to the law of foreign investment could also take place outside of the UN framework and away from politics.

The Multilateral Investment Guarantee Agency (MIGA)

In addition to legal certainty, potential foreign investors need some sort of guarantee of their investment when they invest in developing countries. Although many individual developed coun-

tries have their respective internal system of investment guarantee for those investing in developing countries and investment risks could also be covered through private insurance, it was thought desirable to have an international system of investment guarantee against non-commercial risks, such as expropriation, nationalisation, other political risks.

It would be in order to promote foreign investment in general and private foreign investment in particular. Of course, protection was available to foreign investors under bilateral investment treaties, international law principles relating to the treatment of foreign investment and diplomatic channels. However, it was considered desirable to have an additional mechanism designed to alleviate concerns related to non-commercial risks in order to promote the flow of foreign investment in developing countries. Therefore, as a measure complementary to already existing national and regional investment guarantee programmes[18] and private insurers of non- commercial risks and supplementary to the activities of the World Bank Group, the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) was adopted in 1985. Article 2 of the Convention outlines the objectives and purposes of the Agency in the following terms:

> "The objective of the Agency shall be to encourage the flow of investments for productive purposes among other member countries, and in particular to developing member countries, thus supplementing the activities of the International Bank for Reconstruction and Development (hereinafter referred to as the Bank), the International Finance Corporation and other international development finance institutions. To serve its objective, the Agency shall: (a) issue guarantees, including coinsurance and reinsurance, against non-commercial risks in respect of investments in a member country which flow from other member countries; (b) carry out appropriate complementary activities to promote the flow of investments to and among developing member countries; and (c) exercise such other incidental powers as shall be necessary or desirable in the furtherance of its objective."

Article 11 of the Convention outlines the risks that may be covered by the guarantee of the Agency. The risks covered include problems associated with currency transfer, expropriation and similar measures, breach of contract, and war and civil disturbance.

The guarantee would apply to the foreign investment made in a developing country by a third-country national (whether natural or juridical or whether from a developing or developed country).

The 1992 Guidelines on the Treatment of Foreign Direct Investment (FDI)

The promotion of foreign investment has long been an area of interest for the World Bank. It was joined by the MIGA whose constituent document states that it is supposed to carry out research, undertake activities to promote investment flows, disseminate information on investment opportunities in developing member countries.[19]

Accordingly, the Development Committee, a joint committee of the World Bank and the International Monetary Fund (IMF) requested the MIGA in 1991 to prepare a 'legal framework' to promote foreign direct investment. In 1992, the Development Committee adopted a set of Guidelines on the Treatment of Foreign Direct Investment. Neither the Bank, the IMF nor the MIGA has the competence to adopt any legally- binding instrument for the international community or to modify the existing rules of international law on the subject matter. Strictly speaking, these organisations lack the capacity even to adopt 'soft law' instruments for the international community.

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[18] Many developed countries have their agencies to provide insurance coverage to their nationals who wish to invest abroad. See for a list of such schemes, see A. Akinsanya, 1987, "International Protection of Direct Foreign Investment in the Third World", *ICLQ,* 36, p. 67.

[19] Article 23 of the MIGA Convention.

Nevertheless, the document adopted as a result of the work carried out under the auspices of these three crucial financial organisations does carry a certain weight and thus merits examination. Indeed, as noted by Mr Rubin:

> "Since the "legal framework" was prepared primarily after the triumph of the market over centrally guided economies, and is explicitly aimed at the encouragement of foreign direct investment (and incidentally portfolio investment), it reflects principles which ought to be welcomed by investors of capital or technology. The introduction to the framework makes a bow in the direction of the developing countries which argued, in the 1970s and 1980s, that criteria had to be framed and agreed to ensure that the activities of transnational enterprises – and their investments – had to be controlled to prevent abuse of TNC power, and to bring them into line with the developmental objectives of "host" nations – especially developing countries. That firmly held belief, reinforced by a series of scandals or alleged scandals involving transnational corporation activities, had led to a general rejection of the 1967 OECD Draft Convention on the Protection of Foreign Property, which almost completely ignored these developing country convictions."[20]

The 1992 Guidelines seek to achieve what the OECD Draft Convention could not do in 1967. The General Counsel of the World Bank went to great lengths to justify the approach taken in the report claiming that the principles outlined in the Guidelines were consistent with emerging rules of customary international law. The provision in Part IV of the Report on the question of expropriation reads as follows:

> "Expropriation and Unilateral Alterations or Termination of Contracts: 1) A state may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation; 2) Compensation for a specific investment taken by the state will, according to the details provided below, be deemed "appropriate" if it is adequate, effective and prompt; 3) Compensation will be deemed "adequate" if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known; 4) Determination of the "fair market value" will be acceptable if conducted according to a method agreed by the state and the foreign investor (hereinafter referred to as the parties) or by a tribunal or another body designated by the parties…; 7) Compensation will be deemed "effective" if it is paid in the currency brought in by the investor where it remains convertible, in another currency designated as freely usable by the International Monetary Fund or in any other currency accepted by the investor; 8) Compensation will be deemed to be "prompt" in normal circumstances if paid without delay."

Thus, this provision makes the definition of expropriation somewhat broader and includes situations such as unilateral termination of contracts that would perhaps not have been deemed as straightforward expropriation under traditional international law. The provision in the Guidelines is drawn mainly on bilateral investment treaties in existence. Indeed, the following passage in the report to the Development Committee is noteworthy:

> "Many national investment codes, virtually all bilateral investment treaties and most pertinent multilateral instruments contain provisions to the effect that host states may expropriate foreign investments only if the takings are done in accordance with applicable legal procedures, for a public purpose and against payment of compensation. These provisions are typically broad enough to encompass partial as well as total expropriations of foreign investments. The provisions in the bilateral investment treaties and multilateral instruments also often explicitly cover not only outright expropriations but also measures, such as excessive and repetitive tax or regulatory measures, that have a de facto confiscatory effect in that their combined effect results in depriving the investor in fact from his ownership, control or substantial benefits over his enterprise, even when each such measure taken separately does not have this effect (so-called 'creeping expropriations')."

[20] S.J. Rubin, 1992, "Introductory note' to the 'World Bank: report to the development committee and guidelines on the treatment of foreign direct investment", I*LM,* 31 (1363), p.1363.

Since the CTC was unable, as predicted, to adopt an internationally agreed code of conduct on the TNCs and was eventually disbanded, the 1992 Guidelines remain an essential document on the law of foreign investment. Indeed, the consensus now emerging is that the protection of FDI is potentially beneficial to developing countries. The World Bank Guidelines are helpful in this regard.

The OECD Guidelines and the Multilateral Agreement on Investment (MAI)

When the newly-independent developing countries were gaining a majority within the UN and driving the UN agenda to further their interests, the industrialised countries sought to adopt their instrument on the law of foreign investment. The attempt by the OECD to adopt a Convention on the Protection of Private Property in 1967 failed because it did not take fully into account the concerns of developing countries and the developments that were taking place within the UN.

Nearly a decade later, when the agenda of the NIEO and a code of conduct for the TNCs were high on the UN agenda, the OECD adopted its voluntary code of conduct. The 1976 Declaration of the OECD on International Investment and Multinational Enterprises includes Guidelines for Multilateral Enterprises. As the next step in this direction, the OECD sought to conclude once again a Multilateral Agreement on Investment (MAI)[21] in 1998. A report of the OECD on the MAI stated that the agreement was 'needed to respond to the dramatic growth and transformation of foreign direct investment (FDI) which has been spurred by widespread liberalisation and increasing competition[22] for investment capital.' It went on to state that:

> "A multilateral agreement on investment would provide a strong and comprehensive framework for international investment and would strengthen the multilateral trading regime. It would set clear, consistent and transparent rules on liberalisation and investor protection, with dispute settlement, thereby underpinning the continued removal of barriers to market access and encouraging economic growth ... The MAI would provide a benchmark against which potential investors would assess the openness and legal security offered by countries as investment locations. It would, in turn, act as a spur to further liberalisation."[23]

In making a case for an MAI, the report made it clear that "Growth in FDI has been underpinned by widespread liberalisation which has swept away many formal governmental restrictions on investment and severely curtailed others. Remaining restrictions are a source of friction not least because they are widely perceived as barriers to market access."[24]

The proposed agreement aimed to ensure that the liberalisation obligations of states were complemented by provisions on investment protection and reinforced by effective dispute settlement procedures. The goal of the MAI was to 'set high standards for the treatment and protection of investment' and 'go beyond existing commitments to achieve a high standard of liberalisa-

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[21] W.H. Witherell, 1995, "The OECD multilateral agreement on investment", *Transnational corporations,* 4 (2), pp.1–14.

[22] Putu Samawati, 'Legal Reasons Underlying Demonopolization by State-Owned Enterprises in Indonesia', *Sriwijaya Law Review*, 3.2 (2019), 124–36 <https://doi.org/10.28946/slrev.Vol3.Iss2.126.pp124-136>.

[23] Report by the OECD Committee on International Investment and Multinational Enterprises (CIME) and the Committee on capital movements and transparent transactions (CMIT) on the MAI: DAFFE/CMIT/CIME (95)13/Final, 5 May 1995, p.1.

[24] Report. pp.1–2.

tion.'[25] Accordingly, Article III of the draft MAI contained the following provisions concerning the treatment of investors and investments:

> "1) Each contracting party shall accord to investors of another contracting party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments; 2) Each contracting party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to investors of any other contracting party or of a non-contracting party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments."[26]

On the protection of investment draft Article IV made a more robust provision in favour of foreign investors:

> "1. General treatment - Each contracting party shall accord to investments in its territory of investors of another contracting party fair and equitable treatment and full and constant protection and security. In no case shall a contracting party accord treatment less favourable than that required by international law; 2. Expropriation and compensation - 2.1 A contracting party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another contracting party or take any measure or measures having equivalent effect. 2.2 Compensation shall be paid without delay. 2.3 Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. 2.4 Compensation shall be fully realisable and freely transferable."[27]

Critics described the draft MAI of the OECD as a 'Global Bill of Rights' for foreign investors. It was seen in some quarters as an instrument mainly based on the assumption that capital has little or no social obligation in the new global economy.[28] It was argued that virtually all the 'rights' were given to foreign- based corporations while the 'obligations' were imposed on host governments. Consequently, the OECD had to abandon the draft MAI and adopt a revised set of guidelines in the form of a 'soft law' instrument.[29] The new OECD Guidelines are more balanced than the draft MAI – they include provisions designed to achieve sustainable development and protect the environment and human rights.

When outlining the concepts and principles, the Guidelines state that 'Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law. The entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries.'[30] The Guidelines also state that enterprises should, inter alia, take fully into account established policies in the countries in which they operate; consider the views of other stakeholders; contribute to economic, social and envi-

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[25] Report. p.2.

[26] DAFEE/MAI (98) 7/REV1 of the OECD of 22 April 1998, p.13.

[27] DAFEE/MAI (98) 7/REV1 of the OECD of 22 April 1998, pp.56–57.

[28] For instance, a summary of the debate in the "Commission on Sustainable Development,"1998, in *Environmental Policy and Law*, 28 (3–4), p.129.

[29] After failing in its attempt to adopt a legally-binding MAI, the OECD adopted a set of revised guidelines for MNEs in 2000. The OECD Guidelines for Multinational Enterprises of 27 June 200 in http://www.oecd.org/daf/investment/guideli nes/mnetext.htm; 40 ILM (2000), p.237. The old OECD Guidelines can be found in an OECD publication, The OECD Guidelines for multinational enterprises (Paris: OECD, 1997).

[30] *ILM,* Vol. 40, no. 237, p. 239, 2000.

ronmental progress with a view to achieving sustainable development; respect the human rights[31] of those affected by their activities consistent with the host government's international obligations and commitments; and abstain from any improper involvement in local political activities.[32]

The International Labour Organisation's (ILO) Guidelines

When there was momentum towards adopting guidelines or codes of conduct for transnational corporations or multinational enterprises (MNEs) in the 1970s, the International Labour Organisation adopted its own Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977 (the MNE Declaration), amended in 2000. The original Declaration and its amendments[33] were drafted and negotiated by consensus with the governing body, and the executive organ of the ILO consisting of 56 persons representing the tripartite constituents of the ILO, 28 governments, 14 employers, and 14 workers.

The non-binding Declaration offers guidelines to MNEs, governments, and workers' and employers' organisations in areas relating to employment, training, working and living conditions, and industrial relations. Many of the principles of the ILO's MNE Declaration are reflected in the revised Guidelines of the OECD. While the OECD's Guidelines remain as guidelines, the provisions of the ILO's MNE Declaration have been reinforced by certain legally binding international labour conventions and recommendations.

There are many multilateral enterprises (MNEs) that are accused of violating the human rights of local workers where they operate. Alleged human rights violations of workers by MNEs include: 1) turning a blind eye to the exploitation of child and women labour by their subsidiaries abroad; 2) paying extremely low rates of wages to the local work force; 3) ignoring health and safety standards at work; 4) not paying to the accident victims.

Undeniably, there have been documented cases of MNEs paying wage rates close to the poverty line in the host states, such as Bangladesh, China, Honduras, India and Mexico. For instance, Nike, which sells a pair of trainers in the retail market for $67, seems to pay $2 in wage costs. According to an Oxfam report, in Bangladesh and Cambodia, women workers seem to earn less than $40 per month sewing clothes for fashion companies such as Gap.[34] The situation seems equally unbalanced in the so-called 'export-processing zones' of countries such as China and Bangladesh. Workers are apparently subjected to extreme hardship to ensure more significant profit margins for large MNEs. It was reported that in Bangladesh, workers had to leave their employment rights at the factory gate in order to work in these special economic zones. Neither the local government nor any international organisation seems to be able to protect workers from such exploitative practices of MNEs. There is no global minimum wage set for these global companies. Like other developing countries, workers in Bangladesh have been working: 1) for

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[31] Nurhidayatuloh et. al., 'Does Limitation Rule in International and Regional Human Rights Law Instruments Restrict Its Implementation?', *International Journal of Recent Technology and Engineering*, 8.2S9 (2019), 597–600 <https://doi.org/10.35940/ijrte.B1125.0982S919>.

[32] *ILM,* Vol. 40, no. 237, p. 240.

[33] 2002, *ILM,* 41 (184).

[34] P Watkins, K., & Fowler, *Rigged Rules and Double Standards: Trade, Globalisation, and the Fight against Poverty* (Oxfam, 2002).

poverty-level wages; 2) in hazardous working conditions; 3) with inadequate social-insurance rights; 4) with necessary overtime work.[35]

The MNEs has a substantial amount of economic and political power; with them, they could control the host government and can employ a large quantity of cheap labour.[36] They choose those host states where cheap labours are available, lax labour law exists, and there is opportunity to terminate workers employment at their wishes, can easily escape from paying compensation to the victims and so on. Due to the willingness of receiving more FDI and mighty corporate power of the MNEs, the host states like Bangladesh just avoid taking any action against them. Among others, the government also fears about the unemployment rates; as a result, it lost its durable bargaining power or took any legal action against the MNEs. Moreover, inadequate laws and policies, widespread corruptions, non-implementation of regulations to regulate MNEs are also responsible for the said violations. Therefore, it is crucial to arrange compatible legal protection of the human rights of workers in Bangladesh.

Furthermore, the MNEs also use their home states economic and political power to pressurise the host states as and when needed to get the outcome in their favour. It posses a challenge for the host states on how to tackle them. If the host state stands against them, the mighty developed states use the United Nations to impose economic sanctions. It is evident in Iran, North Korea, and China. Moreover, various treaties under the auspices of the International Labour Organization (ILO) have provisions designed to protect workers' rights, but the implementation aspect of these treaties is weak. The core ILO conventions provide for fundamental rights for workers. They include the freedom to bargain collectively; the freedom of association; the elimination of discrimination in the workplace; the elimination of workplace abuse (*e.g.* forced labour and certain types of child labour); adequate wages; proper working conditions; adequate social-insurance rights; and no obligatory overtime work. However, the ILO has not got much power to bring exploitative companies to justice. It is the host state that is responsible for implementing the ILO conventions through national laws. However, for the reasons stated earlier, many governments are either reluctant or unable to impose even minimum international standards on MNEs operating within their jurisdiction.

For instance, as a member of the ILO, Bangladesh has adopted almost all ILO Conventions on labour and employment; as well as human rights conventions such as the International Covenant on Social and Political Rights (ICSPR) 1966[37] and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966[38]. According to these conventions, the government of Bangladesh is obligated to adopt the entire standards of rights into its existing legal framework

[35] S. Kinley, D. & Joseph, ‘Multinational Corporations and Human Rights: Questions about Their Relation’, *Alternative Law Journal*, 7.1 (2002), 7.

[36] M Weschka, ‘Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad’, *Zeitschrift Fur Auslandisches Offentliches Recht Und Volkerrecht*, 66 (2006), 625.

[37] The ICSPR prohibits all forms of forced and compulsory labour (article 8) and recognises the right to form an association (article 22) as an individual citizen of the state.

[38] The ICESCR gives a detailed picture of obligation to labour rights that include, inter alia, the right to form, establish, and join a trade union; the right to a minimum, fair wages and equal remuneration; the right to safe and healthy working conditions; and the right to equal opportunity in employment (articles 6-8, 12).

immediately or progressively and undertake appropriate measures for their implementation. The rights to be ensured includes the elimination of all forms of forced or compulsory labour; the elimination of discrimination in respect to employment and occupation; the freedom of association and the effective recognition of the right to collective bargaining; effective elimination of child labour; and the right to minimum wages and mandated benefits. So far, Bangladesh has shown its commitment to core labour standards by adopting them into the BLA 2006. However, there are drawbacks of this Act.

An Inconclusive End to the Twentieth Century

During the formative years of the law of foreign investment, the notion of laissez-faire provided the philosophical underpinning for this body of law. This traditional notion gradually gave way to a new neo-liberal concept of regulation of foreign investment in order to achieve the higher goals of humanity. Consequently, the law of foreign investment became part of the attempt to create a global order supported by international law. Nevertheless, this attempt gave rise in due course to a divided world where the interests of developed and developing countries conflicted. However, today, just as during the Industrial Revolution, people and investment from the capital investor countries are reaching all over the world, and the investors and investor countries are seeking ever-greater protection of all forms of their investment, including the capital, technology, services, know-how, contractual obligations, intellectual property rights, licensing, etc.

The law that is taking its shape at present is designed to protect foreign investment against all sorts of non-commercial risks. The law is seeking to safeguard foreign investment not only from traditional forms of political risks but also from other forms of risks, including civil strife, war, perhaps terrorist attacks against foreign companies and their investment. The trend in the 1980s and 1990s was to accord maximum protection possible to foreign investors. It was supported by jurisprudence, BITs, regional trading agreements (RTAs). Thus, as far as the regulation of foreign investment is concerned, the last century ended on a mixture of notes and with no treaty on foreign investment. When the new millennium dawned, there was a need to take stock of events and advance carefully. Consequently, the WTO became involved in 2001 when the Ministerial Declaration adopted at the end of the Doha Conference decided to include investment in the agenda of this world trade body.

The Dawn of the Twenty-first Century - the WTO and Foreign Investment

After the failures of the OECD and the CTC of the UN to formulate a balanced and comprehensive set of standards on foreign investment, efforts were made by the EU at the Doha Ministerial Conference. Although efforts were made during various GATT Rounds of Trade Negotiations to include investment onto the international trade agenda[39] and the WTO itself had been engaged in analysis and debate about the relationship between international trade and investment since 1997. It was only at the Doha conference that the WTO committed itself to include investment as part of

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[39] In 1982, the US put the regulation of foreign investment onto the agenda at a GATT ministerial meeting. The investment was a significant issue in the Uruguay Round and resulted, inter alia, in the adoption of the TRIMs Agreement.

its main agenda. The main decisions taken at Doha on the relationship between trade and investment read as follows:

> "Relationship between trade and investment – 20) Recognising the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross- border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity building in this area as referred to in paragraph 21.[40] Further work in the working group on the relationship between trade and investment will focus on the clarification of scope and definition; transparency; non- discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between members. Due regard should be paid to other relevant WTO provisions. An account should be taken, as appropriate, of existing bilateral and regional arrangements on investment."[41]

The 1994 WTO TRIMS Agreement

Although many developing countries had initially opposed the idea of introducing the item of foreign investment into the world trade agenda, they also came around to accepting the idea that if there were indeed a need for the regulation of foreign investment and thereby the activities of foreign investors, the WTO forum, where developing countries have at least a numerical majority, was better for this purpose than either the World Bank or the OECD.

However, the WTO project was narrow in its scope as it focussed only on trade and investment. Of course, the idea of regulating foreign investment is not entirely new to the WTO. At the end of the Uruguay Round of multilateral trade negotiations, the Agreement on Trade-Related Investment Measures (TRIMS) was concluded. The 1994 WTO Agreement deals with certain aspects of foreign investment. It prohibits governments from requiring foreign investors to purchase inputs locally or to sell their output domestically rather than exporting it. An Annex to the TRIMS agreement outlines the obligations of the WTO members as follows:

> "1. TRIMs that are inconsistent with paragraph 4 of the Article III of GATT 1994 require: (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume of value products, or in terms of a proportion of volume or value of its local production; or (b) that an enterprises purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports. 2. TRIMs that are inconsistent with paragraph 1 of Article XI of GATT 1994 restrict: (a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports; (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production."[42]

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[40] Paragraph 21 reads as follows: 'We recognise the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral co-operation for their development policies and objectives and human and institutional development. To this end, we shall work in co-operation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.'

[41] WT/MIN (01)/DEC/W/1 of 14 November 2001.

[42] World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press, 1999).

As can be seen from the provisions just outlined, the TRIMS agreement is a relatively technical agreement of narrow scope, the application of those provisions is limited to trade in goods. Nevertheless, it is designed to promote foreign investment across international frontiers by eliminating specific trade-related barriers to such investment. The US had wished for the removal of TRIMs as they were both restrictive and a barrier to trade and the development of the global economy. It was also seeking freedom for foreign investors to hire nationals of their choice in key management positions.

The view held by the developing countries was that the right to permit foreign investment and their regulation was an internal matter of a state and therefore did not fall within the scope of GATT. Basically, the argument was that GATT was not the appropriate forum for the discussion of the issue of investment policy. The counter-argument was that the restrictions imposed on the capacity of foreign companies to invest locally were a matter of concern for international law of trade. This second argument won the day, and the TRIMs was adopted, paving the way for further regulation of foreign investment under the auspices of the WTO in the future, rather than under the auspices of UNCTAD as preferred by developing countries.

However, when the state members of the WTO met in July 2004 to agree on the work programme for the Doha Development Round, they too decided to set aside the idea of negotiating an international agreement on foreign investment under the auspices of the WTO. A decision was taken by the General Council of the WTO on 31 July 2004, known as the 'July Package', stated that a number of issues, including the relationship between trade and investment would not form part of the Work Programme of the Doha Development Round.[43] Thus, the idea of adopting an international treaty regulating foreign investment was, once again, forcefully removed from the scope of action of an inter-governmental body for the time being.

Evaluation of International Efforts

A rapid and massive growth in foreign investment, massive expansion of economic activities followed by a considerable increase in the number of TNCs in the post-WWII period, coupled with the emergence of many independent states in Africa and Asia, gave rise to the need for the regulation of foreign investment and thereby the TNCs. Initially, the UN was seen as an appropriate forum for such regulation. However, many developed countries soon saw it as a body heavily influenced by developing countries and appeared reluctant to accept the adoption of a UN code of conduct for TNCs. In the meantime, due to the dramatic political and economic changes of the late 1980s and early 1990s, the balance was shifting in favour of developed countries and foreign investors from these countries.

As the 1990s saw rapid success in the capital and expansion of foreign investment, the OECD tried to adopt a new agreement. However, a coalition of international governmental and non- governmental organisations, interest groups and civil society mounted a challenge to the OECD. After a period of reckoning, the WTO decided to enter into the picture in 2001 but decided to backtrack in 2004. It remains to be seen whether the WTO, an organisation established primarily to promote and liberalise international trade, can ever regulate foreign investment in the interests of the inter-

[43] WT/GC/W/535 (1) of 31 July 2004.

national community as a whole in future rounds of negotiations. In one sense, it was a contradiction that a body created to bring down barriers to international trade and to promote deregulation in the interests of free trade was entrusted with the regulation of foreign investment. Since the practice of the WTO is to work by consensus, it could have been hoped that any regulation of the activities of foreign investors or those who receive foreign investment would have been balanced.

Indeed, the recognition in the Doha Declaration 2001 that any framework 'should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments, as well as their right to regulate in the public interest', was an indication in a positive direction. However, this mission was not made part of the WTO negotiations in July 2004 when the WTO members adopted a work programme for the Doha Round. Thus, the idea of regulating foreign investment through an international treaty is not now on the active agenda of any international organisation, leaving the matter to customary international law and the bilateral investment treaties or free trade agreements.

CONCLUSION

As can be seen from the above discussions, despite various efforts made by the international organisations over the decades, the idea of concluding an international agreement on foreign investment is still some way off. Due to the protest from the developing states, at this moment, international organisations do not have this item on their active agenda. However, the instruments discussed in this paper make it apparent that there is now an identifiable body of law on the subject matter. The contribution made by the UN and other international organisations may not have led to a triumphant conclusion of a universal instrument. However, they have spelt out the main principles of law governing the treatment of foreign investment under international law. However, the host states should be careful while interpreting these laws so that they do not become victimised by the international courts and tribunals, which also represent the developed states and their multinational enterprises to fulfil the purpose of 'globacolisation'. Moreover, the developing host states should protect their interest by regulating FDI like many developed countries.

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