REGULATING FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: BANGLADESH IN CONTEXT

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ABSTRACT OF THE THESIS

Foreign Direct Investment (FDI) is widely regarded as indispensable for the development of modern economies. But FDI usually entails two competing interests: profit maximisation by the investors and the maximisation of economic gains by the host state. A balanced regulatory approach is therefore warranted to serve the inherent purpose of FDI for stakeholders. FDI-induced development is particularly imperative for least-developed economies such as Bangladesh. To this end this thesis undertakes to examine the FDI regulatory regime of Bangladesh with a view to ascertain whether it pursues a balanced approach in regulating FDI. It finds that the regime traditionally assumes that economic development follows automatically as a result of increasing the inward flow of FDI. Contrasting this belief, the study finds that the existing FDI regime lacks a development-oriented approach and tilts, more often than not, towards serving the interests of the investors. It therefore highlights the caveats and inadequacies in the existing FDI regime of Bangladesh to trigger a reform pursuit and offers some recommendations to introduce development as a sought-after goal in regulating FDI, while simultaneously maintaining Bangladesh as an attractive destination for FDI.

The assumed task referred to is accomplished: (a) by engaging in a theoretical discourse on the nexus between FDI regulation and sustainable development; and (b) by an examination of relevant regulatory laws, practice, mechanisms, and institutions involving entry regulations, incentives for FDI, protection of environmental and human rights particularly in the context of labour rights, involuntary resettlement, and the protection of foreign investors and host state's interests.

The motivational factor behind this research is the lack of a comprehensive development-focused legal research in existing literature. The current academic research fills up that gap by focusing on all major development components of regulation attracted by FDI. It thereby makes an original contribution to the relevant literature both in national and international context in that it appears to be the first in-depth research on the FDI regime of Bangladesh with a view to render it a balanced and development-friendly regime. It significantly contributes to the conceptualization of the interrelation between regulation and FDI induced development and the necessity of its application in developing and least-developed host country context. It is comprehensive to the extent possible within the permitted word limit. In the specific context of Bangladesh, the outcomes of the research would immensely benefit

its FDI strategists, policy-makers, negotiators, administrators, and legislators in creating a balanced regulatory regime to attract FDIs for development. In a wider context, other similar economies desirous of attracting FDI for development can learn important lessons from this research.

CERTIFICATION

I, Muhammad Nasrullah Nakib, firmly declare that this thesis, submitted in the fulfillment of the requirements for the award of Doctor of Philosophy, in the Faculty of Arts, Macquarie University is my own work in its entirety unless otherwise referenced or acknowledged. This document has not been submitted for qualifications at any other academic institution.

(Signature)
Muhammad Nasrullah Nakib
Date …………………….

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The opinions expressed in this are entirely mine and I alone take all the responsibilities for any shortcomings and loopholes.

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LIST OF ABBREVIATIONS

AD	Appellate Division
ADB	Asian Development Bank
ADA	Accelerated Depreciation allowance
ATCA	Alien Tort Claims Act
ARIPO	Acquisition and Requisition of Immovable Property Ordinance
BB	Bangladesh Bank
BEPZA	Bangladesh Export Processing Zones Authority
BITs	Bilateral Investment Treaties
BoI	Board of Investment
BoP	Balance of Payment
BLA	Bangladesh Labour Act
BLAST	Bangladesh Legal Aid Services Trust
BSCIC	Bangladesh Small and Cottage Industries Corporations
CESCR	Committee on Economic, Social and Cultural Rights
CHT	Chittagong Hill Tracts
CPC	Code of Civil Procedure
DC	Deputy Commissioner
DoE	Department of Environment
DTT	Double Taxation Treaty
ECA	Environment Conservation Act
ECC	Environment Clearance Certificate
ECR	Environment Conservation Rules
EIA	Environment Impact Assessment
EMP	Environmental Management Plan
ESM	Environmentally Sound Management
E PF	Export Promotion Fund
EPZ	Export Processing Zone
FDI	Foreign Direct Investment
FLA	Fair Labour Association
FPIA	Foreign Private Investment Act
FTAs	Free Trade Agreements
ETP	Effluent Treatment Plant
GATS	General Agreement on Trade in Services
GC	Global Compact
GoB	Government of Bangladesh
GOMO	Ground Order Management Ordinance
GSP	Generalized System of Preference
HD	High Court Division
HR	Human Rights

IEE	Initial Environmental Examination
ICSID	International Centre for the Settlement of Investment Dispute
ICC	International Chamber of Commerce
IIAs	International Investment Agreements
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
IMF	International Monetary Fund
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSPR	International Covenant on Social and Political Rights
JVA	Joint Venture Agreement
LDCs	Least-developed Countries
MAI	Multilateral Investment Agreement
MNCs	Multinational Corporations
MNEs	Multinational Enterprises
MIGA	Multilateral Investment Guarantee Agency
NBR	National Board of Revenue
NWMP	National Water Management Plan
NAFTA	North America free Trade Agreement
NIP	National Industrial Policy
NOC	No-objection Certificate
OSH	Occupational Safety and Health
OECD	Organization for Economic Cooperation and Development
RAN	Rainforest Action Network
R&D	Research and Development
SIA	Social Impact Assessment
SMEs	Small and Medium Scale Enterprises
TRIPs	Trade-Related Intellectual property
TRIMs	Trade-Related Investment Measures
TNCs	Transnational Corporations
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Commission on Transnational Corporations
VAT	Value Added Tax
WTO	World Trade Organization
WARPO	Water Resource Planning Organization

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The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1959

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The Draft Convention on the International Responsibility of States for Injuries to Aliens (Harvard Convention) 1961

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The ICSID Convention on the Settlement of Investment Disputes between States and National of Other States 1966

The International Covenant on Social and Political Rights 1966

The International Covenant on Economic, Social and Cultural Rights 1966

The ILO Tripartite Declarations on Multinational Enterprises and Social Policy

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 1976

The ILO Convention on Freedom of Association and Protection of Right to Organise 1948

The ILO Right to Organise and Collective Bargaining Convention 1949

The ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of Worst Forms of Child Labour 2000

The ILO Convention Concerning Forced or Compulsory Labour 1932

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The ILO Minimum Wage Convention 1973

The ILO Discrimination (Employment and Occupation) Convention 1958

The ILO Minimum Wage Fixing Convention 1970

The ILO Occupational Safety and Health Convention 1981

The ILO Abolition of Forced Labour Convention 1957

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The ILO Convention on Promotional Framework for Occupational Safety and Health 2006

The ILO Indigenous and Tribal People Convention 1989

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The North Atlantic Free Trade Agreement 1994

The OECD Convention on the Protection of Foreign Property 1967

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The UN Resolution on Permanent Sovereignty over Natural Resources 1962

The United Nations Global Compact 2002

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CHAPTER 1

INTRODUCTION

1.1 Introduction

In the present globalised economy, Foreign Direct Investment (FDI) is recognised as an important tool for sustainable economic growth and social development, particularly in developing as well as least developed host countries. Aspects of FDI-induced development include the building of capital resources, increase of GDP, employment generation, poverty alleviation, enhancement of industrialisation, technology transfer, human resource development, and other social developments. However, these development aspects cannot be realised automatically. The liberalisation approach used alone in a legal regime for FDI entry and operation cannot ensure that development occurs along with the increase of FDI in a host country as it may impact negatively on the socio-economic condition of it. Therefore, the legal regulation of FDI in a host country is considered essential for maximising its desired development advantages by minimising its negative impacts. This is exemplified in the context of Bangladesh. To this end this research underscores the need for the regulation of FDI for development in Bangladesh.

If we look back to the emergence of FDI in global economic and financial practice in the post-war era, as an alternative to foreign aid and loans, we notice the trend of both regulation and liberalisation of FDI introduced into national laws and policies. Regulation policies were introduced in the beginning of FDI practice by the communist countries and used in a restrictive approach towards FDI as they maintained that FDI is uniformly injurious.[1] They held that foreign Multinational Corporations (MNCs), the main actors of FDI, in the guise of investment create economic supremacy over developing host countries; in other words, keep developing countries in a state of permanent dependency upon capital-exporting developed countries.[2]

On the other hand, the European democratic countries and the USA maintained liberal attitudes towards FDI as a tool of economic development.[3] This liberal attitude gradually

[1] See M. Sornaraja, *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed., 2010) 53; see also Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (Ashgate, 2002) 17-21.
[2] Ibid.
[3] Ibid, 48; 14-15.

spread over developing countries with the rise of FDI flow which gained momentum in the last half of the 1980s, bolstered by the increased popularity of the notion of economic liberalism across the world.[4] Also, host countries witnessed how international capital movement through FDI allowed developing and least developed countries to participate in the global production network, thus increasing economic output and welfare.

Thus the liberal approach took a prominent shape in host countries' laws and policies, through liberalising the entry and operational conditions of FDI, as well as the guaranteeing of fiscal and non-fiscal incentives in order to attract and motivate potential investors-even at the compromise of national economic and social interests, because of a firm conviction that development goes hand-in-hand with an increase of FDI inflow. The bilateral investment treaties (BITs) between capital exporting developed and capital importing developing countries played a great role in influencing the national laws and policies in this regard.

A clear illustration of the liberalisation of FDI regulations is evident in the UNCTAD's World Investment Reports. According to the World Investment Report 2001, between 1991 and 2000 approximately a total of 1,185 regulatory changes were introduced in national FDI regimes, of which 1,121 were in the direction of creating a more favourable environment for FDI.[5] This trend has continued in the first five years of the 21st century. In 2004 alone, 87 per cent of the 271 changes in national investment laws were favourable to FDI.[6]

The liberalisation of regulation proves to be favourable and attractive to foreign investors in the sense that it creates more opportunities for profit-making from investment at the advantage of lax legal situations in the host country. Conversely, the effect of liberalisation for development appears to be mixed or even proves to be harmful, as it leads to the decrease of the scope of host country's control over investors in many respects that have development implications.

For example, unregulated fiscal and non-fiscal incentives particularly repatriation, transfer pricing may affect the tax regulation of a country;[7] the open permission in industrialization

[4] See Karl P.Suvant, 'FDI Protectionism Is on the Rise' (Policy Research Working Paper No. 5052, The World Bank 2009) < ttp://elibrary.worldbank.org/doi/book/10.1596/1813-9450-5052> 24 January 2014.
[5] See UNCTAD, *World Investment Report 2001 Promoting Linkage* (2001) 6 <unctad.org/en/docs/wir2001overview_en.pdf> 20 December 2013.
[6] See UNCTAD, *World Investment Report 2005 Transnational Corporations and the Internationlisation of R&D* (2005) 22 <unctad.org/en/docs/wir2005overview_en.pdf> 20 December 2013.
[7] Sornarajah, above n 1, 56.

may impact on local industries,[8] it cannot contribute rightly to employment generation and human resource development in the absence of proper labour regulation. In addition, FDI operation may impact negatively on a host country's natural environment, labour, human rights, and social conditions if there is an absence of strict regulation. Some recent harmful incidents wrought by MNCs in developing countries affecting environment, natural resources and human rights are attributed to the laxity of FDI regulation, thus contribute to the realisation of bad impact of liberalization.[9]

Growing realisation about the ineffectiveness of liberalisation and the need for state control or legal regulation has led to re-thinking about FDI laws and regulations. Additionally, successive economic crises in recent years have led to the rapid withdrawal of capital from host states, further destabilising the weaker economies.[10] As a result, a mixed and balanced form of legislation has emerged with a desire to attract investment on the one hand and to control it on the other.

States which traditionally maintained an open policy with respect to the inflow of foreign investment are currently beginning to impose restraints.[11] Some developed countries have introduced the screening of foreign investment entry, including stringent reporting requirements.[12] Some developing countries have begun to adopt similar bodies of laws in consideration of their economic and social development.[13]

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[8] It means that allowing big firms by FDI to compete with local firms can drive local firms can drive local firms out of business. See Yahya Z D Alhijazi, *Developing Countries and Foreign Direct Investment* (LL.M thesis, McGill University, 1999) 11.
[9] For example, the gas leak incident from a pesticide plant of a subsidiary of the TNC Union Carbide in Bhopal, India, in 1984 that left more than 5,000 people dead, more than 500,000 injured, caused severe birth defects to more than 100,000 children, major economic hardship, massive environmental damage, and economic misery beyond the realms of imagination, see VP Nanda, 'Export of Hazardous Waste and Hazardous Technology: A Challenge of International Environmental Law'(1988) 17 *Denver Journal of International Law and Policy* 155,165-70; Michael Anderson, 'Litigation and Activism: The Bhopal Case', (1993) 12 *Third World Legal Studies* 177,179; in Burma allegations were made for the killing of tribal people, raping of women, destruction of property, torture, and forced labour, see *Doe (John) v Unocol* (2002)395 F.3d 932; the activities of McMoran in Indonesia leading to the violation of human rights and environmental damage; the activities of Royal Dutch Shell in Ogoniland, Nigeria, resulting in deaths, human suffering and destruction of the environment, SF Puvimansinghe, *Foreign Investment, Human Rights and the Environment: A Perspective from South Asia on the Role of Public International Law for Development* (Martinus Nijhoff Publishers, 2007) 1-3.
[10] Sornaraja, above n 1, 56.
[11] Ibid, 59.
[12] For examples, Germany through recent amendment to the *Foreign Trade and Payments Act*, Australia through a new policy in 2008, Canada through amendment to its foreign investment law in 2009, Japan through a regulation under its *Foreign Exchange and Foreign Trade Act in 2007*. See details, Suvant Karl P. above n 4.
[13] For examples, Malaysia has instituted and kept currency controls. Similar restrictive controls on investment can be seen in Africa, where Nigeria, Eritrea and the Central African Republic have increased controls on foreign investment. In Latin America, changes have been instituted by left-leaning governments. Widespread nationalisation took place in natural resources sector.

In addition, some scholars and academics have proposed pursuing a regulatory approach in setting FDI laws and policies for the protection of the interests of host countries. Sornarajah proposes a ‘middle path’.[14] Solomon and Mirsky hold that FDI legislations should be enacted in the consideration of some common problems that are significantly related to the development goals of FDI.[15] Seid proposes ‘regulated openness’ of investment regimes where both regulation and openness co-exist in a balanced and pragmatic manner.[16]

Thus the notion of regulation of FDI has now become a reality for the purpose of development in developing and least developed host countries, as there is an in-depth relation between regulation and FDI-induced development. As far as FDI-induced development aspects are concerned, the concept of regulation can encompass them all, but most importantly it involves entry regulation, fiscal and financial regulation, market regulation, environmental regulation, labour regulation, and regulation in respect of human rights and other social conditions. The regulatory issues must be pursued along with the attractive aspect of liberalisation in core FDI legislations, BITs, and other laws that might have implications for the operation of FDI, such as fiscal laws, environmental laws, labour laws, laws relating to occupational safety and health, laws relating to the protection of natural resources, acquisition of land, right to resettlement, and property rights. Without the integration of regulatory aspects in the legal and policy frameworks, the FDI legal regime will not support the desired developmental goal of FDI in the context of developing host states in general and Bangladesh in particular.

1.2 Background of the Research

Bangladesh, as a least developed country, is beset by multiple economic and social problems. It considers FDI as a major vehicle of its development and has striven to attract and increase the inflow of FDI through legal, political, and bilateral treaty initiatives to achieve its desired goal of sustainable development. The initiatives include the enactment of the *Foreign Private Investment (Promotion and Protection) Act* in 1980, the *Board of Investment Act* in 1989, the *Bangladesh Export Processing Zones Authority Act* in 1980, the Private *Export Processing Zones Authority Act* in 1996, and the adoption of the *National Industrial Policy*

[14] See M Sornarajah, above n 1, 55. The concept of a ‘middle path’ is explained in Chapter 2 of this thesis.
[15] LD Solomon and DH Mirsky, ‘Direct Foreign Investment in the Caribbean: A Legal and Policy Analysis’ (1990-91) 11 *North Western Journal of International Law and Business* 252, 259.
[16] Sherif H Seid, *Global Regulation of Foreign Direct Investment* (Ashgate, 2002) 194.

(NIP) in 1982 with periodic modification in every five years. Bangladesh has so far concluded 35 BITs with other states.

The *Foreign Private Investment (Promotion and Protection) Act* (FPIA) as a core legislation offers a legal framework for the protection of FDI including fair and equitable treatment, equal treatment of foreign and local investments, safeguarding foreign investment from expropriation, and assuring the repatriation of finance and profit deriving from share disposal. The *Board of Investment Act* establishes a legal agency to regulate and act as a custodian to facilitate the investment of local and foreign capital. The *Bangladesh Export Processing Zones Authority (BEPZA) Act* offers a secure and conducive location for foreign companies with plenty of fiscal and non-fiscal initiatives. BITs offer a protection and incentive regime for FDI.

There are also many other laws and policies in place for the regulation of FDI operation in Bangladesh. They are, for example, company and corporation laws, fiscal law, labour and employment law, laws relating to the acquisition of land, energy law and policies, environmental laws and policies, and laws relating to foreign exchange regulation.

Given the purpose of FDI regulation for development, the laws and polices so far adopted do not seem to be development-focused on the whole in their application to FDI at either the entry or operation stages. They appear to be mostly focused on offering protection and incentives for investors, lack any specific and binding responsibility regime for investors for the protection of national development interests, and have deficiencies as a catalyst for economic and social development in terms of legal provisions and enforcement mechanisms. This is because the FDI-related laws and policies in Bangladesh are influenced by the concept of investment facilitation at the desire of investors from capital exporting developed countries.

Likewise, in different legal aspects affecting FDI operation development issues such as the increase of national revenue, the protection of labour rights, the protection environment and human rights are not paid due attention by the government policy-makers. BITs are almost adopted traditionally simply focusing on the protection of investment, lacking the adequate reference to development-oriented aspects.

The desired developmental goal of FDI cannot be achieved in Bangladesh unless it pursues a development-friendly FDI regulatory regime. Thus there is a scope for an investigation or evaluation of the entire legal regime of FDI to explore: (a) whether it serves the developmental interest of Bangladesh; and (b) what is essential to establish a development-oriented regulatory framework for FDI operation. The evident absence of any fundamental and original legal research in this area highlights the imperative of this research as a timely reformist response and attempt to remodel the existing legal regime into a development-oriented FDI regulatory framework.

1.3 Research Question

In view of the background description of the study, the concrete research question is as follows:

1. ***Do the existing laws and policies applicable to FDI in Bangladesh consider the regulation of FDI in terms of development? Alternately***
   Is the development goal considered and practiced in regulating FDI in Bangladesh?

1.4 Objectives of the Research

The choice of the subject for this thesis is prompted by the author's conviction that the concept of the regulation of FDI development has to be regarded as an indispensable factor in the laws and policies of Bangladesh applicable to the operation of FDI. Therefore the functional objective of this study is to propose the formulation of a development-oriented regulation of FDI in Bangladesh through necessary reforms or changes in the existing laws, policies and the negotiation process of BITs, or enacting special laws in relevant areas. In fact, there is no set model framework for development-oriented regulation of FDI at a national or international level. The development-oriented regulation is determined on the basis of the features of legal principles that catalyse or support FDI-induced development by providing protection against FDI's potential negative impacts.

In view of this, in achieving its objective the study foremost concentrates on some major issues. Firstly it establishes a nexus between regulation and FDI-induced development with a due focus on an economic theoretical approach of FDI-led development, and thereafter proposes a framework for the development-oriented regulation of FDI.

Secondly it evaluates and examines the principles of relevant laws, policies, and BITs in the light of the proposed framework mentioned above, in order to identify their provisional gaps, loopholes, inadequacies and inefficiencies. In the context of development-oriented regulation this involves:

(1) the consideration of development through entry regulation;
(2) the consideration of the national economic interest in offering incentives through fiscal and financial regulation;
(3) the consideration of social and economic development in the environmental regulation of FDI operation;
(4) the consideration of social and economic development through the protection of human rights in the matters of labour and employment, resettlement in forced eviction and private and indigenous land acquisition; and
(5) the consideration of balancing the interests of foreign investors and host states in matters relating to the protection of the investment.

Thirdly it evaluates, alongside the laws, policies and BITs, the performance of regulatory and enforcing mechanisms applicable to FDI operation in relation to entry and admission, fiscal and financial issues, environment, labour and employment, land acquisition, and involuntary resettlement with a view to appreciating their strength and efficacy in supporting the establishment of a development-oriented legal regime both for national and international entrepreneurs.

Finally it puts forward necessary suggestions and guidelines for legal and policy reforms for formulating a development-oriented regulation of FDI. It is noteworthy that in framing suggestions the prime consideration of the researcher is that they be achievable and deliverable, not onerous and overly-ambitious for a country such as Bangladesh which often encounters numerous internal and external challenges in administering FDI.

1.5 Rationale for the Research

There may be many points or grounds to justify a research work, more importantly a doctoral research work, as it may have both academic and practical implications. The academic or intellectual justification of a research is determined on the basis of the gravity of its need and urgency in a given situation. Similarly the non-academic justification of a research depends upon its viability and practical application, and effects in a given society or society at large. The priority is given on the basis of the nature of the study, as the case may be.

The proposed study entitled 'Regulating foreign investment for development: Bangladesh in context' is deemed to be justified from both perspectives. To especially note on academic justification, the absence of legal research on the regulation of FDI for development purposes is prominently considered as indicated above. To the author's best knowledge, almost all the works so far done on FDI in Bangladesh are from an economic perspective. The purpose of these works are mainly to highlight the importance of different economic, political and legal determinants for increasing the volume of FDI in Bangladesh with a traditional belief that FDI brings development in its ordinary course. The legal determinants as a minor premise are shown there to be an object of liberalisation of state control over FDI operation.[17] There seems to be a knowledge-gap about the laws and policies beyond their roles for motivating potential investors in their choice of location for investment. Given this situation legal research on the regulation of FDI for development in Bangladesh is a pressing need, and this first study of its kind may create a new area of knowledge in FDI and associated development aspects more generally.

The practical justification of this work concerns its prospective application for, or impact on, the existing FDI legal regime in Bangladesh. Bangladesh is a least developed country of South Asia, beset with manifold problems such as poverty, illiteracy, capital scarcity, unemployment and different kinds of social and environmental problems. In a country such as Bangladesh, the importance of FDI is paramount since it can act as a potent means of economic and social development and can play an important role in achieving the country's socio-economic objectives.

To ensure the development goal of FDI, legal regulation is essential and hence the policy-makers need to be informed how the regulatory matters facilitate FDI's positive contribution

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[17] See Shamima Nasrin, Angathevar Baskaran and Mammo Muchie, 'Major Determinants and Hindrances of FDI inflow in Bangladesh: Perceptions and Experiences of Foreign Investors and Policy Makers' (*Paper presented at the GLOBELICS 8th International Conference, Kuala Lumpur, Malaysia, 1-3 November 2010*) 14; Zaidi Sattar, 'Foreign Direct Investment in Bangladesh : Issues of Long-run Sustainability' (Policy Note, The World Bank, 1999) < http://www.worldbank.org> 13 October 2013; Razeen Kabir, *Foreign Direct Investment and Sustainable Growth: A Case Study on Bangladesh* (Masters' Thesis, Emory University, 2007) 6 <http://www.economics.emory.edu> 13 October 2013; Wali I Mondal, 'Foreign Direct Investment: An Analysis of Perceptions of Prospective Investors' (2003) 21 (1) *Studies in Economics and Finance* 105-15; Abdullahel Kafi, Mohammad Main Uddin and Muzahidul Islam, 'Foreign Direct Investment in Bangladesh: Problems and Prospects' (2007) 4(1) *Journal of Nepalese Business Studies*, 47, 55.

to development in order to design future legal framework. For this end, in the absence of any such legal research a new research on development-orientated regulation for Bangladesh is immensely crucial as a guideline that may have an impact on re-designing a future legal framework supportive of development.

The research is also justified from the perspective of wider scale impact creation. The necessity for the regulation of FDI for the purpose of development has turned into a global concern in recent years, reflected partially in the designing of legal frameworks of some developed and least developed countries through national laws as well as in BITs. The concern for regulation is also reflected in some scholarly works in the face of the negative impacts of a flat-gate liberalisation policy. However, a composite framework of development-oriented regulation is not so far distinctively articulated in any academic research. The question addressed in this research, although focusing on Bangladesh, can be applied to all developing and least developed host countries in both its academic and practical aspects. Thus the work is justified as a provider of the concept of a composite legal framework for FDI-induced development.

1.6 Research Methodology

This research work involves the application of a mixed method approach. The methodologies applied here mainly include doctrinal and non-doctrinal approaches of legal analysis. However, the purpose of this legal research indicates that it is to be done mostly on the basis of the doctrinal method with reliance on an interdisciplinary approach.

1.6.1 The doctrinal method

The doctrinal method requires the researcher to find out what the law is on a particular issue and to analyse how it has been developed and applied. It provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, may predict future developments.[18] It consists of either a simple work of research directed at finding a specific statement of the law, or a more complex and in-depth analysis of legal reasoning.[19] Doctrinal research is mainly concerned with the discovery and development of normative standards for a particular objective and

[18] Adilah Abd Razak, *Understanding Legal Research* (2009) <http.www.econ.ump.edu.my/r esearcbulletin/article…> 20 September 2013.
[19] M McConville and HC Wing (eds.), *Research Methods for Law* (Edinburgh University Press, 2007) 32.

thus the application of this method in any legal research ultimately results in reform proposals.

The primary objective of this legal research requires the analysis and clarification of laws applicable to FDI in Bangladesh to explore the state of legal principles, their adequacy, strength, and loopholes in terms of the regulation of FDI, and what they should be to ensure its results in development. In this process, the research relies on the content analysis of relevant legislations applicable to the regulation of FDI, judicial or arbitral decisions on FDI dispute settlements, relevant national policy documents, bilateral treaty documents, and the instruments of individual investment contracts between parties as primary texts.

In the case of legislations, BITs, and national policies, the comparative analysis will be undertaken to the extent necessary for reference. In the case of evaluating the normative standards of development oriented regulation involving in particular environment, labour and employment rights, human health and safety, and right to involuntary resettlement the international soft and binding documents are used as a premise.

The study also adopts, in the process of explaining legal principles, a discourse analysis of doctrinal research based on the author's reading of published and unpublished scholarly works on FDI, liberalisation, regulation, development etc., working papers on FDI, conference papers, and commentaries of academics, lawyers, and policy-makers.

In the case of legal analysis, no single reasoning technique[20] is preferred throughout the thesis; rather a combined approach of analogical and deductive reasoning techniques is applied in attributing legal responsibility under the national laws of Bangladesh to the MNCs as the main actor of FDI as well as other investors.

It is noteworthy to say that in some aspects of regulation, prominently in fiscal and financial aspects, even in some cases of entry regulation, an economic analysis of law is adopted to argue the inadequacy and imperfection of legal provisions. An economic analysis of law refers to the review of legal principles on the basis of their cost-benefit impact.

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[20] See Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds.) *Advance Research Methods in Built Environment* (Wiley-Blackwell, 1st ed., 2008) 29; see also Prof. Khushal Vibhute and Filipos Aynalem, *Legal Research Methods* (Justice and Legal System Research Institute, 2009) 14; William H Putman & Jennifer R Albright, *Legal Research, Analysis and Writing* (Thomson Delmar Learning, 3rd ed., 2004) 29.

1.6.2 The interdisciplinary approach of the research

It has been indicated earlier that this doctrinal legal research has an interdisciplinary approach. In practice, doctrinal analysis makes at least some reference to other external factors. That means the legal principles sometimes are interpreted in view of social or historical contexts. The researchers take relevant extraneous matters into account while evaluating legal rules or policies. Foreign investment is itself a commercial and economic reality. So the proper interpretation of legal rules relating to it obviously requires some interdisciplinary approach, even more so when the legal rules relate to development aspects of it. In view of this the interpretation of some legal issues has been guided by an interdisciplinary approach in this study. These issues include those relating to the protection of labour and employment rights, protection of the environment, determining compensation for expropriation, guaranteeing the right of repatriation, compensation for land acquisition and forced eviction.

1.6.3 The Non-doctrinal or socio-legal method

The non-doctrinal method of legal research is based on other disciplines to generate qualitative or quantitative data to answer research questions. It is mainly concerned with the application of law in a given society such as people perceptions about existing laws and regulation. In this study, to evaluate people's perception about the impact of liberalisation or need for regulation of FDI for development no empirical method has been applied. Nevertheless, in support of the fundamental argument of this study, reference has been made at times to information gained by empirical research. In view of this, in the beginning it is mentioned that there is some measure of the non-doctrinal approach in the legal analysis.

In conclusion, it may be said that this research is based predominantly on internal doctrinal and interdisciplinary approaches which are designed to be descriptive and explanatory, and critically analytical.

1.7 Scope of the Research

The focus of the study as indicated by the title of the thesis is the 'Regulation of FDI for development in Bangladesh.' The phrase 'regulation of FDI for development' refers to the theme of the thesis and Bangladesh is selected as a specific area for the purpose of the study.

The regulation of anything implies legal, institutional and administrative regulation which is based on national laws and policies. Here in this thesis the legal regulation of FDI is the primary focus, set out in core FDI legislation, bilateral investment treaties, and other laws having relevancy for the FDI operations. The discussion of legal regulation involves what the law is, what it ought to be, its efficacy, strength and suitability as well as the strength of enforcement mechanisms for attaining the desired goal.

The functional objective of this thesis as aforementioned is to explore a viable legal framework for Bangladesh as a host country to regulate FDI at entry and post-entry stages to ensure its desired development goal or to make it more development-focused. The development issues are explained here in the sense of sustainable development. However, all components of sustainable development issues are not categorically linked to the regulation of FDI in analytical discourse. To achieve the objective of the research the entire discourse comprises of four major elements of regulation of FDI, namely entry regulation, regulation of fiscal and non-fiscal incentives (or fiscal and financial regulation), environmental regulation, and regulation of FDI in relation to the protection of human rights. In every respect, the discourse is based on the existing legal and regulatory instruments, such as applicable laws, policies, BITs, business contracts and the like.

With respect to entry regulation it is mostly dependent upon the host state to determine at the event of approving investment proposals their prospects for contributing to national economic and social development through industrialisation, employment generation, international market access, development of human resources, capital growth, and environmental sustainability. This study therefore chooses to focus on some essential components of entry regulation which have the most positive impacts on economic and social development. They are capitalisation requirements, carving out, ownership restriction, performance requirements (employment and local content), transfer of technology requirements, export performance requirements, environmental requirements, and official screening as to the legal compliance and financial issues of the investors.

In the context of fiscal and financial regulation, the study covers those fiscal and non-fiscal incentives that are identified as having the potential to create negative impacts on national revenue, capital growth and the balance of payment on account of the lack of proper regulation. The focus is made on all categories of fiscal incentives introduced by the national tax and finance law and policies. It also includes the regulation of transfer pricing which has the potential to create secret avenues for tax evasion on the part of investor companies on the pretext of inter-company contracts.

With regard to non-fiscal incentives, only three major incentives such as low-rate bank loans, incentives for export-oriented companies, and freedom of repatriation are taken into account because of their potential negative impact on national capital growth if they remain unregulated. There are many other non-fiscal incentives which are considered crucial factors in attracting foreign investment, such as infrastructural support, immigration facility, and work permits for foreign employees that are not taken into account as their positive impact is high and regulation has little implication for them.

As far as environmental regulation is concerned, the fundamental thing is to ascertain a legal responsibility of MNCs and development agencies in their FDI operation. Therefore, how this issue is addressed in international hard and soft law, BITs, and a national legal regime, appears to be paramount for discussion.

As regards regulating the FDI operation for the purpose of the protection of human rights, the research covers two selective areas of human rights that are mostly affected by the operation of FDI by MNCs and development agencies and their responsibility can be attributed to the protection of these rights for the social development of the host country in general. These include labour and employment rights, right to involuntary resettlements, and private or indigenous land rights arising out of acquisition or requisition for the purpose of investment.

It is undeniably true that ‘regulation of FDI for development’ has a theoretical aspect that has developed over a debate between the effectiveness and viability of liberalisation and regulation of FDI from an economic development perspective over the decades until the present. A discourse on theoretical issues is made as the foundation of the thesis.

The legal issues relating to protecting foreign investment and property by regulating expropriation or providing national judicial or international arbitral mechanisms, while not closely related to the objective of this thesis, have implications for national development interest. This thesis therefore considers focusing on the legal regime in regard to expropriation and dispute settlement mechanisms available in the context of investment in Bangladesh.

1.8 Limitation of the Research

The author encounters a number of problems due to the non-availability of explanatory legal data about the proposed area which would have made the research work easier and more manageable. Due to the acute lack of literature dealing with FDI from a legal point of view in Bangladesh and in particular in development-oriented regulation across developing host countries, the researcher mostly has relied upon his own ideas, views, and extrapolation in order to establish his argument. This limitation is to be expected of a path-finding first step research work which stands to be original and assessed on its own merit.

It is obvious that in the present global context, the concept of development is perceived as sustainable development and in terms of a definitional construct of sustainable development many indicators and parameters have been established. In designing the textual corpus of the thesis the author has not gone by any set development indicators in economic, social and environmental areas, but rather touched upon those areas inclusively induced by FDI. Some relevant issues of FDI such as market regulation and economic regulation in their entirety are not in specific focus owing to the word limitation of the thesis.

Another notable point is that three instruments are usually brought into consideration when assessing the state of FDI regulation in a host state; namely, the host state's FDI legislation, BITs, and the individual investment agreements between foreign entity or nationals and the government. In this thesis the author has used FDI legislation and BITs for primary references. As the individual investment agreements are private documents and less available in electronic and library sources, the author has been unable to use those documents for references. The private instruments are indeed designed pursuant to national legislations and BITs. However, for in-depth analysis they may be useful to an extent.

1.9 Significance of the Research

This research stands out as significant and worthy in that contributes to the development of legal knowledge about FDI-induced development, particularly in developing and least developed countries. It offers new forms, inputs, and devices for the development of a legal regime of FDI consistent with the objective of sustainable development. At the same time, it contributes to the development of a new legal knowledge regime in the areas of trade, investment, and commercial laws. As this work is largely premised on an inter-disciplinary approach it also contributes to broadening the horizon of knowledge about the environment, human rights and development economics and their implications for investment.

The functional value of this research is no less than the academic significance, and in fact may overreach it. This is because FDI strategists and the policy-makers of developing and least developed host countries have a traditional mindset, which considers FDI always brings development and therefore are more or less influenced by liberalisation. They consider complementary regulation as a barrier to the free flow of FDI in a host country. This research is a ground-breaking endeavour to change this traditional mindset and will encourage them to create an ideal and development-oriented legal framework of FDI on the basis of the knowledge gained herein.

Since Bangladesh is the main focus of this research, its functional value from a national and international perspective is immense in many ways. Nationally it offers opportunities for the policy-makers, lawyers, executives, and academics to fill their knowledge gaps about development-oriented regulation for FDI. It also provides a guideline for policy-makers and legislators to bring about the necessary legal, institutional and policy reforms in respect of FDI in order to make it more development-supportive. And it is likely to facilitate reforms in the framework of relevant commercial, environmental, and labour laws and policies.

Internationally, the gained knowledge from this work may assist state representatives to effectively deal with national interests in their negotiations of BITs with their counterparts. Other developing and least developed host states attracting FDI for their development may learn important lessons from this research which will aid them in articulating their FDI regulatory regime.

1.10 Outline of the Thesis

In terms of its structure, the thesis is segmented into the following eight chapters.

Chapter one introduces the background of the current study on the legal regulation of FDI for development, highlighting briefly its urgency in the present global economy in general and in Bangladesh in particular. Then it pinpoints the research question. It further focuses categorically on the aims, objectives and rationale of the study, details the methodology employed, and sketches the scope, limitation , significance of the work, and the sequence of the presentation of the thesis.

Chapter two is concerned with establishing linkage between FDI-induced development and legal regulation. It offers a base-line of knowledge and understanding in support of the argument in regards to the thematic approach of the thesis ‘Regulation of FDI for Development’. Before discussing the core objective, it focuses on two basic concepts of FDI; definition and determinants, as a general introduction to the readers. It then goes on to describe different aspects of development which FDI has the potential to contribute in a host country, such as the enrichment of national capital and resources, employment generation and economic growth, industrial advancement, improvement of the Balance of Payment (BoP) condition, and overall development of environment and social conditions.

The nexus between FDI-induced development and legal regulation underscores the need for the regulation of FDI to ensure or maximise developmental aspects of FDI as well as to offset potential negative impacts of FDI on the economy of developing host countries. The regulation is recognised here as a host state’s sovereign right for the cause of development. In the context of development, it focuses on two established economic theories that influence formulating a FDI legal framework, i.e. classical and dependency theories. In establishing a link between regulation and development it highlights the negative aspects of liberalisation policy and need for regulation and in addition, the exigency of regulation for sustainable development through FDI. However it does not deny the benefit of liberalisation to encourage the inflow of FDI.

The chapter therefore finally proposes a development-oriented regulation that balances liberalisation and regulation so as to create a win-win situation between investors and the developing host nation. Thus the laws and policies should feature the co-existence of liberalisation, a combination of rights, responsibilities and duties of the investors and host states, and the integration of public interest and development issues.

Chapter three clarifies the status of the aspects of entry regulation of FDI in the laws and policies of Bangladesh. It seeks to establish the necessity of entry regulation, not as a barrier to investment, but in consideration of the resulting benefits of FDI in a host country. It also seeks to discover the legal and policy gaps in Bangladesh and thus suggest some substantive and procedural reforms in the legal and policy framework with respect to entry regulation.

Considering entry regulation as a sovereign right of the host state as well as a vital element for prospective FDI-induced development, it focuses on some issues that need to be taken care of at the point of the admission of foreign investment for the purposes of both economic interest and development. In this course the discussion is concentrated on some very common entry requirements such as a capitalisation requirement, carving out or exclusion, and ownership requirement.

In addition, the discussion also involves some other issues which have implications for development in a real sense such as performance requirement, local content requirement, transfer of technology requirement, export performance requirement, environment-related requirement and overall screening as to the prospect of the investment proposal from economic, legal and development points of view.

Chapter four sheds light on FDI incentive regimes and potential associated risks along with the need for their regulation and control. It intends to show that overall fiscal and non-fiscal incentives, despite their merits for attracting foreign investment, are not beneficial economically unless they are properly regulated. The chapter classifies the incentive regimes mainly in two; fiscal and non-fiscal incentives. The fiscal incentives covers mostly tax holidays, accelerated depreciation allowance (ADA), and reduced corporate tax. Among the non-fiscal incentives, the chapter focuses on three major incentives which have more implications for economic regulation, such as freedom of access to bank loans home and abroad, incentives for export-linkage foreign investment and guarantees for full repatriation of capital and profits.

The legal and policy framework of fiscal incentives including double taxation and transfer pricing are explained with their potential negative impacts on national revenue. Similarly, the legal and treaty provisions in respect to non-fiscal incentives are extensively analysed with their negative impact on national capital and balance of payment situation. Finally it tries to draw on the costs and benefits of all kinds of incentives and suggests for the regulation of fiscal and non-fiscal incentives for the economic interest of the host country.

Chapter five aims at creating an environmental responsibility regime for the regulation of FDI activities affecting environment under existing laws and policies or bilateral treaty provisions. It intends to establish the need for environmental regulation of FDI and thus suggest creating a specific responsibility regime for FDI operation of MNCs through national laws and policies. It therefore examines the existing relevant laws and policies and above all bilateral treaties, to evaluate how far the concern for the environmental performance of FDI are reflected in the legal and policy framework and how far the existing environmental laws and policies are able to provide a sound environmental regulation of FDI.

To start with, the chapter focuses on the environmental implication of FDI activities and their responsibility for the protection of the environment as determined by the international soft laws and international investment treaties. Thereafter, it focuses on FDI laws, policies and bilateral treaties in Bangladesh as to their concern for attributing responsibility for the protection of environment to the FDI activities of MNCs. To evaluate the sound environmental regulation of investment, the chapter determines four basic tests such as the availability of an effective Environmental Impact Assessment (EIA) system, the adequate framework of waste management, the legal compliance and implementation mechanisms, and institutional regulatory mechanisms under the existing environmental laws and policies in Bangladesh.

Chapter six underscores the urgency for the protection of human rights in FDI operation by MNCs as well as development agencies. Among the human rights protection regime it chooses to focus exclusively on labour and employment rights as well as right arising out of forced eviction or involuntary resettlement. The chapter firstly evaluates as prelude the role of the international soft law regime as well as the emerging trend of bilateral treaties for creating responsibility for the protection of human rights potentially affected by FDI operation. Secondly it scrutinises the FDI legislation, polices and BITs available in Bangladesh to examine whether they have addressed human rights issues with the attribution of responsibility for the protection thereof. Thirdly it evaluates the laws relating the protection of labour and employment rights to examine the efficiency and adequacy of legal provisions and strength of enforcement mechanisms.

In relation to the protection of labour and employment rights the focal point is to evaluate whether the international labour standards as provided by the ILO Conventions and human rights documents are translated properly into the legal principles of the newly adopted labour legislation, and also the strength and efficiency of enforcement mechanisms.

Fourthly, the chapter sheds light on the forced eviction and right to resettlement. In this context it discusses the locus of the obligation of the actors in the international legal regime as well as the existing legal framework of protection in Bangladesh. The evaluation of existing legal framework of Bangladesh are based on the internationally recognised protection standards for involuntary resettlement such as prior consent and consultation for relocation, adequate compensation for resettlement, resettlement measures and option for compensations, and access to justice and judicial remedies.

Finally, it brings forth some constructive suggestions so as to make an accountability regime for the protection of human rights affected by FDI operation.

Chapter seven seeks to evaluate the legal regime for the protection of FDI against expropriation as well as existing dispute settlement mechanisms. Protection of investment may create a positive impact on FDI-induced development. As this is the main legal concern of foreign investors, there needs to be a concern about whether a legal regime for such protection is investor-biased to the detriment of the host state's economic interest. The chapter firstly deals with the existing legal status of protection against expropriation. It evaluates thoroughly the existing principle of law, conditions for expropriation, extent of their application, and method of compensation for expropriation. In course of evaluation it strives to identify the lacuna of legal principles that needs to be taken into account for host state's economic and other development interest.

As regards judicial protection, the chapter focuses on local dispute settlement arrangements and an international arbitration system. With regard to local dispute settlement arrangements, the main focus is on local competent courts and the existing arbitral legal system in Bangladesh for international commercial dispute settlement and their efficiency and strength. As for the international arbitral system, the chapter evaluates the position of Bangladesh in its responses to the international arbitral system ICSID in particular. In evaluating the existing dispute settlement mechanisms the conflicting attitudes of the investors and the host state Bangladesh towards the system are in the main focus illustrating that foreign investors are not confident with the judicial mechanism and internal arbitral system on one hand, and the experience of Bangladesh with ICSID is not good on the other. In view of this situation, it concludes with some effective suggestions that may eliminate this situation and thus lead to development of smooth and effective mechanisms balancing the competing interests of investors and the host country Bangladesh.

Chapter eight pulls together all of the major aspects of the legal regulation of FDI in Bangladesh reflecting on the summery of their status. It proposes some practical suggestions and recommendations for reform in legal and institutional mechanisms through amendments, modifications, additions, and the redesigning of the existing legal and institutional framework applicable to FDI for achieving the desired goal.

1.11 Concluding Remarks

To sum up the all above, it can be conclusively said that liberalized approach of FDI entry and operation alone is not enough to effectuate the desired development goal of FDI in a country such as Bangladesh as other developing and least-developed countries. This essentially calls for the simultaneous application of development-oriented regulation linked to entry, fiscal and financial incentives, protection of environment and human rights. The FDI legal regime in Bangladesh is known to be traditionally influenced by liberalized approach, development issues are not yet to be well pursued therein. Therefore, a thread-bear doctrinal analysis of existing laws and policies relevant for FDI entry and operation in Bangladesh is proposed under this study to assess their efficacy, adequacy and conduciveness from development standpoint with an ultimate objective of reforms and changes commensurate with on-going sustainable development concept. The above outlines of the study as reflecting on its broader scope linking to major economic and social development issues potentially impacted by FDI operation such as tax and financial regulation, protection of environment and human rights will enable the fulfilment of that object and thus, in the absence of any such prior study in Bangladesh contribute originally to the development of scholarly literature in the area of foreign investment and policies and above all show a way to adopting regulatory policy guideline for FDI operation at national level.

CHAPTER 2

NEXUS BETWEEN FDI-INDUCED DEVELOPMENT AND LEGAL REGULATION: A THEORETICAL DISCOURSE

2.1 Introduction

The purpose of this chapter is to establish the nexus between FDI-induced development and legal regulation, as it is claimed that the development goal associated with FDI inflows in a country is unachievable unless some legal and regulatory controls intended for achieving a country's development objectives through FDI are put into place.[1] While it is true that investors are motivated solely by their own business interests, their investment may nevertheless create some positive impacts on the development process of the host country.

The potential benefits from FDI leading to economic and social development include capital development, the creation of employment opportunities, the improvement of technology and managerial skill, the growth and expansion of the industrial base, and international market integration by the increase of the volume of exports. In view of its positive role as a development tool, a liberal attitude towards the control and regulation, or a 'deregulation process' of entry and operation of FDI, has grown in recent years across the globe, particularly in capital-scarce developing and least developed economies in order to encourage the increase of FDI inflows.

The liberalisation process is thought to be a successful means of motivating and increasing investment flows, but an increase of FDI flow cannot itself guarantee benefits leading to sustainable development in the host country unless it is properly regulated. This is because the liberalisation of FDI has the potential to create some negative impacts on the economic and social conditions of the host states, and the unregulated operation of FDI by MNCs may create challenges for the host country's implementation of its development policies.

Moreover, the feature elements of sustainable development, such as economic growth, and environmental and social development, require the existence of efficacious and robust legal and regulatory measures as a pre-requisite, as is the case with FDI. It is clear that regulation

[1] See Chakravarti Raghavan, 'FDI useful only when hosts control, direct and regulate', *Third World Network* (6 March 2000) <http://www.twnside.org.sg/title/hosts.htm> at 25 September 2013.

for FDI operation is essential for a host country wishing to optimise its positive benefits by tackling the associated challenges and negative impacts. In establishing this view the follow-up discussion firstly includes the understanding of the concept of FDI and its determinants; secondly, the interrelation between development and regulation; and thirdly it suggests a development-oriented framework of regulation.

2.2 FDI Defined

FDI as an integral part of the global economy is a well-known term that has gained the particular attention of international financial institutes, academics, and international and national trade investment law- and policy-makers after the emergence of the concept of economic globalisation. As a result, many definitions have been developed thus far and these appear to be similar in context. The focal content of all definitional wording is the **investment by one in a foreign country** with a form of ownership control for **the purpose of operation**. Therefore, the author prefers to say that FDI is an 'investment by a foreign individual or corporate body or financial institute in a country other than its own, with particular ownership control for the purpose of operation in intended sectors'. This definition is consistent with Moosa's view as he defines foreign direct investment as 'the process whereby residents of one country (the source country) acquire ownership of the assets for the purpose of controlling the production, distribution and other activities of a firm in another country'.[2] However, the term 'residents of one country' to denote the actors of the investment limits the scope of this definition. Alternatively, the phrase 'nationals of one country' could be used to include all natural and juristic persons based in a country.

Sornarajah's definition of FDI is more general and comprehensive from this point of view. He states that foreign investment involves the transfer of tangible and intangible assets from one country to another country for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.[3] Given this definition the transfer of property, tangible or intangible, from one country to another by any actor, either an individual national, private or state-owned company, or any agency is the constituent element of FDI. But the investor should have control over the exploitation of that property with full or partial ownership.

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[2] Imad A Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan, 2002) 1.
[3] M Sornarajah, *The International Law on Foreign Investment* (Cambridge, 3rd ed. 2010) 8.

The issue of ownership interest and control is a matter of emphasis in the definitional construct of FDI provided by multilateral financial institutes. The International Monetary Fund's (IMF) *Balance of Payments Manual* defines FDI as 'an investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of investor, the investor's purpose being to have an effective voice in the management of the enterprise'. The OECD and UNCTAD's definitions are constructed with an emphasis on 'long term relationship' and lasting interest.[4] Long term relationship and lasting interest indicate the nature of the investment; that it should be in a manner that creates and enables a continued relationship between the investor and direct investment enterprise in a foreign land, and is associated with significance management influence over the latter.[5]

The two terms referred to are the common features of the FDI definitions, mostly used by the financial institutes. The use of these terms represents the feature that distinguishes FDI from portfolio investment, since portfolio investment does not seek control or lasting interest.[6] In portfolio investment the management and control of the company is separate from the share of ownership in it,[7] while the controlling of invested assets is fundamental in direct investment. What exactly determines the control is an issue which is not agreed upon, but the commonly used minimum threshold of 10 per cent shareholding is regarded as enabling a foreign firm to create a significant influence over the key policies of an underlying project.[8] However, the issue is debatable as to how the control of management in a firm is achievable, the discussion of which seems to be unsuitable in this section.

Given the discussion over the definitional construct of FDI, two major qualifications need to be present to constitute FDI: when there is (1) a transfer of capital from a source country to a host country by an individual or by a company; and (2) a control through substantial equity shareholding. However, there exists a gap in these two constituting elements. The transfer of capital is not a hard and fast requirement for an investment to be a foreign investment. The crucial factor is the contribution to the legal capital of a project or enterprise by a foreign individual or company or foreign government-owned company or inter-governmental agency or a non-resident national of the host country. For example, investment by a foreign

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[4] See also OECD, *OECD Benchmark Definition of Foreign Direct Investment* (3rd ed., 1996) <http://www.oecd.org> 19 March 2013.
[5] See, Maitena Duce and Banco de Espana, *Definitions of Foreign Direct Investment (FDI): A methodological note* (final draft, 2003) International Economics and International Relations Department, Bank for International Settlements < www.bis.org/publ/cgfs22bde3.pdf> 20 December 2013; see also, ibid.
[6] Moosa, above n 2, 1.
[7] Sornarajah, above n 3, 8. According to Sornarajah such a distinction is drawn in the texts on economics, and is also a sound basis for distinguishing direct and portfolio investment in the law.
[8] Moosa, above n 2, 2.

individual or a company for a project based totally on a loan to a host country is regarded as foreign investment. In addition, in product-sharing agreement for oil extraction it is seen that the foreign company comes into agreement for oil exploration and there is shift of power from oil companies to oil producing host state. Oil producing host state alone has the right to control and disposal of it. The foreign company is given a certain percentage of products. In view of this the author in his own definition as mentioned above did not articulate the requirement of transfer of capital or control through substantial equity sharing.

Taking into consideration the above discussion on definition it is plausible to say that as one of the most growing economic issues, the definition of FDI is not static, but it is flexible, progressive in nature, therefore regularly becoming broader and comprehensive. This tendency is mostly evident in BITs and national legislations. BITs of capital exporting have a tendency to broaden the scope of definition so as to bring a variety of activities associated with the investment under treaty protection. On the other hand definition in national legislations mostly depends on the states' national economic policies with regards to the urgency of FDI for economic development.

2.3 Determinants of FDI

The specific location choice of foreign investors is instrumental to their amount of investment in a particular country. 'Location theory' as an offshoot of 'international trade theory' seeks to explain the allocative aspects of FDI and is also used to explain why MNCs choose to invest in a particular host country.[9] Location choice depends on various determining factors and considerations such as market size, economic growth, labour costs, trade barriers, distance or geographical location, and the government's legal and economic policies. With regard to the location choice of FDI within the US, in a study the authors assume that a foreign firm or company chooses to invest in a particular country only when doing so will maximise profit.[10]

[9] Qian Sun, Wilson Tong and Qiao Yu, 'Determinants of Foreign Direct Investment across China'(2000) 2 (1) *Journal of International Money and Finance* 79, 82; JN Bhagwati and TN, Srinavasan, *Lectures in International Trade* (MIT Press, 2nd ed., 1998) 20; GM Grossman and E Helpman, *Innovation and Growth in International Economy* (MIT Press, 2nd ed, 1993); J H Dunning, Trade, Location of Economic Activity and the MNE: A Search for an Eclectic Approach in Peter J Buckley and Pervez N Ghauri (eds.) Internationalization of the Firm (Thomson, 2nd ed. 1993) 61.
[10] CC Coughlin, Joseph V Terza and Vachira Arromdee, 'State characteristics and the location of foreign direct investment within the United States' (1991) 73 (4) *Review of Economics and Statistics* 675, 683.

The determinants or factors influencing international investment vary over time, and from region to region or country to country. But the determinants most common across the world are broadly grouped or categorised into three; economic, political, and legal. Academics and FDI analysts are of the view that the interplay of different determinants in a host country stimulates FDI growth and can help make it consistent and static, and that no single determinant is considered sufficient to attract investors and increase the share of FDI in a host country as they are in many cases interdependent.

As part of their business interest private investors always look into the potential return and risks of their investment and compare between different investment destinations in that context. With respect to a destination preference, the expectations of investors are dominated by a host of economic, political, and legal factors. At the event of making a decision for investment into a country the investors look at national economic policy and structure, legal protection and security of the investment, political stability and the governance policy of the host country. All these are evidently cardinal in creating an environment conducive for investment.

Much research has been done on the determinants for the selection of the location of FDI. Most of the previous research identified broadly the macro-economic environment and political stability of the host state as the key factors in selecting an ideal place for investment. The role of the legal and policy regime of the host state in influencing FDI as a potential determinant, in fact, began to receive attention in literature following the mid-1990s when the trend of openness and liberalisation of laws and policies grew in currency in most developing countries in order to attract foreign investment. Moreover, recent econometric studies emphasise that there has been a shift in the relative importance of determinants of foreign investment decisions from economic fundamentals towards FDI laws and policies aimed at attracting higher FDI flows in particular sectors or as a whole. Legal and policy issues involve many investment and business dynamics of foreign companies, such as entry, ownership, protection of property rights, neutral treatment, repatriation of profit, good governance, unbiased and corruption-free bureaucracy, and different kinds of fiscal and non-fiscal incentives.

In addition, legal issues involve foreign exchange regulation, labour regulation, tax and custom regulation, environment regulation, and social and human rights concerns. All these legal variables have also become essential for the economic and social regulation of foreign capital in a host country and the concern for a conducive legal environment appears to be paramount in investors' decision-making, impacting on the magnitude of aggregate FDI flows in developing and least-developing countries.

The legal and regulatory framework of the host country proves to be a vital factor for attracting the inflow of FDI. The operative assumption has been, and still is, that developing countries can stimulate FDI through investment laws and regulations. This assumption is proved by the numerous recent revisions to the foreign investment laws of the developing countries which are intended to encourage FDI.[11] The issues relating to controls and restrictions over the entry and operations of the firms are a big concern for the foreign investors and influence their decisions on locational choice. This is because investors normally tend to exercise full economic freedom in a foreign land and also to enjoy the protection of their rights and interests in equal manner with the domestic investors. Foreign investment laws define the terms in which FDI is permitted within a state. Depending upon its construction (the legal framework and regulatory mechanisms) a foreign investment law may serve to promote or discourage FDI from developed to developing and least developed countries.

Alongside the national laws, an extensive network of BITs between states has developed in order to promote FDI inflow from the contracting countries. Some regional agreements in recent times have also incorporated FDI provisions, underscoring the need for the increase of the flow. The main provisions of the laws and agreements, whether bilateral or regional, are guided by liberal economic attitudes and linked with the gradual openness of entry and removal of restrictions over the operation of firms, the application of non-discriminatory and equitable treatment, and the offering of incentives with a view to promote investment. It is evidently proved that liberalisation and incentives are attractive elements for making investment decisions and thus are able to increase the volume of flow in a host country, but it is debatable how far this liberalisation or de-regulation may contribute to economic growth and development in a host country as a cardinal objective of investment. This will be discussed in a forthcoming section of this chapter.

[11] For example, Eric Schneider and Alev Bilgen, 'Foreign Investment Laws in Republic of Turkey: A Model for Reform' (1992) 5 *Transnational Law* 99,100; Chaudi Ubezonu, 'Some Recent Amendments to the Laws Affecting Foreign Investment in Nigeria' (1993) 8 ICSID Review *Foreign Investment Law Journal* 123; Ken Laryea, 'Recent Investment Legislation in Ghana' (1990) 39 *International & Comparative Law Quarterly* 197; Mary S Flipse, 'Asia's Littlest Dragon: An Analysis of Laos' Foreign Investment Code and Decree' (1991-92) 23 *Law and Policy in International Business* 199; Jonas Berstein, 'Foreign Investment in Uruguay: A Law and Development Perspective' (1989) 20 (2) *Miami Inter-AM. L. Rev*. 359; Scott Norman Carlson, 'Foreign Investment Laws and Foreign Direct Investment in Developing Countries: Albania's Experiment' (1995) 29 (3) *International Investment Law* 577, 580.

2.4 FDI as an Element for Development

FDI is considered as an effective tool for development in a developing or least developed host country as it may contribute to the enhancement or augmentation of the development agenda of the host country in different ways, such as through resource transfer, growth and employment generation, the improvement of balance of payments and filling the saving gaps, enterprise and industrial development, and human capital enhancement. The way FDI can contribute to these development aspects is exemplified below.

2.4.1 Development through resource and capital transfer

FDI can create a positive resource–transfer effect on developing host countries.[12] The main actor of FDI, MNCs while operating FDI entails the transfer of capital, technology, and managerial know-how to the developing host countries which suffer the scarcity of such resources. Thus it helps fill the capital gaps and attain the desired requirements. It is noted that capital transfer has helped some developing countries facing financial crisis and economic hardship. Evidence is available in some countries of the South-East Asian Region in the last half of 1990s.[13]

As for technology transfer, the economic literature identifies it as the most important way through which foreign corporate presence may create positive externalities in the host developing economy.[14] MNCs of the capital exporting developed countries are the most important source of research and development (R&D) and they possess in general a higher level of technology than is available in developing countries. So they have the potential to generate considerable technological spill-overs. However it varies on the basis of the investment forms and their nature as well as the context and sectors.

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[12] See RD Robinson, *Direct Foreign Investment: Costs and Benefits* (New York: Praeger, 1987) 125; See also S Young, *The Economics of Multinational Enterprise* (London: Longman, 1979) 179; See also Yahya ZD Alhijazi, *Developing Countries and Foreign Direct Investment* (LL.M thesis, *McGill* University, 1999) 11.

[13] See for details, UNCTAD, *The Financial Crisis in Asia and Foreign Direct Investment: An Assessment* < unctad.org/en/docs/poiteiitd8.en.pd> 30 December 2013> 30 December 2013.

[14] OECD, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (OECD Publications 2002) <http://www.oecd.org> 19 March 2013.

2.4.2 Development towards economic growth and employment generation

FDI can contribute to economic growth in several ways. Firstly productive FDI generally brings long-lasting and stable capital flows and these are invested in long term assets.[15] These funds are introduced into a country's economy, contributing to the aggregate demand of the economy and thus eventually culminating into the economic growth of a country. Secondly foreign investment contributes to the increase of productivity in host countries on the whole[16] and has a positive effective on domestic firms' productivity.[17] It is claimed that the increased competition associated with the entry of MNCs upgrades the efficiency and product quality in national firms, creating the potential for export.[18] Thirdly, FDI enables the host country to develop export capabilities, thus creating a means of integration with international trade which may result in the establishment of transnational distribution networks culminating in a positive impact on economic advancement.[19]

Employment generation is another impact of FDI. It can create employment opportunities in the host country both directly and indirectly and thus can help boost the economic development of the host country.[20] Direct employment is offered directly by the firm undertaking the investment. Indirect employment is created in industries of supply chains connected to the subsidiaries. Multinational firms that use labour-intensive production techniques can help the host country reduce its unemployment rate. In a study on FDI impact on Singapore, the author has shown the existence of a causal link between investment and the increase of employment.[21]

2.4.3 Development through industrial advancement

Industrial advancement is a major contributory factor to the total development of a country as it leads to job creation, the increase of productivity and infrastructural development. FDI has the potential to significantly spur development in the host country. FDI may bring

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[15] Alhijazi, above n 12,12.
[16] JR Markusan and AJ Venables, 'Foreign direct investment as a catalyst for industrial development' (1999) 43 *European Economic Review* 337, 356; Fabienne Fortanier and Maria Maher, 'Foreign Direct Investment and Sustainable Development' (OECD Paper presented at the Conference of OECD Global Forum on International Investment in 2001) <http://www.oecd.org>12 January 2013.
[17] Ibid.
[18] Ibid.
[19] OECD, above n 14.
[20] Robinson, above n 12, 125.
[21] Koi Nyen Wong and Tuck Cheong Tang, 'Foreign Direct Investment and Employment in Manufacturing and Services Sectors: Fresh Empirical Evidence from Singapore' (Discussion Paper, Department of Economics, Monash University, 2008) <www.buseco.monash.edu.au/eco/research/.../1508foreignwongtang.pdf> 19 March 2013.

changes into the structure of imperfect local industries. The initiation of an FDI project may typically change the supply and demands in related industries, create additional competition, and raise efficiency. The participation of MNCs in local private sectors may lead to beneficial upgrades of governance and management in industrial sectors. For example, the concept of corporate governance and corporate social responsibility as the elements of corporate sustainability are imported by the MNCs to the local private sectors.

2.4.4 Improvement of the balance of payments

A country's balance of payments (BoP)[22] may be said to be the sole means of capacity building for its participation in international trade. By accepting FDI a host country may be able to enhance its BoP status in the following three ways:[23]

(a) The inflow of capital to the host country to initiate the investment can increase the credit on the capital account of the host country;
(b) The products produced domestically can reduce, or even substitute, the importation of these goods, thus improving the credit on the current account of the host country; and
(c) The goods produced locally in the host country can be exported to other countries, thus improving the credit on the current account of the host country.[24]

2.4.5 Development of environmental and social conditions

FDI is able to bring about positive changes to the environmental and social conditions of host economies through the dissemination of good practices and technologies within MNCs and through their subsequent spill-overs to domestic enterprises.[25] FDI has a strong potential to benefit the environment of the host country if the host-country's environmental regulatory policies are at least adequate. Technologies that are transferred to developing countries in relation to FDI usually tend to be more modern and environmentally 'cleaner' than the local

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[22] The balance of payments is "a statement of a country's trade and financial transactions with the rest of the world over a particular period of time, usually a year. The account is divided into two main parts: (a) current account and (b) capital account (investment and other capital transactions)". So if a country pays more than it receives by importing more goods and services than it exports, it is said that this country has trade deficit. See C Pass, B Lowes, L Davis and SJ Kronish, *The Harper Collins Dictionary of Economics* (New York: Harper Perennial, 1991) 34.
[23] Alhijazi, above n 12, 12.
[24] The other side of this transaction will be recorded as a debt in the capital account of the home country where the capital to initiate the investment has flown.
[25] Fortanier and Maher, above n 16.

ones. This positive externality may contribute to the improvement of environmental conditions.

Similarly FDI has positive social consequences. An empirical study carried out by OECD supports the notion that foreign investment may help reduce poverty and improve social conditions.[26] The beneficial effects of FDI on poverty reduction rely on the use of FDI as a tool to develop labour-intensive industries. Foreign investment raises local real wages much more so than domestic investment.[27] Moreover, there is a positive relation between FDI and workers' rights.

2.5 Nexus between FDI-induced Development and Legal Regulation

2.5.1 Economic theories and the formulation of regulation

There are two recognised economic theories of FDI that seem to have played an important role in shaping the legal regimes from the development perspective both nationally and internationally. These are neoclassical economic theory and dependency theory. However, the theory of state intervention in economic development also has a role for marketplace control, which has implications for FDI.

Neoclassical economic theory is the main dominant force and key factor behind the global push for the liberalisation of trading and investment regimes and thus plays a significant role in legal debates relating to global investment. Dependency theory, on the other hand, although it seems to have lost its influence in global rule making, is still considered as a vital force in the rule making process, as an anti-force of neoclassical economics. A mixed approach has been developed recently, striking a balance between liberalisation and regulation or protection.

A. Neoclassical Theory

The neoclassical theory argues that FDI as a means of capital flows contributes positively to the economic development of the host country.[28] It supports the development phenomenon of

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[26] Ibid.
[27] Ibid.
[28] See Sherif H. Seid, Global Regulation of Foreign Direct Investment (Ashgate, 2002) 10; see C F Bergten et al, *American Multinationals and American Interests* (Brooking Institutions, 1978) 355.

FDI as discussed above on the basis of different FDI literature. It firstly propounds that capital movement through foreign investment influences the quality and quantity of capital formation of the host country and thus increases the total savings of the country, including the government revenue.[29] It secondly views that FDI plays the role of a 'tutor,' particularly in developing countries, as the FDI by MNCs promotes replacing inferior production in developing countries by a superior one from advanced industrialised countries in different ways such as via the transfer of technology, managerial and marketing skill, market information, organisational experience, innovation in products and techniques, and worker training.[30]Thirdly it believes that FDI increases competition in an industry through achieving improvement in productivity. FDI can also widen the market for host country producers by linking the host country industry more closely to world markets, leading to even greater competition and opportunities to technology transfer.[31] Finally, it argues that FDI helps generate employment, influences favorably the distribution of income and power within the host country, and generates foreign exchange thereby easing the balance of payments constraints of the host country.[32] The infrastructural facilities are upgraded by foreign investors which also promotes the general benefit of the economy.

The development phenomenon of FDI as propounded by the neoclassical theory has played a major role in influencing the underlying principles of international law on foreign investment. Most bilateral treaties express their conviction that foreign investment flows between the parties would encourage the development of their economies. They affirm that such investment would foster the economic prosperity of the contracting parties.[33] The FDI documents sponsored by the World Bank are also influenced by the neoclassical economic theory. The World Bank Guidelines on the Treatment of Foreign Direct Investment' recognises that 'a greater flow of direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular'.[34]

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[29] Ibid.

[30] K Khojima, *Japanese Direct Investment: A Model of Multinational Business Operations* (Charles E Tuttle, 1st ed., 1978) 25.

[31] Bureau of Industry Economics, 'Foreign Direct Investment in APEC: A Survey of the Issues' (Report 95/21, Australian Government Publishing Service, 1995).

[32] GL Reuber et al., *Private Investment in Development* (Oxford Clarendon Press, 1973) 22; Sornarajah, above n 3, 38.

[33] See, for example, the preamble of the *Model Agreement of the Kingdom of Netherlands on Encouragement and Reciprocal Protection of Investment, 1993*; the preamble of the *Standard Draft of the Swiss Confederation Agreement on the Reciprocal Promotion and Protection of Investment, 1986*; the preamble of the *Model Agreement of the United States of America Concerning the Encouragement and Reciprocal Promotion of Investment, 1992*.

[34] See the Preamble of World Bank Guidelines on the Treatment of Foreign Direct Investment (1992). See for explanation, Ibrahim FI Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* (Martinus Nijhoff Publishers, 1993) 401.

In addition, the ICSID Convention also states that provision for the settlement of investment disputes will increase flows of foreign investment which are beneficial to the economic development of the host country.[35] Furthermore, the MIGA Convention incorporates the neoclassical theory as one of its objectives is to ‘encourage the flow of investment for productive purposes among member countries’.[36] The neoclassical theory is evidenced to have influenced the thinking of several arbitral tribunals. For example, in *Amco v Indonesia*, the Tribunal said that “… to protect investment is to protect the general interest of development and developing countries”.[37]

Apart from the international legal regime of foreign investment, the neoclassical theory influences the shaping of the national legal and policy structures of the host countries. Most legislative and policy frameworks are concentrated on providing facilities and incentives to encourage foreign investments in order to drive the economic benefits. The newly emerging developing countries highly prize the capital, technology, organisational capability, managerial skill, and entrepreneurship that can be gained through FDI. They believe that FDI can bring substantial benefits to their economies and improve the living standards of their people. Accordingly they have embraced FDI with open arms and given it favourable legal treatment. The developing economies have departed from the hostile and skeptical attitudes towards FDI by multinational corporations that they held during the 1960s and 1970s, and are today motivated to refine, modify, and extend their laws and policies to better harness the contribution of FDI.[38]

It is said that the dominance of free market theories and the process of globalisation in recent times influenced thinking on the subject and led to a shift in view about the essential benefits of FDI in developing countries. This view established the idea that MNCs as the harbingers and the promoters of globalisation, should have unlimited movement around the world and that their investment should be protected for the furtherance of the process of economic integration. The new mood was augmented by the downfall of communism from statecraft and the overwhelming triumph of capitalism.[39] Consequently, the 1990s were the heyday of economic liberalism, embodying the classical view on foreign investment. Between 1991 and 2000 approximately a total of 1,185 regulatory changes were introduced in national FDI

[35] See *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1966, reproduced in 2006) preamble.
[36] MIGA Convention (Convention Establishing the Multilateral Investment Guarantee Agency) (1985) art. 2.
[37] (1984) 23 ICSID 351-83.
[38] Sornaraja, above n 3,50.
[39] Ibid, 48; F Fukuyama, *The End of History and the Last Man* (Free Press, New York, 1992) 75.

regimes, of which 1,121 were in the direction of creating a more favourable environment for FDI.[40]

Despite the wider acceptance of classical theory, FDI has not always evidently proven to be better in practice as in some cases it may cause negative effects. Therefore, host countries must be careful about the proper and balanced regulatory mechanisms, because, if proper regulatory mechanisms are not in place host countries always tend to adopt 'flat-gate' policies, and instead of delivering benefits FDI may impact adversely on the social and economic life of a country.

B. Dependency Theory

The dependency theory stands diametrically opposite to neoclassical theory with respect to FDI with the view that foreign investment does not create any worthwhile and meaningful economic development to the host country.[41] It argues that foreign investment hinders economic growth and increases income inequality in the host country.[42] There are several reasons given for slow growth of economy. Firstly FDI for the most part is led by MNCs, and that MNCs in devising global policies normally consider the interest of the developed countries where their headquarters are located and the shareholders in the home countries. As a result, the home countries of the investor companies become the central economies and the host countries are placed as peripheral economies serving the interests of the central economies.[43] Foreign investment keeps developing countries in a state of permanent dependency, and without breaking out of this situation their development becomes impossible. Secondly, through the repatriation of capital and profits, in most cases the investors return to their own countries more than the amount of their investment in the host countries. According to some studies, foreign investors in developing countries repatriate

[40] See UNCTAD, *World Investment Report 2001* (2001) <www.unctad.org/diae> 20 September 2013; See also Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Publishing, 2006) 57; (It is also noted that the liberalisation trend has continued in the first five years of the 21st century. In 2004 alone, 87 per cent of the 271 changes in national investment laws were favourable to FDI).
[41] Sornarajah, above n 3, 53; For more review of these theories, see R Peet, *Global Capitalism: Theories of Social Development* (Routledge, 1991) 43-51; B Hettne, *Development Theory and the Three Worlds* (Longman Scientific & Technical, 1998) 82; P Evans, *Dependent Development: The Alliance of Multinational, State and Local Capital in Brazil* (Princeton University Press,1979) 26; Sherif S Seid, Global Regulation of Foreign Direct Investment (Ashgate, 2002) 20; and TJ Biersteker, *Multinationals, the State and the Control of Nigerian Economy* (Princeton University Press, 1987) 30.
[42] JM Rothgeb, 'Investment Dependence and Political Conflict in Developing Countries: A Comparative Regional Analysis', in S Chan (ed), *FDI in Changing Political Global Economy* (St. Martin Press, 1995) 189.
[43] Sornarajah, above n 3, 53; Seid, above n 28, 20.

twice as much capital and profit as the capital they brought in.[44] Thirdly, it is also a common allegation against the foreign investors that they use local resources without having regard for local needs, leading to lost jobs and commercial bankruptcies.[45]

The dependency theory argues that FDI is also seen to produce unequal income distribution, which in turn causes less growth. It is said that the practice of FDI in a country generates a foreign-dominated, high-income local group or elite who influence the formulation of policies and the enactment of laws protecting foreign interests and ignoring the needs of the people. The ultimate outcome is smaller income shares and a lower standard of living for the majority of the people in the host country. Furthermore, FDI is accused of other things which may not be beneficial to the host countries. They are, for example, the creation of new consumer tastes as opposed to the local producers in developing host countries; and the failure to coordinate investment and production policies with the development priorities of the host countries.[46]

Finally the theory propounds that FDI appears to be a threat to the sovereignty of the host country and also to the independent development of its social and cultural life. It argues that foreign investors are to some extent within the jurisdiction and influence of comparatively powerful foreign governments, and are less firmly under the jurisdiction of the host government. As a result, in the event of a dispute, the power and influence of the investor's country are more likely to be exercised in favour of the foreign investor against the host country. Alternatively, the investor's country indulges in the use of the economic power of its foreign investor to further its political ends.[47] Moreover, at the social level FDI is perceived as resulting in the redistribution of income from locals to foreigners; introducing alien personnel and practices into the local scheme; challenging local arrangements and interests; and threatening indigenous and traditional beliefs.[48]

Given these propositions, the dependency theory has long-held animosity to foreign investment by the MNCs. It therefore apparently discourages the unrestricted access of FDI and also the framing of liberalised laws and policies for the promotion thereof. It has been an active force behind the legal regulation of foreign investment in some developing countries,

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[44] SM Cunningham, 'Multinationals and Restructuring in Latin America' in C Dixon et al. (eds.), *Multinational Corporations and the Third World* (Westview Press, Colorado, 1986) 46.
[45] Rothgeb, above n 42,189.
[46] Reuber et al., above n 32, 20.
[47] Ibid, 16.
[48] Ibid.

particularly in Latin American developing countries[49], although presently it is not the major influence there.[50] The Nepalese *Foreign Investment and Technology Act 1992* can be taken for instance, which requires that authorities should take into account the following when granting foreign investors' permission to invest in the country:[51]

(a) whether the particular investment is desirable for the country;
(b) whether the investment contributes to the import situation or export promotion; and
(c) whether the investment makes available employment opportunities, management skills, and technical training to the Nepali citizens.

Some countries impose ownership restrictions on foreign investors and require them to have the necessary investment capital and skill with a view to promoting national participation. The policy statement of the Government of Zimbabwe reveals that the 'Government prefers majority Zimbabwean participation in new foreign investment projects and the extent of Zimbabwean ownership, management and control following implementation of projects will thus be one criterion used for assessing applications by foreign investors'.[52]

The restrictive and hostile attitudes of dependency theory towards foreign investment is based on the theorists' view that economic development is not gained through the flow of resources to the host state but involves the meaningful distribution of wealth to the people of the state. According to this view, development cannot be achieved unless the people on the whole are freed from poverty and exploitation. Development, in fact, is a right of the people rather than of the state. The right of the people should be considered as a priority over the right of the state. So any kind of law on investment, either national or international, should recognise the protection of rights of the people and local interests against the multinationals. This view cannot be undervalued, when we see that the protest against foreign investment grew out of the fact that the MAI[53] provided protection to the MNCs without addressing the environmental and human rights abuses that these corporations can cause.

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[49] It is perhaps a natural outcome of the United States influence in the economic life of Latin America. See, C Key, *Latin American Theories Development and Underdevelopment in Latin America* (Routledge, 1st ed, 1988)164.
[50] Sornarajah, above n 3, 48.
[51] *The Foreign Investment and Technology Act 1992 (Nepal)* art. 5; see also *The Foreign Private Investment (Promotion and Protection) Act 1980* (Bangladesh) s.3.
[52] See, The Government of the Republic of Zimbabwe, *The Promotion of Investment: Policy and Regulation* (1991) 11.
[53] See OECD, *The multilateral agreement on investment: Consolidated texts and commentary* (13 May 2007) <http://www1.oecd.org/daf/mai/pdf/ng/ng971r2e.pdf> at 26 September 2013.

C. Newly-emerged Mixed Approach

Although the arguments of the dependency theory seem to provide some rationale against development through MNC-led foreign investment from the viewpoint of freedom-oriented development, the reality has changed in the post-communist era. With the failure of communism and the emergence of a free market economy the idea flourished in the world development community that the theories hostile to private initiative as a means of generating growth were not able to make any headway. Animosity towards multinational corporations as reflected in the dependency theory has lessened in recent years. The fear that multinationals pose a threat to the sovereignty of developing states has receded with the increasing confidence of developing states in managing their economies.

The reduction of fear towards MNCs was furthered by the studies of the United Nations Commissions on Transnational Corporations (UNCTC). These studies, while supporting the view that investment through MNCs could have harmful effects in certain circumstances, pointed out that if properly harnessed, MNCs could be engines of development in transitional and developing economies.[54] The studies of the UNCTC on the role of investment paved the way towards identifying the beneficial and the harmful effects of foreign investment. The beneficial effects were similar to those as established by the proponents of the classical theory. Similarly, the deleterious effects were almost the same as those the dependency theorists held. This enabled host countries to undertake regulatory measures to counter harmful practices. This also resulted in efforts to introduce codes of conduct for multinational corporations, thus generating principles which, although not part of international law, have an influence in shaping future law on investment.

Once it is pointed out that MNCs can act as both beneficial and harmful to development, it is easy to adopt a position that foreign investment should be harnessed to economic development and must be carefully regulated to achieve this end. The classical view that FDI is generally beneficial to development is no longer unconditionally accepted in academic literature. The successive economic crises over the last two decades have dented the prevailing viewpoint that foreign investment has uniformly beneficial effects and therefore, developing economies are now mindful that a friendly attitude towards FDI cannot be taken for granted.[55]

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[54] Sornarajah, above n 3, 59.
[55] Ibid.

Equally, the classical view is unlikely to continue to be a guiding influence on policy-making relating to foreign investment in developing countries. Thus, the goal of investment law should be to control inward FDI rather than to attract it. As a result of these changing viewpoints, policy-makers and academics are taking a more mixed approach to legal framework. This mixed approach has been termed a ‘middle path’ by Sornarajah in his work[56] and is followed evidently in the legislation of Australia, a resource-producing country conscious of environmental protection.

Similarly, some developing countries have enacted legislations with a check and balance to provide incentives to investments. The ‘mixed approach’ believes that MNCs can engineer development if properly harnessed, and therefore the host state should be entitled to the right of regulation of the foreign investment process. It opposes the propositions of classical theory that rules of protection should uniformly apply to all investments. The current emerging view is that investment should be entitled to protection only on a selective basis. Protection depends on the extent of benefit it brings the host state and the extent to which it has conducted itself as a good corporate citizen in promoting the economic benefit of the host state. The main reason is that the goal of foreign investment should be to create a win-win situation in terms of economic benefit between the investor and the host state. A legislation based on this mixed approach is seen as desirable to ensure the creation of this situation. The more recent BITs and national legislations are increasingly adopting this middle way, balancing the protection of interests of capital importing and exporting sources. However, the national and international laws are still influenced by the concept of the classical theory.

2.5.2 FDI-induced development and the current trend of liberalisation

The classical economic theory in the belief that economic development can be achievable by FDI advocates for the liberalisation of the legal regime of FDI in order to motivate investors. The liberalisation of legal regime means to bring changes into the regulatory framework of a host country which includes lifting entry restrictions, relaxing performance requirements, liberalising operational conditions, ensuring economic protection and freedom, opening up all sectors for investment, and granting fiscal and financial incentives to the investors. The advocators of FDI liberalisation argue that liberalisation would, in addition to generating more investment, lead to a better allocation of resources and greater economic efficiency,

[56] Ibid.

and thereby faster economic growth at the global level.[57] Their argument relies on the fact that the more the flow of FDI increases in a case, the more development is gained. Under the influence of this notion the liberalisation of FDI regimes is popular at present due to the growing importance of FDI for economic growth and development.

It may be conceded in reliance on several FDI statistics that liberalisation has proven to be a successful attractive factor for the rise of FDI inflows in recent decades. In an account from 1981, we find world annual FDI inflows rose from an average of $50 billion during 1981-1985 to $1.9 trillion in 2007.[58] By the end of 2007, world FDI flows had accumulated to a stock of $15 trillion, controlled by over 80,000 MNEs that have more than 800,000 foreign affiliates.[59] Following 2007, FDI flow is comparatively on the decline due to the global financial crises, which is recovering after 2010. Although the rate of inflow is comparatively on the decline, investment promotion and facilitation have remained the dominant element in recent national investment policies.

Moreover, in view of the rise in FDI inflows in recent decades, it is argued in the policy research Working Paper of the World Bank that the rise of FDI was made possible in recent decades, to a large extent by an enabling or favourable regulatory environment.[60] Particularly since the mid-1980s the investment climate has become more welcoming for foreign direct investors. Countries have liberalised the national entry conditions of MNEs, introduced a variety of measures to attract such enterprises actively (e.g., through incentives and establishment of investment promotion agencies), and facilitated the operations of foreign affiliates once established. [61] These national regulatory changes have also been complemented by international investment agreements, particularly BITs and regional agreements introducing (among other things) the non-discriminatory protection of investment. Increasingly, moreover, commitments and pledges for the protection of international investment, and indeed the liberalisation of entry conditions, have become the

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[57] Ibid.
[58] See for details, UNCTAD, *World Investment Report* (2008) <http://unctad.org/en/docs/wir2008_en_pdf> 12 January 2014.
[59] Ibid.
[60] See David Dollar, 'Globalization, Poverty and Inequality since 1980' (World Bank Policy Research Working Paper No.3333, World Bank, November 20014) World Bank <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=625296> 30 December 2013.
[61] Independent of changes that countries have made regarding FDI, countries have also improved the business climate - and are continuing to do so - for investment in general (some of these changes may also be captured by the UNCTAD data). Thus the World Bank observed (Doing Business *2009* (A Report, The World Bank, 2008)1) "Worldwide, 113 economies implemented 239 reforms making it easier to do business between June 2007 and June 2008. This is the most reforms recorded in a single year since the *Doing Business* project started. In the past year reformers focused on easing business start-up, lightening the tax burden, simplifying export and import regulation and improving credit information system."

pivotal part of free trade agreements; in fact, the great majority of modern free trade agreements set out the substantive principles of free investment.

The increased flow of FDI across developing countries encompasses both the manufacturing and service sectors. The FDI in service sectors came with significant developments during the 1990s that boosted its share of the world's GDP to almost 75 per cent in 2005 from 60 per cent in 1990, one study reports.[62] A major global factor that leads to the increase of FDI share both in manufacturing and service sectors in developing countries is the adoption of favourable regulatory regimes opening up the sectors to foreign participation. In many developing countries impediments, including restrictions on the forms of investment and the level of foreign ownership, have been gradually eased during last two decades through attractive unilateral investment laws, bilateral and regional investment agreements, and commitments under the World Trade Organization (WTO) and its *General Agreement on Trade in Services* (GATS).

In the case of some Asian developing countries, more liberal FDI policies were implemented following the Asian crisis of 1997 to attract more FDI.[63] Many affected countries such as South Korea, Thailand, and Indonesia have progressed in opening up series of sectors for FDI.[64] The progress in liberalisation in China began through its accession into WTO that ultimately impacted positively on its inward FDI flow. India has achieved a record FDI growth in recent years that has been stimulated by freeing up the economy to private enterprises and FDI, investment in infrastructure, export promotion, selective liberalisation, and government investment in productive capacity.

In view of the above discussion it may be argued that liberalisation policy is able to bring more FDI into a host country and it is assumed that associated benefits of FDI can be achieved thereby. But the question is whether the increase of FDI flow can guarantee the development aspects of FDI in a host country, because the liberalisation or deregulation of FDI in practice may defeat the advantages of FDI. In one study the author has argued that deregulation of FDI could eliminate the advantages of FDI or at least reduce them to a

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[62] See for details, UNCTAD, *World Investment Report* (2008) <http://unctad.org/en/docs/wir2008_en_pdf> 12 January 2014.
[63] Karl P Sauvant, 'FDI Protectionism Is on the Rise' (Policy Research Working Paper No 5052, International Trade Department' The World Bank, September 2009) <http:econ.worldbank.org> 20 September 2013.
[64] Ibid.

minimum.[65] If FDI is deregulated, firstly the employment effect will be cut down in cases where the multinationals resort to employing foreigners. Secondly the resource transfer also can be reduced. For example, the positive effect of management skills transfer can be restricted when multinationals reserve their management and high-skilled positions for foreigners. And the benefits of technology transfer can be less attainable if the investment takes the form of a wholly-owned subsidiary. The joint venture form of investment is more conducive way of gaining the benefit of technology transfer. Thirdly, in the absence of regulation, the benefits to the balance of payment can be affected; this mainly happens in cases where the goal of FDI is to serve the national market demand only. It may also happen due to unregulated repatriation or imbalanced fiscal incentives.

Another point is that although multinationals by investment can offer benefits of capital flow, technology transfer, market access, skills, and management in one package, it does not mean that simply 'opening up' to FDI is the best way of obtaining these benefits. Indeed, it is admitted more or less that unqualified FDI may have some parallel disadvantages in developing host countries. The merits and demerits of investment go hand-in-hand. To exemplify, a large flow of FDI resulting from FDI liberalisation can add to foreign exchange and investment resources in a host country, but it may give rise to the crowding out of local firms or the creation of exchange rate problems.[66] The desire to generate employment may lead government to favour labor-intensive, low technology investments on one hand; while the desire to promote technology development may favour more sophisticated investors on the other hand. The desire to upgrade technology may create more reliance on multinationals, undermining the desire to promote the innovation of local firms.

In addition, the increased competition driven by multinationals may result in negative effects on local firms of the host country. In the backdrop of such an opposing situation, there is no guarantee that the liberalisation of FDI always remains advantageous for developing countries in achieving their development objectives. Moreover, empirical evidence provides

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[65] See Frank L.Bartels and SA de Crombrugghe, 'FDI Policy Instruments: Advantages and Disadvantages' (Working Paper No. 1, UNIDO 2009) <ww.unido.org/Data/statistics/utilities/docnew.cfm?id=117&1=1> 29 December 2013.

[66] Sanjayalal, 'FDI and Development: Research Issues in the Emerging Context' (Policy Discussion Paper, No. 0020, Centre for International Economic Studies, 2000) <www3.qeh.ox.ac.uk/pdf/qehwp/qehwps43.pdf> 20 March 2013; see also Manuel R Agosin and Ricardo Mayer 'Foreign Investment in Developing Countries: Does it Crowd in Domestic Investment' (2005) 33 (2) *Oxford Development Studies* 151, 155-158; see also Holger Grog and Eric Strobl, Foreign Direct Investment and Local Economic Development: Beyond Productivity Spillovers in Theodor H. Moran, Edward M.Graham and Moangus Blomstrom (eds.) *Does Foreign Investment Promote Development* ? (Institute for International Economics, Centre for Global Development, Washington, DC, 2005) 143.

no support for believing that there are unqualified systematic gains from a regime of free trade and capital movements, while evidence suggests that there have been systematic losses.[67] Under this situation, regulation is the better way for developing and least developed countries to manage and balance the advantages and disadvantages of FDI and eventually reap its benefits. The liberalisation of FDI in association with weak bargaining and regulatory capabilities on the part of host state governments is more likely to bring one-way benefits to investors.

The pertinent matter is that liberalisation is not voluntarily undertaken by the governments of developing host countries. As the developing countries are in need of capital import, they always face pressure from capital exporting developed countries to achieve certain levels of FDI protection and liberalisation through amendments in their laws and policies or through BIT or regional free trade agreements (FTA). The developing countries under bilateral treaty negotiations are often pressured to participate in a self-destructive race to attract FDI through liberalisation. Consequently, due to weak bargaining and inadequate regulatory arrangements, liberalisation in a host country sometimes appears to be harmful. A South Central Policy brief argues that liberalisation can be harmful to developing countries when they adopt "a global investment regime which [takes] away a developing country's ability to select among FDI projects, and to regulate inflows for macro-economic reasons, [it can] hinder development and prejudice economic stability".[68]

Liberalisation or de-regulation appears to be a good vehicle to attract FDI and in the face of competition, the developing countries adopt such a policy. But it is not taken for guaranteed that the rise of the inflows of FDI depends merely on host state's liberalisation policy. This view can be supported on the basis of two reasons. One, there are many instances where liberalisation and fiscal incentives are considered to be minor factors in choosing FDI locations, while host state's law and order situations and their overall infrastructural availability are of higher priority for the investors. Despite liberalisation, the countries of South Asia are still failing to attract FDI inflows up to expectations on account of political unrest.[69] On the other hand, as per UNCTAD reports on FDI inflows, the developed

[67] Ibid; RE Baldwin, 'The Effect of Trade and Foreign Direct Investment on Employment and Relative Wages' (Working Paper No. 5037, NBER, 1995) <http://www.oecd.org/eco/growth/33764702.pdf> 20 March 2013.
[68] Martin Khor, 'Foreign Investment Policy, the Multilateral Agreement on Investment and Development Issues', *Third World Network*, 2001<http://www.twnside.org.sg> 20 March 2013.
[69] Kevin Williams, *Essays on FDI, Growth and Political Instability in developing countries* (PhD thesis, Nottingham University, July 2010) <http://www.etheses.nottingham.ac.uk/1420/1/ethesispdf.pdf> 25 March 2013.

economies are still higher recipients of FDI, although they have strong environmental and social regulatory mechanisms.[70]

Second, the liberalisation or removal of restrictions on FDI does not create the complementary factors that MNCs need; it only allows them to exploit existing capabilities more freely.[71] Thus FDI response tends to be more vigorous when liberalisation takes place where local capabilities are strong and feeblest where they are weak. Similarly, over time FDI inflows rise where local capabilities are strengthened and new capabilities are created; they stagnate or fall where they are weak. So, liberalisation policy can be treated not as a necessity but as a sufficient condition for attracting FDI and extracting the most benefits from it.

It is clear from above discussion that liberalisation is not necessarily a tool which combines FDI inflow and resulted development in a country. It is not even an ideal policy on FDI that applies to all countries at all times. But its importance cannot be ignored, given its ability to motivate investors in an era of competition as the global trend continues. On other hand, a host country should not attract FDI at the compromise of its development goal. Therefore, it is justified that a state should try to increase the advantages and decrease the disadvantages of FDI through regulation as it is the sovereign right of every state. At the same time, a state should try to remain attractive as an investment site to foreign investors by achieving a certain degree of liberalisation and flexibilities in their FDI policies.

2.5.3 Legal regulation as a host state's right

It is widely recognised that legal regulation over all internal affairs occurring in the territorial jurisdiction of a country is a county's inherent right. From this point of view a host state can exert its control over FDI by laws and policies at entry and operational stages. As a concept of cross-border capital movement, FDI involves economic activities by an alien in a foreign state that concern some legal issues intended for the promotion, control, and protection of investment as well as the protection of the investors. The country hosting FDI has a duty towards ensuring legal protection to the investment property and investors, and a

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[70] See for examples, UNCTAD, *World Investment Report* 2010 (list of global FDI inflows, top 20 host economies from 2008-2009) 3 <http://www.unctad.org/en/publicationsLibrary/wir 2010_en_pdf> 30 December 2013 ; see also UNCTAD, *World Investment Report* 2013 (list of top 20 host economies,2012) 15 <http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf> 30 December 2013.

[71] See Yardanka Chobanova, *Multinational Corporations and Foreign Investors in CEE Western European Multinationals in the CEE Agro-FoodIndustry: The Cases of Nestle, Unilever and In Bev*, Doi Serbia (2008) <http://www.doiserbia.nb.rs/ft.aspx?id=0352-57320824031C> at 25 March 2013; Bartels, above n 65.

corresponding right to regulate them as per its need to meet its intended development goals from FDI. The importance for the legal regulation of FDI within a national territory increased largely after the post-colonial era due to the emergence of independent states as a claim of sovereign right.

The right of a state to regulate is based upon the notion of 'state sovereignty' within its territorial jurisdiction. The sovereign right to regulate the activity of foreign investment is recognised by both international and national law instruments. It is also firmly established in customary international law, as an attribute of state sovereignty.[72] *The UN Charter of Economic Rights and Duties of States* 1974 establishes the principle of state's permanent sovereignty over all of the natural resources, economic activities, and wealth within its territory.[73] The principle of permanent sovereignty recognises "…the right of a host State to regulate and exercise authority over, and supervise the activities of, foreign investors in accordance with laws and regulations and in conformity with its national objectives and social priorities."[74] In the course of this, a state has also the right to regulate and supervise the activities of transnational corporations (TNCs) or MNCs, the main actors of FDI operating in its jurisdiction and require their activities to be in compliance with national laws and regulations.

The state's sovereign right to regulate FDI is also confirmed by the *UN Resolution 1803 on Permanent Sovereignty over Natural Resources* 1962. The Resolution provides the framework of principles and rules conferring the right upon the states to regulate the operations of FDI for the exploration, development, and disposition of natural resources. The principles and rules governing authorisation, restrictions, or prohibitions of economic activities regarding natural resources must be in conformity with national laws and conditions set freely by the people and states concerned on the basis of needs and interests.[75]

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[72] Ibrahim FI Shihata, 'Regulation of Foreign Investment' (2004) 2 *International Sustainable Development Law* <http://www.eolss.net/Sample-Chapters/C13/E6-67-03-04.pdf> 26 March 2013.
[73] *The UN Charter of Economic Rights and Duties (1974)* art.2 (1) (2); See also, Subrata Roy Chowdhury, 'Permanent Sovereignty over Natural Resources: Substratum of the Seoul Declaration' in Paul De Waart et al. (eds.), *International Law and Development* (Martinus Nijhoff, 1988) 59, 59; Emeka Duruigbo, 'Permanent Sovereignty and People's Ownership of Natural Resources in International Law' (2006) 38 *George Washington International Law Review* 33, 38.
[74] Ibid.
[75] Ibid.

The *Calvo doctrine*[76] recognises sovereignty as paramount, which indicates that a state may enjoy the right to regulate the economic activities of the alien investors. Although the concept of absolute sovereignty as perceived by the *Calvo doctrine* is the subject of immense criticism in the face of the growing concept of economic-cooperation led by supra-national institutions, this does not militate against the state's right of regulation for its developmental need.

Given the perceived right of regulation as established under international law, it is justified for host states to exercise control over FDI in accordance with their national laws and policies in order to foster economic and social progress for their people's benefit. Regulation does not necessitate curtailing or affecting the investors' fundamental rights to the protection of their properties and persons in line with established international standards. Moreover the right to regulation can be qualified through treaty commitments or by general international law rules regarding the treatment of aliens.

FDI regulation entails imposing entry restrictions and operational requirements to ensure that investments be consistent with the host state's economic laws and policies. Through entry restrictions a state can ensure that FDI is suitable to its development objectives and interests. For instance, a host can impose conditions for investment to be located in particular region, require certain types of direct investment such as joint venture with local partners, or forbid investment in certain sectors, impose a minimum local equity restriction or environmental certification and so on. [77] The entry control can be exercised through imposing screening, licensing requirements and several approvals or administrative clearance by the host states' central or local authorities. The entry of foreign investment can be excluded by a state where the conditions are not satisfied.

The imposition of conditions upon the entry of investment or exclusion is based on the accepted rule that the whole process would be controlled by the host states laws as it is the prerogative power of the sovereign state. The law of the host state could specify the provisions through which the foreign investment should be made, the nature of capital

[76] The Clavo Doctrine is the body of international rules regulating the jurisdiction of the governments over aliens. The doctrine advanced by the Argentine diplomat and legal scholar Carlos Calvo in his 'International law of Europe and America in Theory and Practice' (1868).
[77] See *Canada v Cain* (1906) AC 542, 546. It was observed by the Privy Council that one of the rights possessed by the supreme power in every state is the right to refuse the alien to enter that state, to annex what conditions it pleases to the permission to enter it and to expel or to depart from the state. See also *Schmidt v Secretary for Home Affairs* (1969) 2Ch 149,168, where Lord Denning said: 'At common law, no alien has any right to enter this country except by the leave of the Crown; and the Crown can refuse leave without giving any reason.' The common law has been modified by the statute.

resources that should be brought from outside the state, the planning and environmental controls that manufacturing plants should be subject to, and the required circumstances of the termination of foreign investment and other similar matters.[78]

The law of the host state also can specify the operational regulations of FDI which might include local content requirements, technology transfer requirements, economic and fiscal regulation (foreign exchange and remittance restriction, product licensing, export performance requirements), local employment restrictions, environmental regulation, and above all regulation related to the protection of human rights. All these regulatory issues are mainly based on a country's national development and eco-politico security interests.

The legal approaches to regulating foreign investments are widely varied on the basis of domestic political considerations, economic theories, development objectives, and perceived national interests.[79] The trend of introduction of entry and operational regulation in view of development objectives is rare in the specific laws for FDI in developing host countries. However in developed countries, there are legislations and regulations dealing with different entry and operational conditions that do exclude FDI on the grounds of national interest and development.

For instance, the *Foreign Acquisitions and Takeovers Act of 1975* in Australia states that the Government must determine whether proposed foreign acquisitions are consistent with Australia's national interest. Australia even announced a new policy in 2008 for proposed investment by sovereign investors. It requires the reviews of applications by investors taking into consideration six issues that determine whether an investor's operations are independent from relevant foreign government; the investor's observance of standards of business behavior; the investment's impact on Australia's national security; and the contribution of an investment to the country's economy and community.[80] Likewise, Japan's *Foreign Exchange and Foreign Trade Act*[81]declares that foreign investments that are likely to impair national security, disturb the maintenance of public order, hinder the protection of public safety, or have significant adverse effect on the " smooth management of the Japanese

[78] Sornarajah, above n 3, 90.

[79] Ibrahim FI Shihato, 'The Regulation of Foreign Investment' in AFM Maniruzzaman at el. (eds.) *International Sustainable Development Law* vol. 2 (IOLSS Publication, 2010) 195.

[80] The Department of the Treasury, Australia, 'Government Improves Transparency of Foreign Investment Screening Process,' (Media Release, No. 009, 17 February, 2008) <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/009.htm&pageID=003&min=wms&Year=&DocType > 26 March 2013.

[81] The Act dates back to 1949 and is amended in 2005.

economy" must be screened by the Ministry of Finance. The review of these examples reveal that the state deserves the right of regulation or control over the entry and establishment of FDI to the extent it is necessary for or consistent with development goals and public interests.

2.5.4 Regulation as a need for sustainable development

Generally speaking, regulation can play an instrumental role in the achievement of sustainable development in a developing and least developed host country by ensuring the potential advantages of FDI. This argument is premised on the fact that although liberalisation of the FDI legal regime has been proved to be an attractive, mere liberalization fails to ensure the utilisation or retention of the benefits of FDI, as mentioned in a previous section. This is because the liberalisation of FDI presents many challenges for implementing policies of sustainable development. For example, although in general trade and investment are not root causes of environmental and social problems, their operation may have an adverse impact on environment and social concerns in a country. Overcoming such challenges and enforcing the opportunities of FDI necessitate the regulation of FDI.

In the context of justifying this argument, a brief discussion on the concept of sustainable development and its linkages with regulation is warranted. The perceived concept of sustainable development goes beyond the traditional concerns for economic growth; it extends to environmental protection and social development as well. In fact, it refers to a situation where development persists as a result of the simultaneous interplay of its various ingredients. The constituent elements of sustainable development fundamentally involve economic growth, environmental protection, and social development. Economic growth involves basically the increase of productivity, income and employment generation, industrialisation, human resource development and so on. Environmental sustainability, in short, refers to attaining the capability of pollution and ecological control and protection. Social development means all right-based developments including the protection of human rights, promotion of human health and safety, education, promoting living standards by poverty alleviation, and so on.

The development issues are interdependent and mutually supportive to each other and as a result one can never be achieved at the compromise of another. In reality, sustainability requires a long-term focus on development in these areas. This view is well-established in the *Brundtland Report 1987* as it defines sustainable development as an effort "to meet the needs of the present without compromising the ability of future generations to meet their own needs".[82]

The interplay between sustainable development and regulation is obvious as all the constituent elements have legal and policy implications. Without fulfilling the legal and policy requirements, economic, environmental and social sustainability remain a distant prospect. The liberalisation of any legal regime may create short-term opportunities and possibilities for development, but regulation is essential for its perpetuity and sustainability. An adequate regulatory regime in respective issues therefore can ensure investors' positive contribution to development and catalyse sustainability.

In justifying the importance of regulation, the issue to be addressed is how far regulation is essential for maximising the benefits of FDI and turning its potential positive contribution into sustainable development in a host country - a proposition opposed to the current trend of the liberalisation of FDI. The importance of regulation is easily understandable by the fact that FDI has both merits and demerits simultaneously in a host country, and demerits mainly result from absolute liberalisation or unregulated situations of FDI operations. It is noted in this context that foreign investors look more to their own interests and maximising their business profits and returns, rather than being concerned about what they are adding to the development of their host country. Therefore, there is no reason to believe that FDI invariably carries benefits leading to sustainable development.

A close look at the advantages of FDI reveals the corresponding disadvantages and challenges in most cases. First, it is already mentioned that FDI can contribute as an element of economic growth by improving the BoP situation of a country. But conversely an unregulated repatriation of earnings of subsidiaries of MNCs may create the potential risk of a BoP crisis as the repatriated earnings of the subsidiaries to their home countries are recorded as debt on the current account of the host country. Unqualified repatriation may create a situation of economic colonisation as carried out historically by the East India Company in British domains in the past.

Second, the other associated economic benefits such as transfer of technology, competition, industrial development, and human capital development can be tarnished by deliberate misuse by MNCs. MNCs are an effective means of disseminating technology from

[82] United Nations, *Report of the World Commission on Environment and Development: Our Common Future* (1987) 37 <http://conspect.nl/pdf/Our_Common_Future-Brundtland_Report_1987.pdf> 26 March 2013.

developed to developing countries. Technology transferred through FDI in general includes the 'entire package' including experts, skills and the financial resources to utilise the technology appropriately.[83] Evidence suggests that for FDI to create a positive impact on productivity, the 'technology gap' between domestic enterprises and foreign investors must be limited. In addition, in terms of the supply of machineries there must be due care for supplying new machineries. There are evidences that MNCs import to the host developing or least developed host countries the machineries for their subsidiaries which are already declared obsolete or unworthy of operation in their home countries.[84] The law and policy to regulate the transfer of technology can only be a tool to prevent the occurrence of such a situation.

Foreign enterprises may greatly assist economic development by enhancing domestic competition, thereby leading eventually to higher productivity, lower prices, and more efficient resource allocation. Conversely it is true that the entry of MNCs also tends to raise the levels of concentration on host-country markets, which can hurt competition. This risk is exacerbated by several factors, one being when the host-country competition law framework is weak or weakly enforced.[85]

It is also notable that in the context of FDI-induced economic growth, there is an increasing body of econometric evidence that countries with open investment regimes have had higher rates of growth resulting from an increase in the production base, introduction of new skills and technologies, and the creation of market competition and employment generation. Similarly, available evidence suggests that many of the poorest developing countries have not been able to participate in the growth-inducing benefits of openness to investment.[86] This failure has happened to the majority of least developed countries (LDCs) despite their multiple efforts at reform to a liberalisation policy in order to integrate into the global economy. Against this backdrop, it appears that market openness is not a sufficient condition for economic growth, but sound macro-economic policies, stability of regulatory institutions and social stability are also necessary.[87] Market reforms cannot work well with weak institutions, poor governance and unsound polices. Moreover, lax economic, political and

[83] Fortainer and Maher, above n 16.
[84] Rita Almeida, Ana M Fernandes, Openness and Technological Innovations in Developing Countries: Evidence from Firm Level Surveys (Discussion Paper No. 2907, Institute for the Study of Labour, July 2007) <papers.ssrn.com/sol3/Delivery.cfm?abstractid=1000889> 26 March 2013.
[85] OECD, *Foreign Direct Investment for Development: Maximising Benefits and Minimising Costs* (2002) <www.oecd.org/investmenfordevelopment/1959815.pdf> 26 March 2013.
[86] Ibid.
[87] Fortainer and Maher, above n 16.

institutional systems that grow often as a result of liberal policies create scope for bribery and corruption, which has a strong negative impact on sustainable development. Anti-corruption law and a regulatory framework are essential to curb this situation for the purpose of sustainable development.

Apart from economic growth, foreign investment can also have significant effects, both positive and negative, on the environment, although in general it is not expected to be the cause of environmental problems. Foreign investment flows may assist in curbing pollution problems through the dissemination of technologies, but the liberalisation of FDI may lead to the increased production and consumption of polluting goods or to a vast industrialisation. This entails in effect growing pressures on the environment such as increased pollution, exploitation of natural resources, rapid urbanisation or damage to protected areas, forestation and arable lands. If investment liberalisation is associated with the implementation of laws and strong regulatory frameworks to protect the environment, it can have a beneficial impact on the environment. For example, FDI can contribute to the improvement of structural efficiencies and make possible new 'green' investments. Moreover, by contributing to a country's economic growth, investment may increase society's demand for a healthier environment as the societies of the wealthy are more willing and able to pay for the protection of their environment.

FDI may have an impact on social development which is recognised as a major factor of sustainable development. Among social development issues FDI can contribute to the labour market, poverty alleviation, and human resource development. FDI's contribution to the development of the labour market through employment generation is an unanimously agreed matter. But the host countries' role for achieving labour market development becomes questionable. This particularly occurs where governments compete to attract FDI and are lenient or over-look the national laws promoting core labour standards. The MNCs are given plenty of opportunities and unconditional facilities for hiring and firing and reserving the managerial posts for foreigners. But this lenient attitude is not conducive for the creation of an efficient labour market. Moreover it is not proven to be good way of attracting investment.

One study finds that the absence of core labour standards does not change the location decisions of OECD investors in favour of less strictly regulated countries.[88] In the majority of cases, core labour standards are not considered to be important for location choice and a

[88] OECD, above n 85.

better way to be competitive. Conversely, countries that strengthen their core labour standards can increase economic efficiency by human capital enhancement in the work force and by creating an innovation- and production-friendly environment.[89]

In addition to labour market development, employment generation can act as a vital means of poverty alleviation and improvement of living standards. This positive effect of investment may be frustrated unless regulatory reform is made that boosts the demand for labor-intensive investment. It helps increase the demand for labour, resulting in an increase in wages and/or employment. However, the reduction of poverty depends upon strong representation of the poor in the type of labour for which demand has arisen.[90] It is noticeable that the MNCs are currently more interested in investing in service sectors in the developing host countries where employment opportunities are limited and confined to a limited number of skilled persons, the representation of a vast majority of poor people is absent there. Therefore, investment in labor-intensive products can be made a requirement for fiscal and non-fiscal incentives in order to broaden access to income opportunities and thus overall welfare gains.

The above analysis establishes that the liberalisation of FDI can create opportunities and possibilities for development in many respects, but the sustainability of development is far off without necessary regulation from economic, environmental, and social perspectives. Therefore, development-oriented FDI regulation is required to achieve the development goals of FDI in a host country.

2.6 Framework of Development-oriented FDI Regulation: A Balancing Approach between Liberalisation and Regulation

2.6.1 Forms of FDI regulation in general

The issues of FDI can be regulated in three ways: unilateral, bilateral, and multilateral. Unilateral regulation as a first form of regulation refers to the national laws of a host country regulating FDI. These regulations cover a wide range of laws; they include specific laws enacted for regulating FDI as well as any domestic law that governs post-entry operation of corporations engaging in FDI, such as tax law, laws relating to currency regulation, labour

[89] Ibid.
[90] Ibid.

and employment law, property law, corporate law, environmental law, and laws relating to mining or exploitation of natural resources. All these laws represent a country's policy and regulatory character towards FDI. The unilateral regulation can also be established by national policy directives in different respects.

The second form of regulation is bilateral regulation that usually takes the form of a BIT, which is an agreement between capital exporting and importing countries, regulating the investment between them.[91] BITs have originated from the earliest treaties known as treaties of friendship, commerce and navigation,[92] which have turned more investment-specific since the beginning of 1960s and thus provided rules for international investments by corporations.[93] BITs have developed in order to provide a certain level of stability and also as an effort to safeguard foreign investments in host countries.

The regulatory issues under BITs are determined by the bilateral negotiations between home and host countries; hence the terms and conditions of BITs applying to investment vary depending upon the position of the contracting parties to each BIT. As a result, each BIT creates country-specific obligation, instead of creating any law at an international level.[94] BITs contain clauses which require parties to keep commitments that are made to each other nationals and therefore the obligation created by BITs extends to the nationals and corporates of the contracting parties. In fact, BITs govern international investment activities in addition to the national investment laws and regulations, and thus complement and supplement the national FDI laws.

The investment agreements between host state and any entity of BIT contracting parties are also treated as regulatory elements in relation to commercial aspects of the agreements. They are for examples concession agreements, product sharing agreements, management

[91] "There are two different objectives pursued by capital exporting states and host countries in BITs. The creation of clear rules and effective enforcement mechanisms to protect investment are the primary objective of capital exporting countries. The secondary objective is to facilitate the entry of their investment." The goals of host countries, on the other hand, are to encourage foreign capital flow to their territories and remain control over the entry and operation of FDI. S Salem-Haghighi, '*MAI and BITs: A Comparative Study'* (Research Paper, Institute of Comparative Law' Montreal, 1998) <www.comparativelaw.info/library.htm> 26 March 2013.

[92] See Sornarajah, above n 3, 180.

[93] Ibid.

[94] See Bernard Kishiyain, The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law'(1993) 14 *Northwestern Journal of International Law and Business* 327, 328; see also Surya P Subedi, International Investment Law: Reconciling Policy and Principle (Hart Publishing, 2008) 84.

agreements, licensing and transfer of technology agreements. These agreements are usually guided by the BIT provisions in the legal treatment and protection of investment.[95]

Multilateral regulation refers to a framework that consists of international driven by international instruments such as WTO rules and regulations relating to investment, regional free trade agreements (FTAs), international codes of conduct, and guidelines for transnational corporations. A review of the relevant international instruments reveals that there is no comprehensive international investment regulation existing in today's world. An initiative was taken by OECD to conclude multilateral investment agreement (MAI) which failed to come into being at the protest of developing countries and NGO's that MAI did not have sufficient regard to protection of the environment and other social concerns such as human rights and labour standards, all of which MNCs are capable of disregarding.

The WTO regime under TRIMs, GATS and TRIPS partially covers some issues of foreign direct investment without creating any specific obligation upon Multinational Enterprises (MNEs) or MNCs in their operations. They are mainly meant to facilitate the trade-related and non-trade investment issues by lifting restrictions and providing protection. Similarly although the corporate codes of conduct provide some directive principles as regards the responsibility of MNEs or MNCs for environmental management and human rights treatment, they are soft in nature and do not have the status of binding regulation. Therefore MNEs or MNCs are mainly subject to the national laws of the home country, where they are established as accepted international law principles.

There are certain circumstances where MNCs encounter difficulties and conflicts in their treatment and these relate to FDI implications for the economic, environmental, and social development of a host country. The problems range from double taxation, repatriation of profit, compensation, employment by MNCs, operation of MNCs involving environment protection and promotion of general principles of human rights, labour and employment relations, technology transfer, and overall MNCs responsibilities to the group rights of citizens of the host country.

Therefore, there is a need for some common standards and guidelines for regulating investor firms' behaviour and responsibilities in these issues at the international level. But there still exists a lack of an international standard or agreed-upon set of rules and regulations owing to

[95] Sornoraja, above n 3, 216.

the absence of multilateral treaty frameworks for FDI. Against this backdrop, the solution to problems must be sought using a rule-based approach under unilateral and bilateral regulation as these are so far the main ways available for the regulation of FDI.

However, the current unilateral legal regimes for FDI, especially in developing and least developed countries are little concerned with the above mentioned development issues; they mostly tend to the liberalisation of FDI to win the ongoing competition for FDI inflows. The specific legislations for FDI therefore in most cases focus only on the promotion and protection of investment, such as provisions relating to expropriation, compensation, repatriation and other fiscal or financial incentives. On the other hand, the provisions of relevant laws such as company, labour, environment, and property lack specificity and certainty in relation to foreign investment operation.

The BITs are similarly formulated on the liberalisation approach in relation to entry and post entry-post operations with a strong commitment to investment protection. Because of this, BITs between developed and developing host countries in many cases seem to be nothing but a single-minded and investor-biased instrument, although some changes are taking place in recent years to match the development demands of developing economies. Under this situation, the application of national laws and BITs are seen more conducive to serve the interests of investors, rather than the development objectives of the host countries. Therefore, to make the aims and objectives of FDI meaningful in the context of the host country, the legal framework, whether national or bilateral, needs to be shaped in such a way that can be balancing, that is, less pro-investors and more development-oriented.

2.6.2 Features of development-oriented regulation

In order to make a balanced and development oriented legal regulation, three features are essential in national legislations and bilateral treaties. They are: (1) co-existence between liberalisation and regulation; (2) combination of right, responsibility and regulation and; (3) integration of public interest and development issues. These criteria need to be considered or pursued throughout the legal framework.

A. Co-existence of liberalisation and regulation

Considering the advantages and disadvantages of FDI, the most pragmatic national approach should be to maximise the advantages and reduce or dispel the disadvantages. A country should try to regulate FDI in such a way so as to achieve this goal. The flat-gate approach of FDI entry or unlimited liberalisation at the compromise of development interests may be able to encourage more FDI inflow, but will ultimately fail to contribute to the fulfillment of positive development objectives of the hosting country. Similarly, the strong regulatory approach from the classical Marxist point of view would be a hindrance to FDI inflows. Thus the formula for host countries for achieving their goal through the interplay of liberalisation and regulation is simple; the more FDI a country can attract and the more regulation it can impose in the direction of its interests, the more advantages it can harness from FDI.[96]

The liberal attitudes of a host country towards FDI help it remain competitive and attractive to MNEs from their business perspective, while the regulatory attitudes of a host country will ensure it reaps the benefits of FDI for its sustainable development purpose. Therefore, in regulating FDI a host country should design its legal framework in such a way as to strike a balance between the benefits they can harness from regulation and remaining attractive to the investors as an investment location. There is no set form for balancing the approach of regulation; it varies from country to country and also on the basis a country's internal capacity, economic needs, and interests. Nevertheless a balancing approach is a valid one that reflecting on the combination of incentives for investors and respect for the interests of the host country.

B. Combination of rights, responsibility and regulation

An ideal national legislation that provides a legal framework usually consists in the combination of three elements: right, responsibility, and regulation. This is because the common purpose of the enactment of laws is to attribute its subjects the rights and responsibilities and ensure their protection and enforceability. The integration of these elements makes a framework perfect and complete.

Most of the national legislations of developing host countries specially enacted for FDI lack the combination of these three elements. They mainly concentrate on the guarantees of the

[96] Alhijazi, above n 12,19.

protection of investors' rights to their investment properties and other incentives available for admission and operation of FDI. The focus on the responsibility aspects, for example, the protection of environment and human rights, and compliance with internationally recognised labour and employment standards is almost absent. The absence of specific principles delineating the responsibility of investors in core legislations for FDI often creates problems in application to investors, who are mainly the powerful MNCs. The question of legal specificity and certainty raises the doubt about the competence for legal action against them, if they are violated. Therefore, the FDI legislations should incorporate principles describing the rights and responsibilities of investors towards the respective host states so as to serve the purpose of all who are subjects. Otherwise, national laws would not be able to serve national interests, rather looking almost one-sided in their protection of the interests of investors.

Apart from core FDI laws, as far as the other relevant laws are concerned, the specific provisions concerning multinationals' responsibility in FDI operation are still absent. It is true that the multinationals are subject to all national legislations of the host countries, but the incorporation of specific provisions is essential for the sake of jurisdictional clarity, particularly in those areas where FDI has implications, such as incorporation of company, taxation, labour and employment, acquisition of lands and real-estates, exploitation of natural resources, environmental management and so on. Recently, changes are noticed in some emergent developing economies such as China, Brazil, Vietnam, Indonesia, and Nigeria.[97] These countries are reportedly in the process of developing a comprehensive legal regime to promote and regulate FDI that involves all relevant commercial, environmental, and labour laws.

BITs which are recognised as the main international instruments to regulate FDI still suffer the same lacuna as national legislations do. The contents of BITs in general are more focused on ensuring protection of foreign investors' properties in the host countries and offering incentives to promote foreign investment. They are seen to boost investors' confidence in the host state; as a result, more investment flow can take place. Most BITs still have no concern for settling the responsibility aspects of MNCs in host countries, although it seems preferable to settle those issues through BIT negotiations in the absence of multilateral binding treaties for regulating MNCs. Some changes are taking place in recent years, but unfortunately they are mostly confined to the model texts of capital-exporting countries and the progress is slow.

[97] See for examples, *The Interim Provisions on Guiding Foreign Investment Direction of China 1995*, *Investment Act of 2007* (Indonesia), The *Nigerian Mining and Minerals Act* 2007. *The Law on Foreign Investment in Vietnam* 1996.

In this backdrop, in order for BITs to be a development-oriented international FDI regulatory instrument, BIT negotiations should address the responsibility concerns of MNCs in their operations in a host state with similar weight as that given for the protection of properties of investors.

C. Integration of public interest and development issues

A legal framework becomes development-oriented when it considers public interests and development issues to be incorporated into the body of law as fundamental. In the case of most FDI legislations it is often seen that there is no focus on development issues as the core points of laws. Sometimes the development issues appear in the preamble or in the objective clauses without subsequent reflection in the main body. The preambular provisions are not binding, though they may be of interpretive significance.[98]

In addition, the relevant economic, commercial, property and environmental laws and policies in developing countries are mostly found to be formulated without due consideration for the growing notion of sustainable development. A similar situation is seen in the majority of BIT texts where development and public interests concerns are not incorporated into obligation-creating principles; instead, they are placed in the preambles. As a result evidence suggests that many ICSID decisions based on the interpretation of BIT provisions didn't consider the public interest and development issues as legal and falling under their jurisdiction because of the lack of references in BITs.[99] The Doha Declaration mandates that the investment solutions should 'reflect in a balanced manner the interests of home and host countries, and take due account of development policies and objectives of host government as well as their right to regulate in the public interest.'[100]

In view of urgency of integration public interest issues national FD legislation, applicable laws and BITs should address the development and public interest issues under the main body of legal principles.

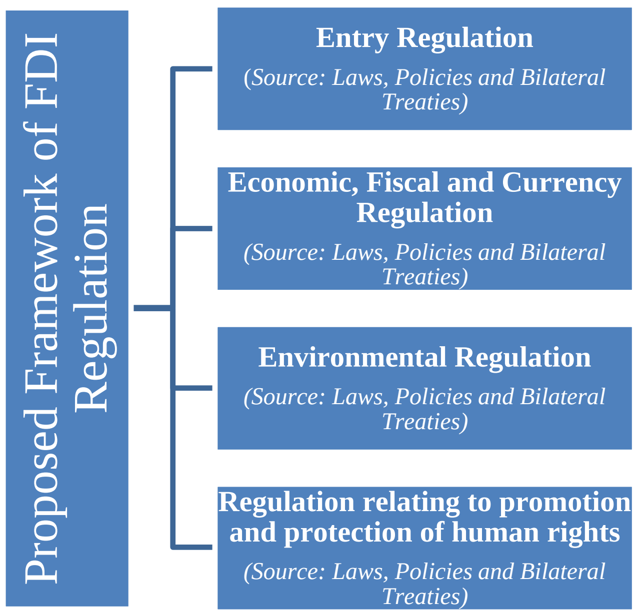
[98] Sornarajah, above n 3, 274.
[99] See the ICSID's decision in *Antoine V Republic of Burandi* (1999) ICSID Case ARB/95/3.
[100] See *UN Doha Declaration on Financing for Development (2008)* para 23-29 <http://www.un.org/esa/ffd/doha/documents/Doha_Declaration_FFD.pdf> 28 November 2013.

2.7 Proposed Method of Regulation in the Thesis

Given the features of development-oriented regulation, this thesis recognises the suitability of the application of a mixed economic approach in formulating legal regulation for FDI in a developing or least developed host country such as Bangladesh that both facilitates a win-win situation between investors and the host country Bangladesh and, more importantly, achieving Bangladesh's development objectives.

As the matter of FDI regulation is generally based on unilateral laws and policies of the host country as well as BITs as a supplement to national regulatory framework, the development concerns of the host country should be upheld and addressed in legal principles, policy directives, treaty provisions, and enforcement mechanisms. From this perspective four main regulatory issues are chosen for the regulation of FDI in order to achieve the development objective. They are: (1) entry regulation, (2) economic, fiscal and currency regulation, (3) environmental regulation, and (4) regulation relating to the promotion and protection of human rights. A structure of proposed regulation is shown as follows:

Proposed Framework of FDI Regulation



The choice of these four regulatory aspects is attributed to the fact that they have wider implications for the entry and post-entry operation of FDI in a host country and presently these are most forefront issues attracted and affected by FDI operation in terms of sustainable development. Undermining these regulatory issues is likely to result in failure to attain the desired goal of FDI.

Entry regulation matters greatly, as the consideration for a host state's national economic and social interests comes prior to the approval of any investment proposal by the foreign investors. The pre-entry stage is the determining point for the host country authority to decide over conditions for accepting any investment proposal in view of its national development plan as well as conditions for the post-entry operation of the investment from the point of economic, social, and environmental development. Entry regulation interacts with all other regulation as the other regulatory aspects are taken into consideration at entry and admission levels in addition to being implemented at the post-entry stage.

Economic and fiscal regulation is obviously important in a FDI regime as the fiscal and financial incentives are used widely across developing and least developed host country as a motivational tool for investment. The incentives have the potential to result in economic and revenue loss in a lax regulatory situation in a country such as Bangladesh. This type of loss creates a negative impact on a government's ability to bear the expenditure of social development and the development of the citizens on the whole.

The environmental regulation of FDI is essential as the operation of FDI in manufacturing, mining, and infrastructure may create a negative impact on the environment, and without environmental sustainability the social development remains incomplete. Regulation of FDI for the purpose of the protection of human rights is essential as FDI activities have human rights implications. It affects labour issues, appropriation and acquisition of land, right of resettlement, and utilisation of natural resources. Protection of human rights gives rise to the scope of freedom-oriented development for the internal stakeholders that will ultimately lead to overall social and economic development.

In conclusion it can be said that consideration for the effective regulation of the above said aspects in FDI operation may pave the way for achieving sustainable development goals.

2.8 Concluding Remarks

The main point of conclusion that can be drawn from the above discussion is that the resulted benefits of FDI are able to contribute to sustainable development, but they do not accrue automatically and the liberalisation process is not enough to enforce it. Liberalisation or deregulation policies are prone to abuses and excesses, which is often the case in trade and investment predominantly controlled by economic giants such as multinationals. In order to reap the benefits of FDI and to turn them into the features of sustainable development the presence of necessary regulation is inevitable and paramount.

The discussion bases this view on a strong correlation between legal regulation and FDI-induced development. The constituent elements of sustainable development such as economic growth, environmental protection, and social development are largely dependent upon a state's regulatory policies in these respects. Therefore, the importance of the existence of an adequate legal and policy framework and its due application is beginning to be appreciated in the current era of liberalisation and is gaining currency for achieving the development goal. Without regulation the potential challenges and negative impacts of FDI operation can never be restrained. Moreover, regulation is a prerogative of the host state under the cover of 'state sovereignty' as established by the general principle of international law which is unrestrainedly enforceable without any compromise of national interests. Nevertheless, regulatory measures should not be so ambitious that they create hurdles to achieving the development benefits of FDI for a least developed country such as Bangladesh. The regulatory measures should be designed in a prudent manner in the best national interests, by and large, in line with national sustainable development goals.

This discussion's proposition of regulation is built on the mixed theoretical approach striking a balance between liberalisation as an influence of globalisation and regulation as a need for achieving the desired goal of development. This form of regulation, termed 'development-oriented regulation' which is believed to be ideal in shaping a legal and policy framework of developing and least developed host countries in general and Bangladesh in particular, is the focus of the whole thesis.

CHAPTER 3

ENTRY REGULATION OF FDI FOR DEVELOPMENT: LAWS AND POLICIES OF BANGLADESH

3.1 Introduction

The importance of entry regulation for a FDI legal regime as paramount is gaining recognition in recent times in the wake of the worldwide move towards liberal entry policies for attracting FDI inflow. It is true that the liberalisation of entry is an effective means of encouraging foreign investors to choose a location for investment and, considering the role of FDI for raising national capital and wealth, most countries have adopted a liberal policy in an effort to attract foreign investment. But there are many issues which need to be taken into consideration at entry stages from the development standpoint of the host state; otherwise it may not be worthwhile for the desired economic goal of the state itself.

It is evident that FDI may create both positive and negative effects in the economy of the host country and from the perspective of the developmental objectives of FDI it is essential to maximise the positive aspects of FDI whilst minimising the negative ones, so that, on balance, there will be a significant benefit. To ensure that foreign investment will a play positive role for the development of the host country, its government must have the right and powers to regulate entry by setting terms of conditions through legislations and investment and industrial policies. States have the right to maintain screening in order to exclude investment they perceive as harmful to their economies.

In the aftermath of recent economic debacles and instances of negative impacts of foreign investment in some places, developing and least developed countries now are in an effort to adopt policies that regulate the entry of foreign firms, which include various conditions and restrictions for foreign investors overall and on a sector-by-sector basis.[1] The entry regulation varies from country to country. As a sovereign right, the regulation depends upon the host countries respective to their development objectives and goals from FDI. Regulation may even be for national security reasons.

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[1] Martin Khor, *The Need to Regulate Foreign Investment*, Third World Network (6 March 2000) <http://www.twnside.org.sg/title/mail-cn.htm> 29 May 2013.

In some countries, it is seen that foreign companies are not allowed to operate in certain sectors, for instance banking, insurance, or telecommunications. In sectors where they are allowed, foreign companies must apply for permission to establish themselves, and if approval is given it often comes with conditions. In some countries, certain sectors are excluded from investment for certain reasons while other sectors are given preference for investment. In some countries the restriction concerns imposition upon equity, for example, a foreign company being permitted to own no more than a certain percentage of equity in a company. In some countries a joint venture with local partners is the only way foreign investment is permitted. There are also certain pre-requisites for investment project applications, which may include the maintenance of a screening procedure, the submission of an environmental no-objection certificate, etc. Likewise, there are many major and minor controlling methods and techniques aimed at subjecting the process of foreign investment to the administrative control of the host state.

All of these changes are made through legislative and regulatory developments of foreign investment which are now on the increase both in developed and developing economies.[2] Although the reasons for the changes are not same for developing and developed countries, the laws and policies are focused on the technique, methods, and the degree of entry control covering pre-entry and post-entry operational requirements. The reason for this trend is attributable to changes in the economic pattern across the world as regards foreign investment, [3] in which developing countries in particular seem to be realising that regulated FDI can be a useful means of achieving their sustainable development goals.

Bangladesh has foreign investment laws and policies which it has adopted in recent years, along with a central agency for administering all investment-related activities for local and foreign entrepreneurs. This chapter attempts to examine how far the common entry regulation issues which are considered conducive to the augmentation of the development process, are pursued in existing laws, policies, and in the activities of administrative agencies in Bangladesh. In so doing, the chapter firstly focuses briefly on some theoretical aspects of entry regulation to rationalise its adoption in Bangladesh. It then analyses different aspects of entry regulation concerning Bangladesh.

This study argues that entry regulation for the purpose of development through FDI remains a low priority in Bangladesh's existing laws and policies. They are still prone to less entry

[2] M Sornarajah, *The International Law on Foreign Investment* (Cambridge, 3rd ed. 2010) 91.
[3] Ibid, 92.

regulation and are not yet influenced by the recent regulatory changes made elsewhere which are meant for ensuring FDI-induced development.

3.2 Concept of Entry Regulation

The matter of entry regulation of FDI concerns the application of legal or administrative requirements or restrictions on the acceptance or approval of investment proposals by the foreign investors. Without fulfillment of those requirements the entry of foreign investment can be excluded by a state. The requirement could be procedural or otherwise related to the internal interest of the host state. The objective purpose of imposing such conditions for entry is to create an administrative or legal control over the entry of foreign investment.

However, there is no uniform purpose maintained for entry control, in some cases it may be for national security reasons, otherwise for economic and development reasons, or for other reasons. For example, nationalism and protectionism have been the motives for the restriction of foreign investment in developed countries. Nationalistic sentiments evidently influence the entry control of FDI in Australia's foreign investment laws, for instance.[4] In Europe, the prospect of the domination of its economy by US multinational corporations was a fear that gave rise to indirect legal responses.[5] A similar case is seen in the US which has anti-trust laws used to prevent dominant foreign firms from entry into its markets. In addition, the US has adopted legislation meant to keep out foreign investment which is inconsistent with its national security.

Although there is no uniform policy of regulation, the host countries in endorsing the proposals for foreign investment usually apply two kinds of tests: whether the investment proposal fits their national interests and the investments are not harmful to their economies; and whether the foreign investment proposals comply with their national economic and development policies.

The consideration of national interest may vary from country to country. It appears to be a composite matter which has no clear-cut standard; it is not static and cannot be defined in a mechanical or water-tight way. Defining this notion depends completely upon the host country alone. The national interest test is very much used and seen in Australia's practice in

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[4] Ibid.
[5] Sornarajah, above n 2, 98; Simon Reich, 'Roads to Follow: Regulating Foreign Direct Investment' (1989) 43 (4) *International Organization* 543.

endorsing foreign investment.[6] Australia maintains a case-by-case screening regime based on a 'national interest' test.[7] The national interest in Australia covers both economic and non-economic policy issues and includes the following considerations at the event of the approval of a foreign investment proposal:[8]

- preserving of national security;[9]
- preserving of government revenue;
- evidence that the participant will respect Australian law and business practice;
- avoiding inappropriate levels of competition;
- consistency with government policies; and
- The character of the investor.

As indicated earlier, an investment proposal can be scrutinised from the perspective of the economic development policy of the country and may include plenty of entry requirements relating to the macro-economy, such as industrialisation, corporate sustainability, comparative product advantage, technological development, and employment opportunity, as well as environmental and social sustainability.

Thus the synthesis of a number of past and contemporary national investment codes, policies, and regulations finds that restrictions on entry and admission imposed by host countries can be categorised mainly into three groups: (1) capitalisation requirements, (2) carve-outs/exclusions, and (3) ownership control.[10] In addition, performance requirements, quantitative restrictions on the number of foreign companies admitted in specific sectors, environmental and export requirements, screening or authorisation process of investment proposals or designated industrial projects are also introduced in FDI laws and policies as conditions for the regulation of FDI access.[11]

[6] *The Foreign Acquisition and Takeovers Act* 1975(Australia) art. 25 (1A).
[7] Vivienne Bath, 'Foreign Investment, the National Interest and National Security - Foreign Direct Investment in Australia and China' (2012) 34 (1) *The Sydney Law Review*, 5, 5.
[8] Andrew Lumsden, *The National Interest Test and Australian Foreign Investment Laws* (2007) Centre for Law, Markets & Regulations UNSW<http://www.clmr.unsw.edu.au/article/accountability/national-interest-test-australia> 29 April 2013.
[9] See the Department of Foreign Affairs and Trade, 'Advancing the National Interest: Australia's Foreign and Trade Policy White Paper' (Parliamentary Paper No. 39, 2003) <http://trove.nla.gov.au/version/50560382> 02 December 2013.
[10] Sherif H Seid, *Global Regulation of Foreign Direct Investment* (Ashgate, 2002) 36.
[11] Ibid.

It is noteworthy that the current reality is that the absolute ban on FDI has ceased to exist. The general trends of contemporary FDI laws are towards liberalisation and the restrictions imposed on entry depend on a case-by-case, not as barrier to foreign entrepreneurship, but to ensure the development dimension of FDI.

3.3 The Need for Entry Regulation of FDI

The need for entry regulation is obvious, as indicated earlier. The practical reason stands on the asymmetric character of the objective priority of the interests between investors and host states. The individual investors and multinational companies always tend to drive more commercial benefits from their business, ignoring or even causing harm to the internal social, economic interests, and cultural values of the host states, whilst host states, particularly developing and least developed countries, actively seek development through FDI.

The economic might of the investors and multinationals is often seen to influence the host states' economic policy, thus leading to an unregulated situation in order to drive the former's own economic benefit. As a result, in many cases the development objectives of host states remain frustrated. To safeguard from such a future situation, host states should design certain policy and legal requirements in endorsing foreign investment proposals so that their development objectives are not ultimately compromised.

Restrictions may be justified on the grounds of sovereignty as well as national development. To give an example, for national development special treatment of the local firms and financial institutions need to be given for a considerable length of time so that they can be in a position to compete with more powerful and better-endowed foreign companies and be good sources of revenue earning in foreign markets. There is evidence that local companies, due to their technological and managerial inefficiencies, are knocked out from competition, impacting negatively local entrepreneurship. A recent report states that the entire poultry sector in Bangladesh is controlled by seven foreign companies which have created a monopoly in the international market.[12] In the opinion of the market analysts, Bangladesh's government's lack of concern and unjustified liberal policy are responsible for this situation.

[12] Staff reporter, 'Poultry industry in Bangladesh is in the Grip of Seven Foreign Companies', *Daily Inquilab* online (Dhaka, Bangladesh) 15 January, 2013 <http://www.dailayinquilable.com/print.php?id=102188&&page_id=5> 15 January 2013.

An entry requirement appears to be crucial for saving the national market from the exploitation of foreign investors. Sometimes the foreign investors exploit the host state's national market by displacing products or services previously provided by local firms, and this eventually leads to foreign exchange loss and BoP problems. Countries with a large market such as China and India have faced this problems several times, because foreign companies are attracted to the large population and local market there.[13] As a result a large part of these companies engage in producing goods for local markets rather than for export. Under this situation the export requirement for admission needs to be a central rationale for developing countries' policies for foreign investment.

Likewise, there are many other social and economic development aspects that can be considered as entry requirements. The important issue is that developing and least developed host countries need to exercise control over the entry and also the overall operations of FDI for the sake of their development objectives. Development should be the prime concern of FDI and entry policies should be designed consistent with development objectives. Otherwise, the foreign investment will play the role of high cholesterol in the economic context of host states.

3.4 Sovereign Right of Host State to Regulate the Entry of FDI

The right of a host state to control the entry of foreign investment is inferred from the concept of its sovereign power as recognised by international law. According to Article 2 of the *UN Charter of Economic Rights and Duties (1974)* a state enjoys permanent sovereignty over all of the natural resources, economic activities, and wealth within its territory.[14] The principle of permanent sovereignty recognises "…the right of a host State to regulate and exercise authority over, and supervise the activities of, foreign investors…."[15] This right to regulate extends from entry to exit.

[13] Khor, above n 1.
[14] *The UN Charter of Economic Rights and Duties* (1974) art..2 (1)(2); See also, Subrata Roy Chowdhury, 'Permanent Sovereignty over Natural Resources: Substratum of the Seoul Declaration' in Paul De Waart et al. (eds), *International Law and Development* (Martinus Nijhoff, Dordrecht, 1988) 59, 59; Emeka Duruigbo, 'Permanent Sovereignty and People's Ownership of Natural Resources in International Law' (2006) 38 *George Washington International Law Review* 33, 38.
[15] Ibid.

There is a little customary law on the subject. According to customary law the entry of foreign capital in the form of FDI[16] is always subject to state sovereignty.[17] It recognizes that entry of foreign investment is entirely a sovereign prerogative of the state. It is a right which is unlikely to be given up.

The sovereignty confers on the state the right of total discretion as to how it accepts foreign investment in its territory. It can either impose statutory or policy restrictions on foreign participation in internal business activities by imposing conditions (trade-related or administrative) or open it to the extent it deems fit. The law of the host country can specify legal means and ways according to which the investment should be made, the nature of the capital resources brought in from outside the state should be, the planning and environmental controls the manufacturing plant should be subject to, the circumstances of the termination of the foreign investment should be, and other like matters.[18]This discretion can only be limited by international legal obligations or by economic and development necessities.

Therefore the right of a host state to control the entry of an alien or his property is unlimited, which is established by the Privy Council in the following words:

> One of the rights possessed by the supreme power in every state is the right to refuse the alien to enter that state, to annex what conditions it pleases to the permission to enter it and to expel and deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order and good government, or to its social and material interests.[19]

It is drawn from the statement that the situation can be transferred to the foreign investors and the conditions can be attached to the entry of foreign investor into a host state.[20] Moreover, conditions can be attached to the *modus oparendi* of the investor's business. A similar proposition is articulated in the draft Code of Conduct on the Transnational Corporations in the following terms:

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[16] There is an indirect form of foreign investment. It can be done in many ways such as through securities, funds or private equity.

[17] Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Publishing, 2006) 55; See, article 1 of the *Charter of Economic Rights and Duties* noting that "Every State has sovereign and inalienable right to choose its economic system as well as political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever."

[18] Sornarajah, above n 2, 90.

[19] J Brierly, *Law of Nations* (Oxford University Press, 7th ed., 2012) 277.

[20] Sornarajah, above n 2, 89.

> States have the right to regulate the entry and the establishment of transnational corporations including determining the role that such corporation may play in economic and social development and prohibiting or limiting the extent of their presence in specific sectors.[21]

The unlimited right of entry control is also established by the decisions of the cases. In *Electronica Sicula S.p.A* (ELSI) Case[22] Judge Oda held a proposition that when businesses being incorporated in one country undertake commercial transaction through local companies of another country, they be treated as legal entities of that country and would be subject to local laws and regulations. Thus foreigners may have to accept a number of restrictions in order to gain the advantages of doing business through local companies. In *Schmidt v Secretary of State for Home Affaires*[23] Lord Denning observed that in common law, no alien has any right to enter the country except by leave of the Crown; and the Crown can refuse leave without giving any reason.

It is drawn from above discussion that the host state can enjoy the right to unlimited entry control within its sovereign capacity which only can be curtailed or surrendered at the desire of the country itself, or by mutual obligation, through the conclusion of a treaty or in the face of economic and development necessities. It is noteworthy that the exercise of the right of entry control must be consistent with the principle of non-discrimination and that host states should avoid procedures which appear to be unduly cumbersome or complicated, as the *World Bank Guidelines on the Treatment of Foreign Direct Investment* suggest.[24]

The sovereign right of entry regulation or control can be exercised by introducing specific provision in general or in particular in the legal and policy regime for FDI or any other relevant law having a link to the investment operation. In addition, it can be exercised through bilateral treaty negotiations between host states and home states of investor companies or introducing restrictive provisions for entry in intra-firm product sharing agreements. Entry regulation usually concerns legal and administrative requirements for the admission of investment.

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[21] UNCTC, *Proposed Text of the Draft Code on Transnational Corporations* (1988) <http//www.unctc.org.> 10 May 2013.

[22] *United States of America v Italy* [1989] ICJ Reports 15, 90.

[23] (1969) 2 Ch 149, 168. Ralston observed similarly that 'a nation may by general provisions exclude a certain class of individuals entirely or place limitations upon their admission subject to the duty to inform them of the special conditions of entry when they seek admission'. J Ralston, *The Law and Procedure of International Tribunals* (Stand ford University Press, 2nd ed.1973)270.

[24] See *The World Bank Guidelines on the Treatment of Foreign Direct Investment* 1992 s. II. <italaw.com/documents/WorldBank.pdf > 29 December 2013. It is noted that the Guidelines recognize that host state maintains the right to make regulations for the admission of private foreign investment.

3.5 Concerns for Entry Regulation: FDI Laws and Policies in Bangladesh

The core legislation of FDI in Bangladesh FPIA 1980 does not provide specific rules focusing on legal or administrative requirements for admission of foreign investment. However, section 3 (1) of this law reflects on some directives to be taken into consideration by the authority while granting any foreign industrial undertaking. According to the section, in granting any establishment with foreign capital a government may take into specific consideration the following matters:

1. If such establishment of industrial undertaking does not exist, how far it is desirable.
2. If it exists, whether it is being carried out on a scale adequate to socio-economic needs.
3. Whether this establishment of industrial undertaking is likely to contribute to:

    a. The development of capital, technical and managerial resources of Bangladesh; or
    b. The discovery, mobilisation or better utilisation of the natural resources; or
    c. The strengthening of the balance of payment of Bangladesh; or
    d. Increasing employment opportunities in Bangladesh; or
    e. The economic development of the country in any other manner.

It is further said in sub-section 3 (2) that the sanction of foreign investment may be subject to any such given condition as the government thinks appropriate.

The words under the section 3 of the Act appear to be very much indicative and focused on the consideration of development-oriented aspects of FDI at the event of entry. It includes consideration of the potential of FDI for the development of capital, technical, and managerial resources, exploration and better utilisation of natural resources, strengthening employment opportunities, and above all, economic development.

More importantly, the first consideration as revealed by the wording (to test the desirability of an industrial undertaking at the event none of its kind is available) is very much encompassing. It may be considered from economic, social, and cultural perspectives. Thus it is easily drawn from the wording as above that the law has mandated the government to impose any condition in conformity with the socio-economic development of the country itself at its own discretion. The words of the section do not seem to be obligation-creating;

rather they can be used as a guideline for setting lenses for approving the foreign investment for achieving said development purposes.

Therefore, the imposition of the requirement may be through a voluntarily or compulsory approach manifested though administrative functions, legal or policy framework, or contractual agreement between the parties to attain the development goal.

3.6 Aspects of Entry Regulation in National Legal and Policy Framework

There are two types of entry regulatory aspects Bangladesh as a host country can take into consideration while approving a FDI proposal for achieving development goals. One type of regulation is very much common and is usually taken into consideration regardless of its relation to the operational impacts of FDI. The application of these means of regulation depends upon the circumstantial needs of the host state. They are mainly the following three:

1. Capitalization requirement;
2. Carving out or exclusion-related matters; and
3. Ownership restriction.

Another type of entry regulation is related to operational issues, which seem to be very much cardinal for incorporating into legal and policy regimes for developing host countries regardless of their situation, in order to achieve development goals of FDI. It includes, for example, performance requirements, environment-related requirements, and procedural screening.

3.6.1 Regulation through a capitalisation requirement

A capitalisation requirement is a common kind of entry requirement that represents a situation where the host countries insist the investors bring in all or a particular percentage of its capital from overseas [25] with a view to overcoming its shortage of foreign currency through FDI.[26] Sometimes, the imposition of capital requirements may be in the host state's interest in preventing the foreign investor from raising capital locally so that local savings that could be utilised for other projects of benefit to the country should not be absorbed into

[25] See, for example, the *Investment Proclamation No. 37 /1996* (Ethiopia).
[26] J H Dunning, *Multinational Enterprises and the Global Economy* (Wokingham, 1993) 559.

serving the interests of the foreign investor.[27] The ultimate goal of this sort of requirement is the attraction of local investors to share the investment in a project with a large corporation, thus diverting investment funds to financing local entrepreneurs or local projects. In this sense, the capitalisation requirement is rationally beneficial for the development of local industrialisation and the service sectors. However in this situation the foreign investors sometimes participate in the investment through the amount of loan they receive from the national banks of the host state with a low rate of interest, thus not bringing any capital from abroad. This is in fact does not help the host state's capital-building objective through FDI. Whatever the objective is, the capitalisation requirement is applied as an entry condition and non-compliance with it would be a ground for the rejection of an investment proposal or the termination of permission for foreign investments. This type of action is admissible from the point of view of a state's sovereign right and it does not amount to the violation of international law if due process standards are maintained.[28]

In fact, a capitalisation requirement is still rare in the legal codes as it is usually determined by agreement between investor and state. The incorporation of such a requirement in legal or policy framework is thought to be unwelcoming to foreign investors as it creates a general obligation. In Bangladesh the foreign investment laws and policies do not contain any such provision concerning restrictions of foreign capitalisation. Even bilateral treaties have no focus on such requirements. However the investors must obtain a certificate from Bangladesh Bank declaring the amount they have invested in any joint-venture project. A least-developed country such as Bangladesh should introduce a capitalisation requirement instead of granting bank loans in joint ventures or fully-owned investment projects.

3.6.2 Regulation through exclusion of sectors for investment

Carving out or exclusion is another category of entry requirements. It means the closing by host countries certain sectors, industries, or activities to FDI and reserving them for their nationals or the state itself. These sectors are deemed to be too sensitive for the allowance of foreign investment. This practice as reflected in host states' legal and policy regimes usually takes place for economic, strategic, or other nationalistic public policy reasons. States may

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[27] Sornarajah, above n 2,106.

[28] Ibid; See *Amco v Indonesia* (1983) ILM 354; (1988) 27 ILM 1281; In this case, Amco, in a joint venture with an Indonesian partner, was supposed to bring an agreed sum of capital into the country from abroad to capitalise the venture. It was alleged that Amco had not brought in such capital and on that ground the agreement was cancelled by the administrative agency of Indonesia. The allegation was cognised by ICSID tribunal and it didn't deny the allegation, but held that the due process standard was not maintained in administrative action.

have diversified economic reasons to justify the exemption of these sectors from liberalisation, which differ from country to country, but the more common and important ground is that they are reserved for nationals in order to develop new comparative advantage.[29]

Sectorial protection can either be a sign of a functioning market for protectionism or a sign of the host state's effort to create competitive industry where it is felt that the entry of multinationals will quell the emergence of a domestic entrepreneurial class. Sometimes foreign investments are barred from certain sectors for reasons of public policy, or national security, or on cultural grounds. In the United States foreign investment in the areas of communication and transport systems, and the exploration of natural resources goes through stringent regulations.[30] There have some attempts to broaden the scope of national security legislation to include the screening of foreign investment entry. The foreign investment in Islamic shariah-dominated Middle-Eastern countries is restricted on cultural grounds for alcohol and tobacco.

The exemption of sectors under economic, public interest, or security reasons is a common phenomenon in developing countries as well as industrialised nations. The investment legislations or policies of these countries introduce the exempted sectors in the negative list approach or by a reserved list of sectors. Examples of the negative list approach are available in developed economies such as Iceland, [31] Netherlands,[32] and Australia[33] as well as in developing economies such as Thailand,[34] Angola,[35] Ethiopia[36] and Vietnam. The foreign

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[29] Pollan, above n 17, 59.

[30] See The Federal Communication Act , 1934 ss. 310 (a) (b) ; For a comprehensive discussion on this issue, see RJ Turcon, *Foreign Direct Investment in the United States: Legal Aspects for Foreign Investors* (Sweet and Maxwell, 1993); see also Edward M Graham and Paul R Krugman, *Foreign Direct Investment in the United States* (International Institutes for Economics, 3rd ed., 1995) 125. It notes that in addition to carving out the President has the power to block any mergers, acquisitions, or takeovers of US companies by foreign interests when such actions are deemed to threaten the national security; See also Adis M.Villa, 'Legal Aspects of Foreign Direct Investment in the United States' (1982) 16(1) *The International Lawyer* 1, 13.

[31] Non-residents may invest in a business enterprise in Iceland with some limitations. Restrictions apply in the energy area where only Icelandic entities and entities domiciled in another member state of the European Economic Area, are permitted to own energy exploitation rights as regards to waterfalls and geothermal energy for other than domestic use. The same applies to enterprises which distribute energy. See UNCTAD, *World Investment Directory Country Profile: Iceland* <http://www.unctad.org/sections/dite_fdist/docs/wid_cp_at_en.pdf> 20 November, 2011.

[32] Foreign firms in the Netherlands are allowed to invest in any sector, except for a few public and private monopolies from which foreign investment is banned (e.g. railways and public broadcasting). UNCTAD, *World Investment Directory Country Profile: Netherlands* <http://www.unctad.org/sections/dite_fdist/docs/wid_cp_at_en.pdf> 20 November 2011; see also Pollan, above n 17, 59.

[33] In Australia, foreign investors are not allowed to invest in financial sector companies. See the *Foreign Acquisitions and Takeovers Act 1975* as amended in 2012 (Australia) s.17D.

[34] There are nine categories of business where investment by foreigners is absolutely prohibited and these include businesses relating to printing and electronic media, rice farming, animal farming, fishery for marine

investment law in Vietnam does not provide any negative list; rather it characterises the businesses in which foreigners are prohibited to invest. Article 3(2) of the foreign investment law states that the State of Vietnam will not license any foreign investment project in sectors or regions which may have adverse effects on national defense, national security, cultural and historical heritage, fine customs and tradition, or the ecological environment.

In Bangladesh, the FPIA 1980 does not contain any list or provision prohibiting certain sectors for foreign investment. All sectors except for four are open for foreign investment as determined finally by the *National Industrial Policy (NIP) 2005* (The NIP 1999 listed five, including the railway sector, but this was later excluded). According to the policy these four sectors are reserved exclusively for public investment and kept out of local and private foreign ownership for national security reasons. The sectors include:

a) Arms, ammunitions, and other defense equipment and machinery
b) Production of nuclear energy
c) Forest plantation and mechanised extraction within the bounds of reserve forests
d) Security printing (currency notes) and minting [37]

Apart from these sectors, there is no sector where investment is prohibited for any economic, social or cultural reason. However, there are certain sectors which are termed as 'regulated industries' under the NIPs 2005 and 2010, where the investors need to undertake two stages of approval to initiate a project. The BoI, BEPZA, and BSCIC do not register the regulated industries without the express approval of the ministry concerned. Due to the absence of a wide-ranging rule and policy to regulate these sectors, the main reason for bringing them under strict regulation is somewhat unclear. However, the regulated or controlled sector mostly includes those industries which may be deemed to be potentially risky for the environment and human health.[38]

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animals, extraction of Thai herbs, antiques and historical objects, and land trading. See *The Foreign Business Act 1999* (Thailand) Annex. List 1.

[35] See *Foreign Investment Law* 1994 (Angola) art. 3.2; it states that foreign investment is prohibited in the areas (1) of defense, internal public order and state security; (2) banking activities involving central bank and issuing bank functions; (c) other areas which are considered by law to be absolutely reserved for the state.

[36] In Ethiopia, foreign investors are not allowed in the banking, insurance microcredit and saving services; broadcasting services; and air transport services using aircraft with seating capacity of up to 20 passengers. See Ethiopian Business Development Service Network, *Investment Policy* <http://www.bds-ethiopia.net/investment-policy.html> 20 August 2013.

[37] See *National Industrial Policy of 2010* (Bangladesh) Ch. 13.

[38] These are in total 17 sectors such as, 1. Fishing in the deep sea, 2. Bank/financial institution in the private sector, 3. Insurance Company in the private sector, 4. Generation, supply and distribution of power in the private sector, 5. Exploration, extraction and supply of Natural gas/oil, 6. Exploration, extraction and supply of coal, 7. Exploration, extraction and supply of other mineral resources, 8. Large-scale infrastructural project (e.g.

3.6.3 Regulation through ownership control

Ownership control is another category of entry regulation which is carried out by putting a cap on foreign ownership of certain industries or allowing foreign investment in some selected areas or only in joint ventures with a state entity or with local investors. These two types of ownership control by limiting equity participation or requiring joint venture were widely practiced in many developing countries in the past, especially in the socialist economies.[39] It is still in practice in some developed countries; for example, in Australia where foreign ownership in commercial television broadcasting services is limited to 15 per cent for individuals and 20 per cent in aggregate.[40] Some of the countries in their codes, such as Bosnia and Herzegovina, introduce an approval requirement based on a foreign ownership limit, although it adopts the system of open admission.[41] As regards joint venture, in particular cases, the joint venture has been mandatory in Malaysia through policies to give the disadvantaged people some priority in the ownership of means of production, and under its new economic policy it allows foreign nationals' participation in the economy only as minority shareholders.[42] In China and Vietnam, joint ventures had been the principal mode of foreign investment for a long time. The situation has changed recently with the permission of wholly-owned subsidiaries, subject to certain conditions.[43]

The purpose of joint venture or local equity sharing is different from the host and home state perspectives. In developed countries, this joint venture form of investment is popular in many high technology industries, in particular in the aviation and tourism sectors, where the prospect of international business co-operation is high. The main reason why the foreign investors choose this form is the penetration of new markets through a local counterpart is easier and less risky as regards local legal challenges.

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flyover, elevated expressway, monorail, economic zone, inland container depot/container freight station). Crude oil refinery (recycling/refining of lube oil used as fuel), 10. Medium and large industry using natural gas/condescend and other minerals as raw material, 11. Telecommunication Service (mobile/cellular and land phone), 12. Satellite channel, 13. Cargo/passenger aviator, 14. Sea bound ship transport, 15. Sea-port/deep sea-port, 16. VOIP/IP telephone, 17. Industries using heavy minerals accumulated from sea. See the *National Industrial Policy 2010* (Bangladesh) Annex 4.

[39] Sornarajah , above n 2, 104, 111.

[40] Seid, above n 10, 37.

[41] See, *Law on the Policy of Foreign Direct Investment 1998* (Bosnia and Herzegovina) art. 4. It notes that … "foreign equity ownership of an enterprise engaged in the production and sale or arms, ammunition and explosive for the military use, military equipment and public information shall not exceed 49 per cent of the equity of the enterprise. In case of investment in sectors… foreign investors must receive prior approval from the competent body of the respective entity."

[42] Seid, above n 10, 37.

[43] Ibid.

In a socialist state, joint venture is compelled by legislation in vital sectors of economy. The reason may be to marry socialist ideology with the admission of foreign investment on the ground that ultimate control over the investment remains with the state.[44] From the developing host countries' perspective, economic consideration is the main reason for requiring joint-venture investments. This is because they enable a more effective transfer of management and technology leading eventually to the maximising of one of the assumed benefits of foreign investment.[45]

Sometimes it is seen that the host state does not impose any cap limit on investment, permitting the investor to hold up to 100 per cent equity participation with conditions. The conditions usually relate to export requirements up to a certain percent of its product in consideration of the host states' economic benefit. For instance, in Malaysia foreign investors are permitted to hold up 100 per cent of the equity with the meeting of different conditions such as the requirement of export of 80 per cent of its product, so as to not compete with locally-manufactured products for local markets.[46] For the projects that export 51 per cent to 79 per cent of production foreign equity ownership up to 51 per cent will be allowed.[47] However, foreign equity ownership up to 70 per cent may be permitted, depending on various factors such as the level of technology brought in, the spin-off effects, the size and location of the investment, the value added, and the utilisation of local raw materials or components.[48] For projects which involve the extraction or mining or processing of mineral ores, equity participation up to 100 per cent is permitted depending on: the level of investments, technology, and risk involved in the projects; the availability of Malaysian expertise in the areas of exploration, mining and processing of minerals concerned and; the degrees of integration involved and the level of value added in the projects.[49] A deeper look into Malaysian equity permission reveals that despite being a liberal country for the purposes of FDI it has considered the regulation of ownership in every extent for its economic development purpose.

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[44] Sornarajah, above n 2, 115.
[45] Ibid, 113.
[46] See Malaysian Industrial Development Authority, *Malaysia Investment in the Manufacturing Sector: Policies, Incentives and Procedures* (4th ed. Reprint , March 1990) 40; see also Aramugam Rajenthran, 'Malaysia: An Overview of the Legal Framework for Foreign Direct Investment' (2002) Institute of Southeast Asian Studies <http://www.iseas.edu.sg/documents/publication/ef52002.pdf> 20 August 2013; See also Michael KL Wong, 'Malaysia's Laws and Policies on Foreign Investments' in HoPeng Kee et al. (eds.) *Current Development in International Investment Law* 467, 469-470.
[47] Ibid.
[48] Ibid.
[49] Ibid.

Ownership control through imposing a ceiling or conditions on the amount of private investment or a joint venture condition with the public sector in selected industries was prevalent in Bangladesh in 1970s.[50] Soon after the 1980s the government undertook an open policy and as a result foreign investment in any type and form (i.e., sole ownership and partnership) is welcome in all sectors except the reserved ones. The Government allows the establishment of any industrial undertaking with foreign capital that is broadly supportive of economic development or otherwise desirable.[51] Therefore, as part of Bangladesh's foreign investment policy there is now no limitation on equity participation. Foreign participation is allowed up to 100 per cent under the existing laws and industrial policies without any condition or factor analysis from the development perspective as seen above in Malaysia's case.[52]

In Bangladesh there are many foreign companies with 100 per cent equity participation enjoying all of the local incentives as export-oriented companies, but their products are not restricted in the local markets and thus they affect local producers for the local market. For instance, in Bangladesh the local market is dominated by the toiletries products of UniLever, the biggest multinational.

However the government does fix the amount of equity participation for any joint venture in the 'controlled sector'.[53]A joint venture is not an obligation under the laws and policies; nevertheless it is encouraged in all sectors except in Ready-Made Garments (RMG) and financial institutions such as banking and insurances. Foreign investment is, however, encouraged on a priority basis in the sectors which are considered to be more directly contributing to the national economy in terms of production, employment, and export earnings. These sectors are characterised in the following ways:[54]

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[50] M Sadrel Reza, Ali Rashid, and Mahbubul Alam, *Private Foreign Investment in Bangladesh* (University Press Ltd, Bangladesh, 1987) 63-64.
[51] *The Foreign Private Investment (Promotion and Protection) Act 1980* (Bangladesh) s 3. It notes that the Government may for the promotion of foreign investment, sanction establishment with foreign capital of any industrial undertaking… (c) which is likely to contribute to (i) the development of capital, technical and managerial resources in Bangladesh; or (2) the strengthening of the balance of payment of Bangladesh; or (iii) increasing employment opportunities in Bangladesh; or (iv) the economic development of the country in any other manner.
[52] See *National Industrial Policies (NIP) 1984, 1991, 2005* (Bangladesh).
[53] Ibid.
[54] Under the *National Industrial Policy of 2005,* the Government identified 33 thrust sectors where foreign investments are encouraged on the priority basis; See annex 1 of chapter 20 of the *National Industrial Policy of 2005,* Bangladesh. For explanation, see also ADB and AusAID, *Study on Interregional Trade and Investment in South Asia* (2009) <www.adb.org> 8 December 2011.

- Export-oriented industries;
- Industries in the Export Processing Zones;
- High technology products that will be either import substitutes or export-oriented;
- Undertakings in which more diversified use of indigenous natural resources is possible;
- Basic industries based mainly on local raw materials ;
- Investment in the improvement of quality and marketing of goods manufactured and /or the increase of production capacities of existing industries; and
- Labour-intensive/technology-oriented/capital-intensive industries.

Under the above criteria there are 32 industrial sectors[55] in which investment is encouraged without any restriction. Among these, there are certain sectors where Bangladesh has comparative product advantage such as RMG, jute and jute products, leather and leather products, and tea. Foreign investment without any equity restriction in the area of comparative product advantage may potentially create a negative impact on local industrial sectors, particularly on the Small and Medium Scale Enterprises (SMEs).Therefore, it is better to introduce the requirement of joint venture or product sharing investment agreement, particularly on the transfer of technology, human capital development, and investment in research and development (R&D) in this area so as to make investments economically beneficial and less risky.

It is drawn from the above discussion that there is no limitation on equity participation, and no obligation for joint venture in Bangladesh. As per the suggestion in section 3 of FIPA as mentioned above, a joint venture can be a requirement for the purpose of technological and managerial resource development in certain sectors which have economic prospects such as leather, ceramics, and tourism. Therefore, through an amendment in the current FDI legislation, the different forms of investment can be ascertained with due requirement and prescription of share as per the need. In this respect, the FDI law of Vietnam can be used as a

[55] These sectors list, 1. Agro-based and agro-processing industry, 2. Human Resource Export, 3. Ship Building, 4. Renewable Energy (Solar Power, Windmill), 5. Tourism, 6. Basic chemicals/dye and chemicals, 7. ICT and ICT based service, 8. Readymade Garments Industry, 9. Active Pharmaceuticals Ingredient Industry and Radio Pharmaceuticals Industry, 10. Herbal Medicinal Plant, 11. Radio-active (diffusion) Application Industry (e.g. developing quality of decaying polymer/preservation of food/ disinfecting medicinal equipment), 12. Development of Polymer Industry, 13. Jute and Jute products, 14. Leather and Leather products, 15. Hospital and Clinic, 16. Light Engineering Industry, 17. Plastic Industry, 18. Furniture, 19. Handicrafts, 20. Energy Efficient Appliances/Manufacturing of Electronic goods/Development of Electronic materials, 21. Frozen Fish Industry, 22. Tea Industry, 23. Home Textiles, 24. Ceramics, 25. Tissue Grafting and Biotechnology, 26. Jewellery, 27. Toys, 28. Container Service, 29. Warehouse, 30. Innovative and import substitute industry, 31. Cosmetics and toiletries, 32. Light engineering industry. See the *National Industrial Policies 2005, 2010* (Bangladesh) Annex 4.

model that provides for three forms of foreign investment with certain requirements for ownership control in consideration of Vietnam's economic interest.[56]

3.6.4 Regulation through the application of performance requirements

Performance requirements are commonly known as business practices that may be used by the host countries as an entry condition of foreign investment. They generally refer to stipulations imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country. In UNCTAD parlance, performance requirements are one kind of so-called "host country operational measures", with the main other measures being various restrictions.[57] Performance requirements as evident from practice may embrace the whole spectrum of investment operations. The commonly practiced requirements can be grouped into three major categories:

1. Those relating to local content requirements such as the local purchase of capital goods, raw materials, intermediate goods, goods and services, and local recruitment
2. Those relating to technology transfer and environment related requirements
3. Those related to export performance

The employment of such requirements is recognised as one of the most contentious business practices developed and developing countries apply together with other policy instruments, such as trade policy, screening mechanisms and incentives, to enhance various development objectives. Some experts argue that governments tend to apply such requirements as a policy package in FDI to achieve specific objectives in relation to macro-or micro-economic developments.[58] These objectives are, for example, strengthening of industrial bases, generation of employment opportunities, export generation and performance, technology transfer, trade balancing, balance of payment justification, development of comparative advantage in a particular sector of economy, and other non-economic objectives such as political independence and distribution of political power.[59]

[56] See *Law on Foreign Investment in Vietnam 1996* (as amended in 2000) arts. 4-16 <www.vietnamlaws.com/freelaws/LFIna12Nov96(aa9Jun00)[I1].pdf> 26 September 2013.
[57] United Nations Conference on Trade and Development, *Host Country Operational Measures* (UNCTAD Series on issues in international investment agreements, 2001) <http://www.unctad.org> 25 December 2011.
[58] UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries* (2003) <www.unctad.org> 10 November 2011.
[59] Ibid.

Others oppose the use of performance requirements, arguing that their imposition may lead to anti-competitive behavior and restrictive business practices on the part of investing MNCs or TNCs and thus result in welfare loses[60] as the commercial interests of MNCs do not always coincide with a host country's development objectives. Moreover, it is said that strengthening local industrial bases through performance requirements tends to create inefficient indigenous firms which may adversely affect the host economy.[61]

Although there are divergent opinions as regards the effectiveness of performance requirements, on the ground of restrictive and anti-liberalisation trade and business practice initiatives are undertaken for eliminating this practice under the WTO Agreement on Trade-Related Investment Measures (TRIMs) and some other interregional, regional or bilateral agreements.

TRIMs has explicitly prohibited four types of performance requirements, including local content requirements, trade balancing requirements, foreign exchange restricts (related to foreign exchange inflows attributable to an enterprises), and export controls. TRIMs require the signatories to eliminate them in phases and report all existing measures inconsistent with TRIMS.[62] There are many other requirements which are prohibited, conditioned or discouraged by International Investment Agreements (IIAs) at bilateral and regional levels.[63] However, the environmental requirement is not restricted, rather it is emphasised by bilateral and regional agreements. The measures of WTO and other International Agreements are contended to be anti-development for developing and LDCs. One of the major purposes of FDI in developing countries is resource-seeking in the host country that mainly concerns the availability of chief labour and raw-materials. This kind of FDI can help a developing host state to gain the benefit of employment generation and the utilisation of local resources. The prohibition of a performance requirement as a trade-restrictive approach under TRIMs protects the interests of capital exporting countries to the detriment of the development interests of developing countries and thus creates an imbalanced trade practice.

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[60] Ibid.
[61] Ibid.
[62] See Agreement on Trade Related Investment Measures 1995, art 5.1. It is noteworthy that for phasing out of performance requirements five years are fixed for developing countries from the date of the conclusion of the Agreement and seven years are fixed for least developed countries.
[63] They are, for example, requirement to establish a joint venture with domestic participation, requirements for minimum level of domestic equity participation, requirements to locate headquarters for specific region, employment requirements, export requirements, requirements to transfer technology, production process or other proprietary knowledge, and research and development requirements. See UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries* (2003) <www.unctad.org> 10 November 2011.

Despite these measures under WTO, the empirical studies show that developing countries use performance requirements more or less in specific sectors, in most cases they are local content requirements linked to automobile industries.[64] Some impose other types of requirements.[65] There are studies which indicate that certain performance requirements are used by developed states as part of their economic development.[66]

Bangladesh, since the conclusion of TRIMs under WTO, indeed has not introduced new measures that deviate from the obligations of the TRIMs Agreement. It has already withdrawn the quantitative restrictions as per its commitment after the expiry of some extended periods since 1994 until 2009 upon its request. However, it does not follow the notification provision for removal as India and Sri Lanka do.[67] Bangladesh has again, along with other LDCs, requested the extension of time frames for compliance with TRIMs obligations. The LDCs request for extension has been approved until 2020.[68] So in view of local economic interests the government of Bangladesh is allowed to impose a performance requirement as an entry requirement of FDI until the approved period. The performance requirement can be used as a condition for the approval of an investment or as a condition for advantages. For understanding the present situations of law and policy concerning performance requirements, an account will now be given.

A. Local content requirements

The use of local content has two main elements as indicated above, namely, the use of available raw materials and the employment of local labour. The use of local materials promotes the sustainable use of resources in many ways and benefits the local producers,

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[64] For example, Argentina, Brazil, Chile, China, Colombia, Ecuador, India, Indonesia, Malaysia, Mexico, Philippines, Republic of Korea, South Africa, Taiwan, Thailand, Uruguay, and Venezuela. See Ibid; for specific information about China see also Joanna I Lewis, *A Review of the Potential International Trade Implications of Key Wind Power Industry Policies in China* (2006) Energy Foundation of Sustainable Energy Programme <http://frankhaugwitz.info/doks/wind/2006_12_China_RE_Wind_Policy_WTO_Regulations.pdf> 12 November 2013.

[65] For example, in China local content is required on a case-by-case basis and depends on the level of technology and the export to output ratio. Foreign exchange balancing is also required. In Malaysia, export requirements apply to almost all sectors. There are technology requirements for FDI as well. Restrictions also exist on the employment of foreign personnel, and local content is required in all sectors. See Bureau of Industry Economics, 'Foreign Direct Investment in APEC: A survey of the Issues' (Report 95/21, Australian Government Publishing Service, 1995) 41.

[66] Sornoraja, above n 2, 271.

[67] Sri Lanka, in its notification dated 14 March, 2000, has indicated that it has no TRIMs inconsistent measures. Subsequently India has withdrawn all its TRIMs inconsistent legislations. (See, CUTS Centre for International Trade, Economics & Environment, 'FDI in South Asia: Do Incentives Work? A Survey of the Literature' (Research Report, 2003) <www.cuts.org> 20 November 2011.

[68] United Nations Development of Social Affairs (DESA), *Survey on International Support Measures Specific to Least Developed Countries and Preferential Market Access related to WTO Provisions* (March 2012) <http://esango.un.org/ldcportal/documents/10179/38149/summary_results_bangladesh.pdf> 2 June 2013.

owners, and processor, and thus eventually contributes to economic and social development. It also aids in building up an import-substitution product regime.

The laws and policies of Bangladesh affecting FDI do not impose any requirement of the use of local materials and services in general for investment in Bangladesh. Industries are allowed to enjoy the freedom to use raw materials procured locally or from outside the country at a competitive price. However, in the case of the pharmaceutical industry the procurement of the raw materials of some drugs from local sources is mandatory. In addition, the government encourages the use of local materials in garments and some other non-traditional exports by providing either cash compensation or duty drawback facilities applicable to the export items.

In this regard, as a LDC Bangladesh offers the benefits associated with the Generalized System of Preference (GSP) to importers in developed countries when the share of raw material is 60 per cent or more.[69]

As part of local content, an employment requirement may appear to be beneficial for developing and least developed countries where the employment opportunities are limited and the unemployment rate is high, impeding economic and social development. Similarly, training in quality- and productivity-related skills that results in or facilitates progress into higher quality and value-added products while improving human resources is very much essential for developing and least developed countries where a scarcity is quality workforce is predominant.

The employment requirement can be imposed for different purposes. There is evidence that in South Africa and Malaysia it has been imposed to diminish racial imbalances and has had success in addressing this issue.[70] In developed countries these requirements are sometimes attached to the granting of incentives.[71] For example in Ireland the grant cost per job created was the key guideline for offering incentives.[72] In Portugal, the creation of local employment is a requirement for granting certain benefits or advantages to the investors concerned.[73] The

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[69] See, United Nations, *An Investment Guide to Bangladesh* (2000) <www.un.org>20 November, 2011; See also CUTS Centre for Competition, Investment and Economic Regulation, 'Investment Policy in Bangladesh: Performance and Perceptions' (Discussion Paper, CUTS, 2003) <www.cuts.org> 20 November, 2011.
[70] Seid, above n 10, 13.
[71] Ibid.
[72] Ibid.
[73] Wenhua Shan (ed), *The Legal Protection of Foreign Investment: A Comparative Study* (Hart Publishing, 2012) 41.

employment requirement is deemed to be essential in a country where there is huge crisis of employment opportunity and where economic and social sustainability depends largely on the expansion of employment opportunities.

Despite the fact that Bangladesh suffers huge unemployment crisis, there is no requirement for local requirement in the foreign invested industries or projects. At the same time, work permits are granted to efficient foreign professionals without any restriction and with a 50 per cent tax exemption on the basis of recommendations by foreign investing or joint-venture companies.[74] In view of the huge employment crisis and unsustainable use of raw-materials, it is very expedient to introduce the use of local content as an entry requirement in fully owned or joint-ventured enterprises against the offer of incentives or business advantages. This will be a better way to achieve the goal of increasing employment opportunities and the sustainable use of available raw materials as pursued in the section 3 of the *FPIA 1980.*

B. Transfer of technology requirement

Technology transfer is one of the fundamental objectives of host governments through FDI. Hence it is rationale for imposing a technology transfer requirement on foreign corporations to induce them to adopt technologies that appear to be appropriate in the contexts of the relative sectors and to facilitate the transfer of knowledge. The evidence for explicit requirements to transfer technology is relatively uncommon among the countries as revealed by a study a decade ago by UNCTAD.[75]Apart from the challenges of the WTO regime, the main reason behind the absence of imposing such a requirement is attributed to considerable problems in enforcing and monitoring such requirements, because of the difficulties involved in objectively measuring the extent of technology transfer and also in identifying the kind of technology that would be most desirable for a given economy at a given point of time. In addition, local absorptive capability is crucial for introducing successful technology transfer, particularly in the case of research and development (R&D). Despite the difficulties, the requirement of technology transfer for the expansion of industrial and service sectors is of paramount importance.

As far as a technology transfer requirement is concerned, there is no focus on one in the legal and policy regime of FDI in Bangladesh. However, in product-sharing contracts in the oil ,

[74] The provisions relating to recruitment of foreign manpower will be detailed in Chapter 5.
[75] UNCTAD, *Foreign Direct Investment and Performance Requirement: New Evidence from Selected Countries* (United Nations, 2003) 19 <books.google.com.au/books?isbn=9211126045> 10 April, 2013.

gas and mineral resource sector there is a provision for intra-firm technology transfer requirement. Contracts signed with foreign oil companies stipulate the transfer of technology to the national oil company, Petrobangla, including regular training to develop local human capabilities, and the handover of some heavy machinery after the conclusion of the contracted work.[76] Petrobangla has designed a model product-sharing contract introducing the requirement of transfer of technology.[77]

In Bangladesh a general emphasis has been placed on the development of technological development and for this purpose high-tech related investment has been declared as a thrust sector. In NIP 2010 emphasis has been given on bringing new technology through FDI and strict screening of FDI is suggested for this end.[78] Furthermore, Bangladesh adopted a policy in 1986 entitled 'Science and Technology Policy' under which the acquisition, adoption and adaptation of foreign technology has been integrated as a major point of objective functions. So it is obvious that the issue of transfer of technology by FDI is of great importance, but there is no specific initiative so far under the FDI legal regime or through the introduction of any policy for the acceleration of transfer of technology.

Therefore the issue of technology transfer as an entry requirement could well be added in the FDI legal or policy framework or could be a subject of bilateral treaty negotiation. In this respect experience can be gained from the Vietnam's FDI law. Article 29 of Vietnam's FDI Law states that the transfer of foreign technology to Vietnam in foreign investment projects may be carried out in the form of capital contribution of the value of technology or technology purchase made on the basis of a contract in accordance with law of technology transfer. The Government of Vietnam encourages accelerated transfer of technology, especially of advanced technology. However the wording of the relevant section does not signify the binding obligation of transfer of technology.

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[76] CUTS Centre for Competition, Investment and Economic Regulation, *Investment Policy in Bangladesh: Performance and Perceptions* (Discussion Paper, CUTS, 2003) <www.cuts.org> 20 November 2011.

[77] Ibid; see *Model Production Sharing Contract 2008 (Bangladesh Oil, Gas and Mineral Corporation, Petrobangla)* art.25.

[78] It is stated in the NIP 2010 that the industrial policy should not consider FDI merely as a means of complementing domestic resources for industrialisation. It should also ensure that foreign investors bring new technology into the country. A strict screening of FDI would therefore be necessary. To that end, the proposed industrial policy should clearly lay down that foreign investors shall not be accorded permission to invest and conduct business in this country unless they bring the latest technology.

C. Export performance requirements

Export performance requirements are a condition that may induce investing foreign companies to help the host country integrate into the world economy. These requirements enable developing countries to tailor the operations of MNCs to their own development objectives. A trend of shifting from import substitution to export led-growth has caused developing countries to seek investment by MNCs with an objective that they would manufacture and export and thus create a better means of foreign exchange earnings.[79] Therefore, some growing economies of the developing world use export requirements in FDI. The newly industrialising countries such as Singapore, South Korea, Taiwan, and Hong Kong, have adopted such a model of export-led development.[80] The foreign investment-assisted export policy based on export performance as an entry requirement was maintained by the developed countries during their period of development.[81]

Under the *Privatization Policy 1992* Bangladesh has moved to export-led private sector development activities and encouraged investment in intensive sectors. The NIPs emphasise export-oriented economic growth and therefore offers different kinds of fiscal and duty incentives.[82] The facilities are provided on the basis of the export percentage of the products. According to the NIP 2010, industry, either local or foreign, needs to export 80 per cent of their produce or exportable goods to be termed as export-oriented industries.[83] But there is no prescribed limit for any foreign investors for exports as a requirement for approval. The periodic export policies of Bangladesh do not have any such provision as part of an export control policy. For all export items, the prior permission of Bangladesh Bank to open back-to-back letters of credit has been waived as long as such exports conform to guidelines for adding domestic value.[84]

The potential benefit of export requirement is clear for supporting export-led industrialisation. But the imposition of such a requirement may turn into a protectionist practice as sometimes the investor may find it difficult to meet the required target.

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[79] Sornarajah, above n 2, 110.
[80] Ibid.
[81] Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press, 2nd ed. 2005) 71.
[82] See *National Industrial Policy 2010*, Ch. 13.
[83] Ibid.
[84] United Nations and ICC, *An Investment Guide to Bangladesh: Opportunities and Conditions (2000)* <http://www.unctad.or/en/docs/poiteiitm/e.pdf> 20 November 2011.

3.6.5 Imposing environmental requirements

An environmental requirement is an important requirement that every host country and its agency should have regard for as an entry condition of foreign investment. The notion of an environmental protection requirement indeed is stimulated by the very concept of sustainable development and the negative impacts of the environmental performance of multinational corporations. With regard to environmental protection the host state has the right to interfere with the performance of FDI by multinationals as the right to a clean environment progressively evolves as a human right.[85] Therefore, as a prime concern it needs to be introduced as an entry requirement in the legal or policy framework applicable to FDI or any kind of investment.

In developed countries the effect of a foreign investor's activity on the environment has been a greater emphasis. An investment project or agreement may be cancelled, even after it has commenced operation, on the ground of potential environmental harm which is irreversible or which outweighs the benefits of the projects.[86] There is a prime example in a dispute concerning sand-mining on Fraser Island, close to Australia's Great Barrier Reef. The Australian government terminated the concession accorded to US corporations to mine sand on the basis that an environmental impact study showed the considerable adverse effect of sand-mining on the environment of the Great Barrier Reef.[87] Upon protest by US corporations the Australian High Court upheld the validity of the Australian government.[88] However there is a general acceptance that a state has the right to cancel agreements or investment projects which cause significant environmental harm.[89]

The introduction of an environmental requirement as an entry condition is a growing concern in recent years in developing host countries as a result of incidents of negative environmental performance by MNCs, particularly out of the belief that they often export hazardous technology which is already outdated or banned in their home countries.

In Bangladesh the foreign investment legislation and policy do not impose an environmental requirement as an entry conditions, as some other countries do. However, the *Bangladesh Environment Conservation Act*, 1995 requires all investors either local or foreign to obtain an

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[85] See for details chapter 5 of the thesis.
[86] Sornarajah, above n 2, 109.
[87] Ibid.
[88] See *Dillingham-Moore v Murphyores* (1979)136 CLR 1.
[89] See *International Bank of Washing v OPIC* (1972) 11 ILM 1216.

environmental clearance certificate from the Department of Environment (DoE), the principal environmental regulatory department under the Ministry of Forest and Environment; at the event they submit any project proposal for approval. For obtaining the certificate the law requires the submission of an Environmental Impact Assessment (EIA) report. The EIA is screened before permission is provided for operation. The screening also includes appropriate water-treatment plants, air and noise pollution-controlling devices, and safety measures. The emphasis for screening depends upon the degree of the intensiveness of potential environmental risk by the industries and therefore The Environment Conservation Rules 1997 has categorised all industries into three: 'Green', 'Yellow', and 'Red', with environmental safety standards becoming stricter in ascending order.[90]

3.7 Requirement of Screening of Investment Proposals

Screening has traditionally been very common and one of the main tools for controlling the access of FDI into a host country. It is a method of scrutiny the host states apply in accordance with their laws and policies to decide on the approval or rejection of foreign investment proposals. Foreign investors are often required to obtain certain approvals or permits before initiating business operations, and projects are screened to ensure that they conform to the established criteria.[91] There may be certain objectives to apply screening procedures as determined by the capital importing country itself.[92] But the fundamental objective of screening is to examine or evaluate the foreign investment proposals as to whether or how far they are suiting to the economic goals as defined by the host state's law and policies and what is the potential impact of investment on local economy; additionally, whether they have followed the established guidelines for investment in any specific type or form or any specified sector. It is well-indicated in Armenian Code, as it states that certain economic activities '… may only be conducted by enterprises with foreign investment only after obtaining a license in the established manner'.[93]

There exists a division of opinions between international law writers with regard to the general wisdom of such screening procedures. At the early stages the institutional writers

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[90] *The Environment Conservation Rules 1997* (Bangladesh) Rule 7A; These three categories will be explained in section 5.4.3.1 of Chapter 5.
[91] See UNIDO, *Guidelines for Foreign Investment Promotion Agencies* (2003) <http://www.unido.org> 10 November 2011.
[92] Abdullah Al-yagout, *The Regulation of Foreign Investment in Kuwait: The Role of Law, Politics and Economics Policies in the Development Process* (PhD thesis at the University of Warwick, 1997) 142 <http://go.warwick.ac.uk/wrap> 25 November 2011.
[93] *Law of the Republic of Armenia on Foreign Investments 1994* (Armenia) Article 14.

such as Victoria and Vattle advocated the exercise of complete freedom of entry for the purposes of trade and investment. Victoria believed in "fundamental human rights which inheres in all men to trade with the people of other lands and thus fulfils the human urge to the community."[94] A number of commentators consider the impositions of conditions such as screening as a major obstacle to foreign investment in developing countries.[95] However, such regulations are not uncommon where certain investments are considered to be opposed to national interests.[96]

In reality, screening regulations have been relaxed and simplified in different countries to a considerable extent compared to the post-liberalised communist era. The host countries, mostly, pursue an 'open door policy' requiring simple registration or prior authorisation for investment in a number of sectors. Some developed and developing countries, however, have resorted back to or stick to protective measures in the aftermath of the recent global economic recession. These include France, Australia, Canada, Japan, China, Russia, and India. The screening system they have adopted varies, but they mostly involve the sectors which are economically sensitive and strategically important for national security purposes.[97]

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[94] Al-yagout, above n 92,142.

[95] AA Fatouros, *Government Guarantees to Foreign Direct Investment* (Columbia University Press, 1962) 290; see UNCTAD, *The Development Dimension of FDI: Policy and Rule Making Perspectives* (2003) <unctad.org/en/Docs/iteiia20034_en.pdf> 26 September 2013.

[96] Shahita comments on screening position that all or most proposed investments are subject to scrutiny or screening by the authorities, and must receive a formal approval, such as an investment license, before an investment can actually be made. Pursuant to these provisions, the screening process typically involves an assessment of the projected investment's economic impact and in particular, of the economic benefits that may accrue to the host country from investment. For more about admission under national legislation see, Ibrahim Shahita, 'Recent Trends Relating to Entry of Foreign Direct Investment' in Heng et al. (eds.) *Current Legal Issues in Internationalization of Business Enterprises* (Butterworth, 1996).

[97] For example, in France a decree was issued at the end of 2005 identifying eleven strategic sectors in which investment proposals fall under the purview of review authorities. In Australia under the *Foreign Acquisitions and Takeovers Act of 1975*, the Government must determine whether proposed foreign acquisitions are consistent with Australia's national interest. A new policy was announced in February 2008 for proposed investments by sovereign investors. It requires the review of applications consider six specific issues, including whether an investor's operations are independent from the relevant foreign government; the investor's observance of standard of business behaviour; the investment's impact on national security; and the contribution of an investment to the country's economy and community. In Canada, on 12 March, 2009, the foreign investment law was amended. Apart from changes that liberalised the country's foreign investment review process of general application, the amendment included a national security test for proposed investments, which applies to a much broader range proposed transactions than the pre-existing net benefit test. In Japan, according to its *Foreign Exchange and Foreign Trade Act*, foreign investment that potentially impairs national security, disturbs the maintenance of public order, hinders the protection of public safety, or has a significant adverse effect on the smooth management of the Japanese economy must be screened by the Ministry of Finance and the Ministry having jurisdiction over the business. China strengthened its review system in August 2006 by announcing the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*. Under this, a new screening mechanism was developed which was further enhanced in a five year plan of National Development adopted in November of the same year. Besides this it also enacted an anti-monopoly law in August 2008. In Russia, a 2008 law on *Procedures for Foreign Investments in Companies of Strategic Importance of National Defense and Security* requires government approval for certain transactions involving foreign investors if (i) the Russian company is engaged in an activity of strategic importance to the country's defense and national security and (ii) the foreign investor would control either the company or rights to 'natural resource deposits having federal importance. In India the government recently introduced investment

Bangladesh pursues very relaxed policies to allowing foreign investments which are mainly confined to a mere registration process after completing incorporation procedures under the existing company laws. There is no policy guideline adopted by the Board of Investment (BoI), the main approving or registering authority in Bangladesh, in consistence with directives of section 3 of the Act 1980 as discussed earlier. However it maintains a certain administrative procedure requirement for the registering of a new foreign project.

The registration or approval process is different on the basis of the nature of the investment projects. For joint ventures or 100 per cent foreign equity investment projects, there is no requirement of prior approval or a no-objection certificate (NOC) for setting up units. However to take advantage of various financial and fiscal incentives, facilities, and institutional support, these investments need to be registered with BoI. Registration with BoI is also necessary to obtain benefits such as importing machineries at concessionary duty rates or importing items on the 'restricted list'. However, pre-registration clearance is a requirement for investment in RMGs, banks, insurance companies and other financial institutions.

For private investment either foreign or local, the industries are categorised into three groups: thrust sectors, reserved sectors and controlled sectors.[98] According to the NIP 2010, investment in the controlled sector cannot be registered with BoI or BEPZA unless approval or NOC is obtained from the Ministry of Industry and Commerce or the concerned ministry or commission as discussed earlier. The government holds the power to fix the equity rate of local-foreign investors for any joint venture project in this sector.

A separate condition applies to the registration of joint venture enterprises with BoI. If a local or foreign entrepreneur wishes to set up a joint venture with a public sector corporation, it must be registered with BoI, if the private sector's equity participation is more than 50 per cent. In such a case it is treated as a private sector project. The public sector entity in

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policy measures that include a requirement of prior approval for the transfer of ownership or control from resident Indian citizens to non-resident entities in specific sectors, including air transport services, banking, insurance and telecommunications; see Karl P Sauvant, *FDI Protectionism Is on the Rise* (Policy Research Working Paper No. 5052, World Bank, September 2009) <www.worldbank.org> or <www.vcc.columbia.edu> 5 December 2011.

[98] Thrust sectors include 32 industrial sectors that currently occupy a dominant position in economy or have high growth potentials but are currently non-existent or in a nascent stage in the economy. The government may extend the number of the sectors from time to time in consultation with all stakeholders and on the basis of information collected on various industries, their growth potentials and likely positive impact on the economy (Chapter 3 and annexure 11 of NIP 2010). The reserved are four which are exclusively limited for public investment (Chapter 3 and Annexure 3 of NIP 2010). Controlled sectors include 17 industrial sectors that might cast a negative impact on the economy or cause threat to the national security and culture (Chapter 3 and annexure 4 of NIP 2010).

question must get approval from the concerned ministry in order to invest its own resources, and the ministry then processes the registration.

BoI is the main registering authority for private investment, be it local or foreign. But if a foreign enterprise is to be set up in an EPZ or industrial estate, the registration must take place with BEPZA. In the case of a manufacturing company employing ten or more workers, the registration must also take place with Chief Inspectors of Factories and Establishment under the *Bangladesh Labour Act* (BLA) 2006.[99] This requirement is intended to regulate the working conditions and to ensure safety measures in the industry.

BoI is a one-stop service provider which is usually able to provide quick service to applicants for registration. In addition, it also helps in getting environmental clearance certificates from the DoE as mentioned in the former section. The normal procedures for registration with BoI are not cumbersome or time consuming. The applicants are required to attach to the prescribed application form the following documents duly completed:[100]

1. Certificate of incorporation (including Memorandum and Articles of Associations in case of a Public or Private Limited Company)
2. In case of a Joint Venture Project (JVP), a JVP Agreement (signed by both parties)
3. Deeds/documents in support of project land (either purchase deeds, or in the case of lease and rental premises, a deed of agreement)
4. Total estimated cost of the project (if the total cost exceeds Taka 50 million, the submission of a project profile is necessary)
5. Personal details of the investors (permanent and mailing address, nationality and position)
6. List of machinery (with the indication of quantity and price), and the supporting documents of loan (if the project is financed by loan)

After receiving the application duly submitted in association with aforesaid required documents, BoI, reviews and if found suitable, issues the registration certificate within seven days. Although BoI is supposed to complete the required processes in the shortest possible

[99] It was previously under the *Factories Act, 1965* which is annulled by and the provisions merged with the newly adopted the *Bangladesh Labour Act, 2010*.
[100] See Board of Investment, Bangladesh, *Investing in Bangladesh (Handbook & Guidelines, 2011)* <www.boi.gov.bd> 06 December 2011; see also *The Board of Investment Act of 1989* (Bangladesh) s.11.

time, some investors report difficulty obtaining registration due to bureaucratic red tape and administrative corruption.[101]

Apart from BoI, in order for industries to be registered under BEPZA, the investor is required to make an application in the prescribed form. Upon the receipt of application, the authority or any person authorised to act in this behalf, shall grant him permission in the prescribed form, if he finds that the investor satisfies all of the requirements for setting up an industry in the zone.[102] The requirements are not specifically set under any policy, they are determined upon by the guidelines the government provides from time to time. However, it is at least settled by the *National Industrial Policy 2010* that only export–oriented industries can be set up in the EPZ, and to be an export-oriented, the industry is required to export at least 80 per cent of their produce or supply 80 per cent of their output as raw materials for exportable items. The same requirement applies to service enterprises.

In view of the above discussion, it may asserted that apparently BoI does not maintain any screening method necessary to examine the developmental viability of an investment project in its entirety, in conformity with common standards of entry requirement as available in legal and policy regimes across the globe. It functions are limited to registration and certain procedural requirements for that purpose that may relate to any economic issue in part, and not on a holistic basis.

3.8 Concluding Remarks

The entire discussion reflects an inconsistency between the directives as introduced in section 3 of FPIA 1980 and the legal and policy initiatives in regard to entry regulation for development purposes on the whole. The review of overall entry regulatory aspects reveals a lack of concern from the state for the exigency of the introduction of such issues in laws, policies, or treaty negotiations, while the concept of FDI-induced development gains in currency and influences progress in other host states' laws and policies. The laws and policies in Bangladesh are still influenced by the liberalised and permissive attitude to admitting FDI. No legal changes have taken place accommodating the entry regulatory issue since the legal regime emerged in 1980. In addition, there is no screening manual reportedly adopted by BoI consistent with the directives of section 3 or general regulatory aspects as

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[101] US Department of Justice, *Doing Business in Bangladesh* (*2010*) <http://www.justice.gov/business/business/opportunities.htm> 20 November 2011.
[102] *The Bangladesh Export Processing Zones Authority Act 1980* (Bangladesh) s. 12.

mentioned above that may enable Bangladesh to reap any FDI-driven development benefit. The industrial division on the basis of regulation in the NIP is a good initiative, but for its due enforcement and application there needs to be some concrete specific legal provisions. Procedural restriction alone is not sufficient.

There is a plenty of scope for legal and policy reforms in respect of entry regulation. Firstly, there should be an amendment in the text of section 3 to give it the status of legal binding force. Therefore the word ‘may’ needs to be replaced by ‘shall’ to denote obligatory expression. As the performance requirement is very much cardinal for realising the development objective of FDI, there should be legal principles requiring conditional performance requirements for authorisation or the gaining of incentives. Secondly, a screening manual needs to be set focusing on the entry regulatory aspects in line with the directives of section 3 of FPIA 1980. Thirdly, some legal provisions need to be added into FPIA 1980 as regards forms of investment, defining their nature, scope and condition of application. Fourthly, in the case of joint venture or fully-owned foreign investment there needs to be some policy reform as regards capital contribution and local content requirements under NIP. Moreover, in joint venture investments, the requirement for technology transfer can be imposed. Finally, for official screening a ministerial committee under the auspices of BoI can be formed.

CHAPTER 4

FISCAL AND NON-FISCAL INCENTIVES FOR FDI: POTENTIAL RISKS AND REGULATION IN BANGLADESH

4.1 Introduction

In recent years investment incentives have been recognised as an important part of any national legal regime for foreign investment. As an economic determinant, irrespective of their degree of influence on investments, governments and policy-makers often tend to regard them highly as a means of attracting foreign multinationals, in alignment with a liberalised attitude towards entry and strong protection measures. Therefore, they integrate incentives into the core legal framework of investments or enact separate laws which have implications for investment.

There are various types of investment incentives, but they are usually classified into two; fiscal and non-fiscal or financial incentives. Fiscal incentives are popularly known as tax incentives and duty exemptions. Tax incentives are designed to reduce the tax burden of operating investor companies and include tax holidays, accelerated depreciation allowances (ADAs), reduced corporate tax rates, and import duty exemptions. The facility for double tax avoidance and scope for transfer pricing are also treated as fiscal incentives.[1] Financial incentives include different types of financial supports extended by the government[2] that include *inter alia* full repatriation of profits, low interest rate bank loans, infrastructural support, arrangements of a specialised business zone and so on. The incentives are normally intended by the host government to encourage investment by foreign companies,[3] and this practice has been widely assumed in all economies. However, fiscal incentives are offered more in developing and least-developed countries.

Bangladesh, in a similar way to other contemporary developing economies, has laws and policies recognising both fiscal and financial incentives as part of its economic and trade liberalisation with an ultimate goal of achieving an increased volume of foreign investment.

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[1] UNCTAD, *Tax Incentives and Foreign Direct Investment: A Global Survey* (ASIT Advisory Studies , No.19,2000)<unctad.org/en/Docs/iteipcmisc3_en.pdf>19 October 2013; Sandwip Kumer Das and Manoj Pant, ‘Incentives for Attracting FDI in South Asia: A Survey’ (2006) 43(1) *International Studies* 1, 3.

[2] Ibid.

[3] Jacques Morisset and Neda Prinia, *How Tax Policy and Incentives Affect Foreign Direct Investment: A Review* (Policy Research Working Paper No, 2509, World Bank Foreign Investment Advisory Service, 2000) 6<http://ssrn.com/abstract=632579> 4 May 2012.

It is obvious that the incentives are likely to ensure the possible benefits of investing foreign companies and thus influence the scale of investment.

But there has been a growing debate over the effectiveness of fiscal and non-fiscal incentives as a determinant of foreign investment and also their ultimate consequences in the national economy of the host countries.[4] This is because both fiscal and non-fiscal incentives may create potential risks to the national economy in different ways. In particular, among non-fiscal incentives, the opportunity for full repatriation is very much a contentious issue because of its potential negative impact on national capital control leading to a BoP crisis. There is also growing attention in recent times to the negative impact of fiscal incentives in poor countries on fiscal regulation, leading to the loss of national revenues, as the costs associated with tax incentives appear to be higher than the collected revenue. Also, tax incentives in a country with weak tax regulation facilitate administrative corruption, different venues for tax evasion, and fraudulent and suspicious behaviour on the part of companies.[5] The desired goal from the use of incentives thus remains distant. This is mainly because developing countries often establish tax incentives without having a proper regulatory and good tax governance system. A similar situation exists in Bangladesh both in fiscal and non-fiscal incentive issues. In view of this, in association with offering incentives to retain competitiveness in general there needs to be some balancing regulation and control to eliminate the negative impacts of incentives and achieve their advantages for stimulating foreign investment.

This chapter therefore seeks to focus on the pros and cons of some major fiscal and non-fiscal incentives offered in Bangladesh for foreign investment, in order to examine the existing legal framework, regulatory mechanism, and evidences of potential negative impacts on the national economy and to suggest necessary reforms as regards regulation and control. In addition, the chapter also focuses on the facility for double tax avoidance and available transfer pricing system in Bangladesh to examine their regulatory frameworks.

There are a number of non-fiscal incentives offered in Bangladesh. Three types of non-fiscal incentives; incentives for export production, a bank loan facility, and facility for repatriation,

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[4] See Yitzhak Hadari, 'The Role of Tax Incentives in Attracting Foreign Investments in Selected Developing Countries and the Desirable' (1990) 24(1) *The International Lawyer* 121, 123; see also Howell H Zee, Janet G Stotsky, and Eduardo Ley, 'Tax Incentives for Business Investment: A Primer for Policy Makers in Developing Countries' (2002) 30(9) *World Development* 1497, 1508; Dr. Bruce Bolnick (Nathon-MSI Group), 'Effectiveness and Economic Impact of Tax Incentives in the SADC Region' (Technical Report, USAID/RCSA, 2004) <http://pdf.usaid.gov/pdf_docs/PNACY929.pdf> 19 October 2013.
[5] Morisset and Prinia, above n 3, 5-6.

are chosen as our focus as these types have both positive and negative impacts. However, the chapter begins with need for regulation of fiscal and financial incentives, describing reasons why Bangladesh offers both types. This chapter argues that the prevalent incentive measures in Bangladesh are less regulated, unbalanced, and biased towards foreign investors. Without complementary regulation the incentives will not able to play an effective role in the development of Bangladesh, but will rather be detrimental to the national economy.

4.2 Advantages and Disadvantages of Incentives and Need for Regulation

The fiscal and non-fiscal incentives are a recently grown and widespread practice as an economic determinant of foreign investment as mentioned earlier. Until recently, there was a strong consensus in FDI literature about MNCs' preference for strong economic fundamentals in their choice of location for investment.[6] The major economic fundamentals include the host country's market size and the level of real income in association with skill levels, and the availability of infrastructure. It also includes other resources that facilitate the efficient specialisation of production, trade policies, and political and macroeconomic stability as other central determinants. Investment incentives were perceived as comparatively minor determinants of FDI decision-making. In similar investment locations it was seen to have a marginal effect on influencing investment decisions.

However in recent years there has been a shift in views on the importance of incentives as evidenced by the proliferation of investment incentives across the world. Once the MNC's executives used to downplay the role of incentives; they now readily concede their increasing importance for investment decision-making.[7] According to statistics, more than 100 countries offered various incentives in the mid-1990s; dozens more have introduced such incentives since then.[8] Financial incentives are more commonly used in industrialised countries, while fiscal incentives have been a priority in developing countries. Developing countries mostly base their incentive enterprises on tax holidays and other fiscal measures that do not require direct payments of scarce public funds.

The internationalisation of the world economy is arguably deemed to be the main reason for the emerging prominence of FDI incentives. Global trade liberalisation has opened up convenient avenues for MNCs to set up international production networks, and investment

[6] Mongus Blomstrom & Ari Kokko, *The Economics of Foreign Direct Investment Incentives* (Springer, 2003) 3.
[7] Morisset and Prinia, above n 3, 5-6.
[8] Ibid.

incentives play a vital role. The incentives, in fact, have reduced the importance of market size and thus allowed smaller countries to compete for investments that would have been earlier directed to major markets. The regional market integration as a consequence of global trade liberalisation has intensified the competition within similar economies in a single region. Investors are able to choose between alternative locations in a given region and the offering of investment incentives can give a country a competitive edge. Developing countries that desire to be locations for FDI have increasingly resorted to tax incentives as they are in close geographical proximity to other countries with similar features attractive to investors.[9] As a boost-up measure, incentives have also become increasingly important for national policy-makers who attempt to promote local production, employment, and welfare relying mainly on inbound FDI.

The use of incentives in developing countries, particularly fiscal preferences as noted earlier, suggests that they have become highly significant determinants of investment flows.[10] Although the ratio of the quantity of FDI flow in the absence or presence of incentives is not often calculated, policy-makers believe that they are likely to influence both location and operational decisions.[11] A study evidences that FDI in tax haven countries in the Caribbean and South Pacific grew more than fivefold between 1985 and 1994, to more than $200 billion.[12] In addition, Ireland's tax policy has been recognised as a key factor in its success in influencing foreign investors over two decades during the 1900s.[13]

The use of fiscal and other incentive measures in developing economies, such as land and infrastructural subsidies in export processing zones and industrial estates, may be attributed to some basic reasons. One is that tax allowances consisting of a tax holiday or lower corporate tax encourage companies to take a long-term view when planning investments. The main benefit of tax holidays is that they provide large benefits as soon as the company starts earning and thus they reward founding companies rather than existing companies. A low tax rate allows investors to keep a larger portion of profits and therefore the investors look favorably on a country offering a low statutory tax rate. Some countries offer a generalised tax reduction for investment, while some countries adopt a selective approach of

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[9] Ibid; Orighoye Rewane, 'Using Tax Incentives to Compete for Foreign Investment: Do They Work?' (Working Paper, University of Dundee, 2004) <www.dundee.ac.uk/cepmlp/journal/html/Vol15/Vol15_7.pdf> 5 June 2013.
[10] Kelly Edmiston, Shanon Mudd, and Nevan Valev, 'Incentive Targeting, Influence Peddling and Foreign Investment' (Working Paper, Georgia State University, September 2000) <aysps.gsu.edu/isp/files/ispwp0007.pdf> 05 June 2013.
[11] Morrisset and Prinia, above n 3, 6.
[12] Ibid,9.
[13] Ibid.

reduction targeting specific industries. The broad-based generalised low corporate tax rate is appealing, although it may bring distortion to the tax base of a country initially that may be compensated by further increasing the tax rate in the long run. The selective approach of tax reduction may minimise the initial effect of fiscal revenues, and help to target specific industries or activities that would bring greater benefit to the country.

Another reason for using tax incentives is that the host country intends to compensate for its negative factors, such as infrastructural inefficiency, socio-political instability, or a weak law and order situation. The governments of the countries having such weaknesses assume that the lower tax rate and longer tax holidays may make up for these unattractive features and interest the bigger multinationals for investment as they usually only look for the highest possible return for their investment. Many South American and Sub-Saharan countries which were otherwise unattractive regions adopted an attractive tax reduction policy for foreign businesses; however, they ultimately came out with little success in generating investment flows to their areas.[14]

Certain types of tax incentives are granted by developing countries for some special sectors which are intended mostly for transfer of technology. These sectors mainly include those which are weaker in the host country but crucial for development, such as energy and mining.

Despite the positive role of incentives in attracting FDI in the present competitive economic era, there is debate on the success rate of fiscal incentives in developing and least-developed countries on the whole in attracting foreign investments, with both sides being sometimes supported by studies, and therefore mixed opinions come across in the academic literature. In particular, some potentially serious adverse effects of the widespread use of tax incentives are identified in a study, which are also a reality in practice. The study argues that tax incentives may lead to the erosion of the tax base, either because many highly profitable investments would have taken place even without them, or because they are given to investors not eligible to receive them in violation of the relevant laws and regulations by government officials or investors.[15] In addition, tax incentives have the potential to distort resource allocation. More importantly, granting unconditional tax incentives opens the way for corruption and socially unproductive activities.[16] Tax incentives involve many types of cost burdens upon the government, such as revenue costs, resource allocation costs,

[14] Ibid.
[15] Zee, Stotsky and Ley, above n 4, 1498; Hadari, above n 4, 123-129.
[16] Ibid.

enforcement and compliance costs, and the costs associated with corruption and lack of transparency.[17] In view of its potential risks and extra cost-generating impact, due regulation and a control policy is essential for the appropriate handling of fiscal incentives. Otherwise, the incentives will not be beneficial for a host country in a real sense. Likewise, the efficacy of financial incentives such as bank loans and repatriation of profit depends upon the complementary regulatory process. Without effective regulation, these kinds of incentives impact negatively on the capital control of host country by affecting the net revenue reserve and also creating BoP deficits.

The object of regulation is to offset the collateral negative impacts of incentives granted without the host state's consideration of their potential to affect the economy. In granting incentives, the main concern should not be how far they are able to attract foreign investments. The concern should be how far subsidising the foreign investment with fiscal and non-fiscal incentives is justified, where: (1) the developing countries in reality can afford the higher associated costs of providing incentives so as to still benefit from the investment; (2) whether the tax incentive in particular is detrimental to building up a sound tax regulation of a country, or may have adverse impact on its national economy or; (3) how far the unregulated outflow of foreign exchange through the repatriation of profits has the potential to generate a capital crisis, and what is the way out to prevent such potential risks.

4.3 Rationales for Incentives in Bangladesh

The economic objectives of FDI incentives either fiscal or non-fiscal are almost the same in developing and least-developed countries. The developing or least-developed host countries strive to attract FDI with the ultimate goal of pursuing sound and sustainable economic development and therefore they adopt different motivational policies, one of which is the liberalisation of tax regulation by offering a variety of tax incentives through the application of methods of deductions and exemptions. In addition, the host countries also offer other incentives to create a sound and sustainable climate for doing business with foreign investors.

Although these incentives are costly for host countries, FDI as a widely means development may contribute to the building-up of capital resources, rising of employment opportunities, amount of exports, and the expansion and improvement of skill and efficiency in industrial sectors etc. In view of this, the host countries may have different economic equations and

[17] Ibid.

objectives for offering fiscal and non-fiscal incentives. Bangladesh as a country beset with multiplied economic problems offers both kinds of incentives to achieve certain targets which may be assumed to be from three main rational points, such as capital building, expansion of industrialisation, and survival in the competitive global market. These points are discussed below.

A. The need to attract FDI for capital-building

Capital building is a very common and foremost means of attracting FDI for developing and least-developed countries as they are usually short of the required resources of capital to build up a sound national economy. One of the main positive effects of FDI on developing host countries is resource-transfer. FDI by MNCs along with others contributes to the growth of host countries' revenue and foreign reserves. Capital scarcity is central to the economic restraints Bangladesh has been facing since its very beginning as an independent state. Following its independence, conservative economic efforts through the nationalisation policy undertaken by the then government were frustrated mainly because of capital scarcity, where the only make-up policy was dependence upon foreign aids and loans. The subsequent shift into privatisation and a private sector-based economy since the mid-70s, and particularly in the 1980s, was intended for and opened the way for generating a national capital base apart from foreign aid and loans. To augment this process the government offered different kinds of fiscal and non-fiscal incentives for national and foreign enterprises through the enactment of the FPIA of 1980, the BEPZA Act of 1980 and the *Income Tax Ordinance 1984*. Even before 1980 when the foreign equity level was restricted tax incentives were offered in order to help motivate foreign investors and thus contribute to the increment of national revenue.

B. The expansion of industrialisation

Industrialisation is generally believed to be instrumental in economic development for developing countries. The expansion of industrialisation, as evidenced from the scenario of advanced industrial economies has largely been possible through the enhancement of private entrepreneurship. The need for creating a local industrial base by promoting private entrepreneurship was felt in Bangladesh in the first decade of its independence in the aftermath of an economic setback resulting from the nationalisation policy of then government. Thereafter successive governments particularly from the end of the 1970s have adopted national industrial policies (NIPS) to create a stable climate for industrial growth and improve the long term performance of the economy in terms of productivity, employment, and international competitiveness. The review of these policies adopted in 1982, 1986, 1991, 1999, 2000, 2005 and finally in 2010, conclusively reveals that the policies greatly stimulate the development and expansion of private sector-based industrialisation and as an important boost-up measure they recognise various types of fiscal and non-fiscal incentives for both local and foreign private investors. Apart from this, *the Income Tax Ordinance 1984* offers a tax holiday facility for industrial undertakings by local or foreign investors set up at different times beginning from 1974, with a lucrative tax exemption for industries in the regional level in order to create a new industrial belt.

Incentives are offered in EPZs through the enactment of BEPZA in 1980. The EPZs are the main base of foreign investment for industrial entrepreneurship and are equipped with all of the required logistic supports and facilities for doing business in a safe and secure environment. The main point is that special incentives are likely to increase the volume of foreign investments, which may eventually bring changes into the total industrial structure of the country with the introduction of new technologies and training, techniques for inventory and quality control, the breaking down of monopolies, the stimulation of competition and efficiency, increase in managerial efforts, and improvement of marketing techniques either in the local market or internationally.

C. Survivability in the competition

Survivability in competition is a prime reason for which Bangladesh offers various fiscal and non-fiscal incentives for foreign investment. There has been a battle in recent years among the developing and least-developed countries to attract foreign investments in order to achieve their developmental goals. The MNCs are generally inclined to invest in a new location having more attractive economic and deregulatory features with the expectation of maximising their business returns. In such a situation, developing countries have increasingly resorted to measures that make them better alternative locations for FDI, where the importance of fiscal incentives is pronounced with great emphasis.[18] Thus these incentives are viewed by the host-state governments as an important policy variable in their strategies to attract FDI for economic development. This has eventually created a competitive trend of reducing business taxation where a competing country tries to make

[18] Blomstrom and Kokko, above n 6, 4-9.

investments within its borders relatively more attractive by relaxing tax requirements or claims on any income generated from such investments.

There is pressure on countries from capital exporting partners to lower their corporate income tax rate to ensure their competitive position in today's global economy. The increasing mobility of international firms and the gradual elimination of barriers to global capital flows have stimulated this competition, which often flourished through tax incentives. The process of globalisation also requires the low income countries to lower their fiscal rate to remain accessible for foreign trade and investment. The countries of similar economic status of South and Southeast Asia are found to be in the lead with lucrative low tax rates. Bangladesh is not an exception to this global trend. It otherwise experiences some factors which may discourage foreign investment, such as political instability, a poor law and order situation, and infrastructural inadequacy. So, to compensate for such negative factors and at the same time to survive the competition in attracting FDI among similar economies in South and Southeast Asia the fiscal incentives it offers appear to be viable and valuable.

4.4 Fiscal Incentives for Investment and their Regulation

4.4.1 Different types of fiscal incentives in existing laws

Fiscal incentives are a common and prominent phenomenon of tax regimes which have been practiced widely over the last three decades among developing and least-developed countries in order to attract foreign investment. Developed countries tend to use targeted investment incentives, generally incorporated into the income tax law.[19] Developing or least-developed countries tend to combine targeted and more general incentives, which may be embodied in the income tax law, the investment law and other laws, or simply in government industrial or economic policy or decrees.[20]

In Bangladesh *the Income Tax Ordinance 1984* is the key legal instrument that deals with tax regulation. It recognises different types of tax incentives in the form of tax deductions for industrial undertakings and physical infrastructure facilities set up with local and foreign investments. The perceived objective of incentives under this is an emphasis on

[19] Zee, Stotsky, and Ley, above n 4, 1497.
[20] Ibid.

industrialisation, enhancement of infrastructural development, and the promotion of specific economic sectors that ultimately contribute to improving overall development.

Apart from the said Ordinance of 1984, the other laws and policies dealing with corporate tax incentives are the *Bangladesh Export Processing Zones (BEPZA) Act 1980* and *National Industrial Policies (periodically adopted).* The BEPZA Act 1980 offers different types of tax incentives for industries in export processing zones. Above all, the *Finance Act* adopted annually in line with the national annual budget and the National Board of Revenue's (NBR) Manual presents from time to time the existing tax exemption or deduction rate for corporate tax with changes if any in line with the provisions of the Ordinance. The major fiscal incentives as offered for local or foreign investment are enumerated as follows:

1. tax holidays;
2. accelerated depreciation allowance (ADA); and
3. reduced corporate tax in certain sectors.

Tax holidays are by far the most common form of tax incentive for investment. It is a kind of deduction and exemption from taxable income for certain duration.[21] A tax holiday may take the form of a complete exemption from income tax, or of a reduced rate of tax, or a combination of the two (e.g., two years' exemption, plus a further three years at half rate). The term 'accelerated depreciation' generally refers to any depreciation allowance that provides for the writing off the cost of an asset for tax purposes, at a rate faster than the true economic depreciation.[22] The reduced corporate tax rate is a reduced rate of corporate income or profit tax applied to particular types of activities or investment in particular locations or regions.[23] There are some other incentives offered in Bangladesh where both local and foreign private investments are entitled. These incentives include deduction from capital gains income, dividend income, royalties, and salaries of foreign technicians. The concessionary duty on imported machinery is another form of indirect tax incentives regulated by the custom law. *The Income Tax Ordinance* also recognises the avoidance of double taxation as an incentive for foreign investors.

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[21] Alex Easson, *Tax Incentives for Foreign Direct Investment* (Kluwer Law International, 2004) 1 <siteresources.worldbank.org/INTTPA/Resources/EassonZoltPaper.pd>29 December 2013.
[22] Ibid.
[23] Ibid.

4.4.2 Legal framework of different fiscal incentives

4.4.2.1 Tax holidays

A .Tax holidays for industrial undertakings

Since the enactment of this *Ordinance* the tax holidays are offered for industrial undertakings established in Bangladesh at the different phases of time with the variation of duration and percentage of exemption facility on the basis of the geographical location of the industrial investment. For the first time this facility is permitted for industrial undertakings established between 1 July 1974 and 30 June 1985.[24] In the second phase, through an amendment, this facility is offered for industrial undertakings established between 1 July 1985 and 30 June 1994.[25] In the third phase, the facility is offered for industrial undertakings established between 1 July 1995 and 30 June 2008.[26] Lastly, through a legislative amendment the facility for a tax holiday is offered for newly established undertakings between 1 July 2011 and 30 June 2015.[27]

The review of the definition of 'industrial undertaking' since the beginning reveals that there has been a chronic and needs-based change in defining this term.[28] However, in the beginning stages the NBR was the authority defining the classes of industrial undertakings by its gazette notification for this facility. The statutory definition of 'industrial undertaking' first came into being from the immediate first duration effective from 1995 to 2008 and it covers industrial undertaking engaged in both the production of goods and machineries.[29] But the definition applicable for industrial undertaking set up between 2011 and 2015 includes 18 types of products that mostly relate to machineries.[30] It is noteworthy that

[24] See *Income Tax Ordinance 1984* (Bangladesh) s. 45 (1).
[25] Ibid, s. 45 (2).
[26] Ibid, s. 46B.
[27] Ibid, s. 46C.
[28] For the period of time, meaning the industrial undertaking set-up between 1974 and 1994, the industrial undertaking was not defined in the *Ordinance* (see Ibid, s.45), for the second duration it included some more important sectors and for the final period it becomes more inclusive and the emphasis is different in terms of the targeted sectors.
[29] The industrial undertakings set up between 1995 and 2008 include textiles, textile machinery, high value garments, pharmaceuticals, melamine, plastic products, ceramics, sanitary ware, steel from iron ore, fertilisers, insecticides and pesticides, computer hardware, petro-chemicals, basic raw materials of drugs, chemicals, pharmaceuticals, agricultural machines, ship building, boilers, and compressors. See *Income Tax Ordinance 1984* (Bangladesh) s. 46A (1A) (i).
[30] The industrial undertakings set-up between 2011 and 2015 include active pharmaceuticals ingredients and radio pharmaceuticals, barrier contraceptives and rubber latex, basic chemicals or dyes and chemicals, basic ingredients of electronics (e.g. resistance, capacitor, transistor, integrator circuit), bio-fertiliser, biotechnology, boilers, compressors, computer hardware, energy efficient appliances, insecticides or pesticides, petro-

industrial undertaking for the purpose of a tax holiday under the *Income Tax Ordinance* was meant for businesses which are located outside the EPZs area. Industries located within EPZs enjoyed a tax holiday facility as being treated in a special economic zone in terms of duration and percentage of exemption. But recently through a governmental circulation the treatment of the industries in EPZs has been made equal with that of those in EPZs areas, with the same eligibility conditions, duration, and rate of exemption. However, it is noteworthy that in EPZs a tax holiday applies to all industrial undertakings.

The relevant legal principle of a tax holiday for industrial undertaking at different times fixed the duration of tax exemption in different geographical areas and the rate of exemption was set by NBR gazette notification or under the *National Industrial Policy*. For the first time the principles relating to facilities for industrial undertakings set up between 2011 and 2015 combine both a duration and rate of exemption facility.[31]The duration and rate is always determined on the basis of geographical location of the industry. Therefore the rate and duration of termination differ from each other. For the purposes of tax exemption for newly established industries the Dhaka and Chittagong divisions (excluding the Hill Tract Districts) constitute a single industrial zone while other administrative divisions in Bangladesh such as Sylhet, Rajshahi, Khulna, and Barisal including all of the Hill Tracts District constitute another single zone.

The period and rate of exemption for industrial undertakings has changed several times since the enactment of the Ordinance. According to a statutory calculation for all newly established industrial undertakings in Dhaka and Chittagong divisions between 1 July 2011 and 30 June 2015 the exemption period is five years, which will be calculated from the month of commencement of commercial operation, and the exemption rate is 100 per cent to 20 per cent with a gradual decrease. The following chart shows the rate of exemption during the five years duration.[32]

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chemicals, pharmaceuticals, processing of locally produced fruits and vegetables, radio-active (diffusion) application industry (e.g. developing quality or decaying polymers for preservation of food or disinfecting), textile machineries, and medicinal equipment. See Ibid, 46B (2).

[31] Ibid, 46B (1) (i).

[32] Ibid.

Tax Exemption Rate and Duration in Dhaka and Chittagong Divisions

Period of Exemption	Rate of Exemption
For the first and second year	100% of income
For the third year	60% of income
For the fourth year	40% of income
For the fifth year	20% of income

Source: Income Tax Ordinance 1984 (Bangladesh)

On the other hand for newly established industrial undertakings in the Rajshahi, Khulna, Sylhet, and Barisal divisions, including the Hill Tracts districts, between the above said period the tax holiday is available for up to seven years.[33] The deduction rate is 100 per cent to 10 per cent with a successive decrease. The following chart shows the exemption rate during the entire seven years.[34]

Tax Exemption Rate and Duration in Other Divisions

Period of Exemption	Rate of Exemption
For the first and second year	100% of income
For the third year	70% of income
For the fourth year	55% of income
For the fifth year	40% of income
For the sixth year	25% of income
For the seventh year	10% of income

Source: Income Tax Ordinance 1984 (Bangladesh)

The reason for the difference and variation in the duration and rate of exemption is to promote the investment of local and foreign entrepreneurs in less-developed regions of the country or areas of high unemployment. In Bangladesh Dhaka is the capital city and Chittagong is the main sea-port, therefore since the British and Pakistan regimes industrialisation is largely centralised in these two cities and the surrounding areas.

[33] Ibid, 46B (1) (ii).
[34] Ibid.

B. Tax holidays for industries in EPZ

The industries in the EPZ areas were entitled to special tax holiday facility before January 1 2012 as they are the main base of foreign investment. They were not under strict conditions for gaining these advantages. Only the official registrations with BEPZA were enough to avail the fiscal incentives. After January 1 of 2012 for all newly established industries are entitled to five years and seven years tax exemptions on the basis of locality.

Tax Exemption Rate and Duration in EPZs of Dhaka and Chittagong Divisions

Period of Exemption	Rate of Exemption
For the first and second year	100% of income
For the third and fourth year	50% of income
For the fifth year	25% of income

Source: Gazette notification of NBR no. 1, 2012-2013 (Bangladesh)

Tax Exemption Rate and Duration in EPZs of other Divisions

Period of Exemption	Rate of Exemption
For the first three years	100% of income
Following three years	50% of income
Following one year	25% of income

Source: Gazette notification of NBR no. 1, 2012-2013 (Bangladesh)

Although after January 1 of 2012, they are subject to the same eligibility conditions for industries outside EPZs, still, the rate of fiscal incentives are higher in EPZ industries.

C. Tax holiday for a physical infrastructural facility

The *Income Tax Ordinance* also provides a tax exemption for a physical infrastructural facility. This exemption for the first time was incorporated in the Ordinance for establishments set up between 1 July 1995 and 30 June 2008. The legal scope and regime of physical infrastructure facility was then comparatively limited. The last amendment of this *Ordinance* in this regard covers establishments between 1 July 2011 and 30 June 2015, and the amendment has broadened the scope and regime of physical infrastructure for the purpose of tax exemption. This is because the need for investment in this sector is regularly gaining momentum in Bangladesh for the purpose of development where the majority of investments come from foreign companies and development agencies. The definition of physical infrastructural facility as prescribed by section 46B (2) of the *Ordinance* includes sixteen categories of development activities that mainly relates to the development of communication, establishment of deep-sea ports and EPZs, establishment of an information and communication technology (ICT) village and information technology (IT) park, and waste management plants etc.[35]

The relevant legal principle under the *Ordinance* also provides for the duration and rate of the exemption facility. The duration and rate is equal irrespective of the establishment's location, unlike the case of an industrial undertaking. Both the duration and exemption rate is higher than with industrial undertakings. The exemption duration is up to ten years irrespective of the establishment location. The deduction rate begins from 100 percent down to 10 per cent successively. The following chart shows the proportion of deduction across the total duration.[36]

Tax Exemption Rate and Duration for Infrastructural Facilities

Period of Exemption	**Rate of Exemption**
For the first and second year	100% of income
For the third year	80% of income
For the fourth year	70% of income
For the fifth year	60% of income
For the sixth year	50% of income
For the seventh year	40% of income
For the eighth year	30% of income
For the ninth year	20% of income
For the tenth year	10% of income

Source: Income Tax Ordinance 1984 (Bangladesh)

The duration and exemption rate of physical infrastructural facility reveals the governmental policy of prioritising this sector over industrialisation as the Bangladesh lags behind in this respect. The development of physical infrastructure as selected under this law including *interalia* road-communication, deep sea ports, export processing zones, gas pipelines,

[35] All 16 categories in detail include deep sea port, elevated express way, export processing zone, gas pipe line, hi-tech park, flyover, information and communication technology village or software technology zone, IT park, large water treatment plant and supply through pipeline, liquefied natural gas, terminal and transmission line, monorail, rapid transit, renewable energy, underground rail, and sea or river port.
[36] *The Income Tax Ordinance* 1984 (Bangladesh) 46 (c) (i).

renewable energy plans, and information and communication technology is instrumental in building sustainable economic development of the country.

D. The conditions for eligibility

The industrial undertaking or physical infrastructure facility do not become eligible for a tax exemption automatically or at the discretion of the authority. A newly established undertaking or physical infrastructure becomes eligible after the commencement of commercial operations when certain conditions are met. Almost the same conditions apply to both industrial undertaking and physical infrastructure with little exception. The law under the *Income Tax Ordinance* imposes the following conditions:

i) the industrial undertaking or physical infrastructure must be new;[37]

ii) the industrial undertaking is not formed by splitting up or by reconstruction or reconstitution of business already in existence;[38]

iii) the undertaking or physical infrastructure facility is owned or managed by a body corporate under the *Company Law 1994*, having its head office in Bangladesh, or by a company as defined in the Company Law with its registered office in Bangladesh and having a subscribed and paid up capital of not less than two million Taka on the date of commencement of commercial production;[39]

iv) the thirty per cent of exempted income needs to be reinvested in the said taking or physical infrastructure or in a new undertaking or physical infrastructure during the exemption period including another ten percent of the exempted income in each year in the purchase of company shares;[40]

v) the industrial undertaking needs to obtain a clearance certificate for the relevant income year from the Director of Environment;[41]

vi) the industrial undertaking or physical infrastructure has to be approved and stand approved by the Board of Revenue under this *Ordinance* for the purposes of tax exemption; and

vii) the industrial undertaking or infrastructure facility has to maintain a book of account on a regular basis and submit return of its income as per the provision of section 75 of this *Ordinance*.

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[37]See *Income Tax Ordinance 1984* (Bangladesh) s.46B (1).
[38] Ibid, 46B (4) (1c) .This condition does not apply to physical infrastructure facility.
[39] Ibid, 46B (4)(1a) (i) (ii).
[40] Ibid, 46B (4) (1b).
[41] Ibid, 46 B (4) (1d).

The said conditions are both procedural and substantive and essential initially for achieving a tax exemption and for its continuation over the prescribed duration. The conditions here provide the scope for factual verification of the initial conditions and the compliance monitoring of continuing qualifying requirements. Therefore the legal conditions for industrial undertaking or physical infrastructure facility under this Ordinance appear to be significant from two perspectives; firstly they prevent the exercising of absolute discretion of authority in granting applications for exemption, and secondly they introduce a process of regulation of this exemption facility initially including some form of verification to ensure compliance once the exemption is granted.

4.4.2.2 Accelerated Depreciation Allowance (ADA)

Bangladesh also offers ADA under its tax law. It is a form of investment allowances[42] offered for new investments not enjoying a tax holiday.[43] The industrial enterprises receive depreciation as an alternative to a tax holiday. It applies to a percentage of the total cost of the plant and machinery. In the case of any machinery or plant used in an industrial undertaking set up in Bangladesh between 1 July 1977 and 30 June 2012 ADA will be allowed and calculated in the first year at 50 per cent of the total cost of plant and machinery, for the following year 30 per cent and for the next following year 20 per cent.[44] In order to be eligible for ADA the industrial undertaking claiming such entitlement is subject to conditions such as: (1) it must be managed by a Bangladeshi company or a corporate body formed under any Act of Parliament and registered in Bangladesh; (2) no application for tax exemption under section 45 or 46A or 46B is made to NBR; and (3) the industrial undertaking must belong to the class of industries as NBR may by notification specify.[45]

ADA is also allowed for new machinery or a plant used in an expansion unit set up between 1 July 1995 and 30 June 2005 in any industrial undertaking enjoying exemption from tax under section 46A of the *Income Tax Ordinance*, or for the machinery or plant in the treatment of effluents in any industrial undertaking subject to similar conditions as

[42] There are two types of investment allowances; accelerated depreciation and enhanced deduction. With accelerated depreciation, the industries are allowed to write off capital costs in a shorter time period than is dictated by the capital's useful economic life. With an enhanced deduction forms are allowed to claim deductions for the cost of qualifying capital that are a multiple act of the actual cost. See for more information, UNCTAD, above n 1, 20.
[43] See for details the *Third Schedule of the Income Tax Ordinance, 1984*, para 7(2) (d).
[44]Ibid, para 7(1).
[45]Ibid, para 7 (2) (a) (b) (d).

mentioned above.[46] In that case ADA is calculated for the extended unit or treatment plant at the rate of 80 per cent in the first year and 20 per cent in the following years.[47]

There is a special category of depreciation allowance offered to private energy generation companies. It allows 100 per cent depreciation in the first year for solar photovoltaic and solar thermal projects and 100 per cent depreciation for five years for wind, biomass, geothermal, tidal and small hydro projects.[48]

According to the existing tax law, the period for depreciation allowances will be calculated from the date of commencement of commercial production. Although ADA is granted as an alternative to a tax holiday or to those industrial units not entitled to a tax exemption under the sections 45, 46A and 46 B of the *Ordinance*, the condition for ADA is relaxed. There is no continuing qualifying requirement prescribed for ADA.

4.4.2.3 Reduced corporate income tax

Governments may set a lower corporate income tax rate as an exception to the general tax regime in order to attract FDI into specific sectors or regions. Hong Kong (China), Indonesia, Malaysia, Ireland, the Laos People's Democratic Republic, Cambodia, and Estonia are a few countries that use this type of incentive.[49] Bangladesh offers a reduced corporate income tax rate to certain industrial sectors in lieu of a tax holiday and accelerated depreciation allowance. These industries will not be entitled to get a tax holiday and claim an accelerated depreciation allowance under the existing *Income Tax Ordinance of 1984*. This facility applies to newly set up industries between 1 July 2009 and 30 June 2012.[50] The rate of reduced tax varies depending on the location of established industries.[51] The reduced income tax rate for industries is valid up to five years in the Dhaka and Chittagong divisions, and seven years for industries set up in other divisions. The reduced tax rate for industries in the Dhaka and Chittagong divisions (barring three Hill Districts) is five per cent for the first and second year, 10 per cent for the third and fourth year, and 15 per cent for fifth year. Likewise,

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[46]Ibid, para 7A (1) (a)(b).
[47]Ibid, para 7A (b) (i) (ii).
[48]See *National Energy Policy* 2005 (Bangladesh) Ch.20.
[49] UNCTAD, above n 1.
[50] There are at least 30 to 50 categories of industries registered under *Companies Act 1994* which may be entitled to a reduced tax rate after obtaining certificate from BoI for that purpose.
[51] For example, the reduced tax rate for industries in Dhaka and Chittagong Divisions (barring three Hill Districts) is for first and second years five per cent, for the third and fourth years 10 per cent and for the fifth year 15 per cent. Likewise in other divisions for the first three years it is five per cent, for the next years it is 10 per cent and for the seventh year, 15 per cent.

in other divisions for first three years the reduced tax rate is five per cent, for the following three years 10 per cent, and for the seventh year 15 per cent.

4.4.3 The administrative operation and control

The National Board of Revenue (NBR) in Bangladesh is the statutory authority that controls and regulates all tax issues including deduction and exemption matters of corporate income, gains, and benefits although there is no specific emphasis on corporate tax exemption matters within the framework of its power and functions in the *Income Tax Ordinance*. On behalf of NBR the Deputy Commissioner of Income Tax deals with all matters relating to the review and examination of the conditions for eligibility and other administrative control. According to the Income Tax Ordinance the regulatory elements in this context includes verification of the conditions, approval, rejection, and cancellation of the application for deduction facility, withdrawal of facility, making approval and rejection rules. These regulatory functions are discussed in the following.

A. Approval, verification and rejection

The approval of the application depends upon the decision of the Board, but the decision is not discretionary. The Board approves the application for granting a deduction facility on the basis that conditions of eligibility as prescribed by this law are met and duly verified by the authorised officer.[52] However, there is a prescribed time for making the decision and if the time elapses without a decision the application will be automatically approved.[53] The Board can reject the application if the conditions are not met and the application fails to maintain the due procedure prescribed by this law. But the applicant has to be given a reasonable opportunity to be heard and the Board will review its previous decision or order on the basis of an application by the aggrieved.[54] The rejection procedure creates a check and balance and the right of the aggrieved is respected.

B. Cancellation, suspension and withdrawal of the facility

Once the deduction facility is granted the Board has the power to cancel, suspend, and withdraw the facility mainly on three grounds under this law as the case may be. Firstly, the

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[52] *The Income Tax Ordinance 1984* (Bangladesh) 46B (6) & 46C (4).
[53] Ibid.
[54] Ibid, 46B (7) & 46C (5).

Board may cancel the facility if it thinks fit upon written application by any ongoing facility holder within one year from the commencement of the facility.[55] Secondly, in the case of an ongoing facility, if the Deputy Commissioner finds in the course of making an assessment that one or more of the conditions are not met, the deduction facility shall stand withdrawn for that assessment year and the facility holder is required to pay full tax.[56] Thirdly, the Board may, in the public interest cancel or suspend fully or partially any exemption allowed under this law.[57]

The first cancellation ground is voluntary and the second one depends upon regular compliance monitoring and proper assessment of the yearly income. The appropriate exercise of this power may control any abuse of an exemption facility granted for a lengthy duration. The third cancellation ground, although discretionary, appears to be important to control the overall negative impact of tax facilities.

C. Power to make rules for approval, rejection and review

The Board has the power to make rules regulating the approval and review procedure of applications for a deduction facility.[58] In addition, it has the power to take any measures incidental to the operation of a deduction facility under this law. The rule making power is very significant for creating a control mechanism for tax incentives in their entirety.

The above mentioned three types of statutory power of the authority may have a potential impact on the proper controlling of tax incentives both at the initial and ongoing stage of tax incentives. Particularly noteworthy is the cancellation or suspension of power on the grounds of the public interest. Cancellation on this ground can be specified and categorised for effective implementation and to check the abuse of the authority's discretion which creates scope for corruption by beneficiaries and the concerned officials.

4.4.4 Tax incentives and negative realities in Bangladesh

While tax incentives in developing countries around the world are commonly used to attract foreign investment in general, there are some potential negative impacts of tax incentives as mentioned earlier. Tax incentives on the whole involve revenue losses, the increase of

[55] Ibid, 46B (12) and 46C (10).
[56] Ibid, 46B (11) and 46C (9).
[57] Ibid, 46B (13) and 46C (11).
[58] Ibid, 46B (14) and 46C (12).

enforcement and compliance costs, and opportunities for corruption. In particular tax holidays, as the most common and widely practiced form of incentive in developing economies, inherently have some negative impacts, such as creating opportunities for tax avoidance, money laundering or administrative corruption, or other potential misuses or abuses.[59] With their long duration, the revenue cost of tax holidays cannot be estimated in advance with any degree of accuracy, nor is the cost related to the amount of the investment or to the benefits that may accrue to the host country.[60]

Bangladesh, like other developing countries, provides tax incentives for the purpose of encouraging investment in targeted sectors with the ultimate goal of wide industrialisation and infrastructural development as evident from the earlier discussion on its regulatory framework. But evidence suggests that the practice of using tax incentives is nevertheless ineffective as a means to the increment of investment, rather on the whole they prove to be detrimental to the country's revenue earnings. Particularly, the purpose of tax holidays is not attained and in many cases it contributes to the distortion of tax bases of the country, the scope of money laundering, and high-level corruption surrounding the calculation and realisation of taxable income. Some highlights of the evidences of the negative impacts of tax holidays and other incentives on the whole are discussed hereinafter.

4.4.4.1 The evidence of negative impacts of tax holidays

A. Failure to encourage entrepreneurship outside Dhaka and Chittagong

It has been discussed in the tax holiday section that they are targeted at new firms in Dhaka and Chittagong (which are comparatively developed regions in Bangladesh) and some specific under-developed regions and/or industry sector. In new industrial undertakings beyond Dhaka and Chittagong more tax holidays are offered in order to support regional development and income distribution policy goals. Such a tax liberalisation policy was undertaken with an expectation to be contributing to the total industrial development as well. But the tax holiday incentive has not been able to bring any changes and foster industrial growth in those under-developed regions. According to an official report in 2000 more than 60 per cent of industries base their operations in the Dhaka and Chittagong metropolises and

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[59] Vito Tanzi and Howell Zee, 'Tax Policy for Developing Countries' (Economic Issues No.27, International Monetary Fund, March 2001) <http://www.imf.org/external/pubs/ft/issues/issues27/> 26 August 2013.
[60] Alex Easson and Eric M Zolt, *Tax Incentives* <siteresources.worldbank.org/INTTPA/Resources/EassonZoltPaper.pd> 29 December 2013.

surrounds.[61] However some companies based in developed areas divert their operation to less attractive areas for the purpose of dodging tax, and thus the tax holiday facility in those regions has created a tax haven opportunity for tax-dodgers.[62] As a result, the target of tax incentives remains unattainable as the returns of foreign investors, even for locals for industrial undertakings outside Dhaka and Chittagong, are meagre. This is because of some regional negative factors that include worse road communication, limited infrastructure, and limited skilled labour pools. It proves that although the tax holiday is one of the components used to motivate the decisions of investors, the mere scheme of granting tax holidays in Bangladesh cannot be effective unless other factors are present and active.

B. Creation of revenue losses

Bangladesh's experience of granting tax holidays has not been good over the last two decades as it is argued that tax holidays tend to be particularly problematic from the host country's perspective in terms of revenue loss where significant business already exists in targeted activities.[63] To give an example, due to the giving of tax holidays Bangladesh incurs successively a huge amount of revenue loss. One study shows that in the fiscal year 1999-2000 the number of holiday entitlements was 1531, causing the loss of about 2.5 billion Taka which was estimated at about 9.6 per cent of the total income tax earnings of that year.[64] In another study conducted by a committee under NBR on the evaluation of the advantages and disadvantages of holiday facilities it is reported that from the fiscal year 2005 to 2007, a total of 999 industries had enjoyed the tax holiday facility causing a 12.05 billion Taka loss in revenue whereas the value of entire industrial units was 150 billion Taka in the 2005-2006 fiscal year, and 21 billion Taka in the 2006-2007 fiscal year.[65] The government granted holidays to 89 industrial units and tourism businesses in 2005-2006 while 30 units got that facility in 2006-2007. The estimated amount of their investment was 120 billion Taka and 7.32 billion Taka respectively. The committee calculated that the government incurred a

[61] See Mary Swire, 'Bangladesh Tax Holiday has Failed in its Objectives', *Global Tax News* online, 6 August 2001<http://www.tax-news.com/news/Bangladesh_Tax_Holiday_Has _Failed_In_Its_Objectives> 06 June 2013.
[62] Ibid.
[63] SA Waresi, 'Tax Holiday as a Fiscal Incentive in Bangladesh' (1998) 3 (5) *Tax Chronicle: Special Edition* 350, 352.
[64] See Tapan K Sarker, 'Who Bears the Burden of Taxes in Developing Countries: A Case of Income Taxation in Bangladesh' (2006) 44(2) *Pakistan Economic and Social Review* 181, 188.
[65] See the National Board of Revenue, Bangladesh, *Final Report of Revenue Reform Commission* (2008) <www.nbr.bd.org>19 October 2013.

revenue loss worth 2.67 billion Taka by offering a tax holiday facility that stands equivalent to 0.07 per cent of the GDP.[66]

C. Creation of distortion in the tax base and regulation mechanism

Apart from revenue loss, the tax holiday in Bangladesh creates two types of negative impacts on the prevalent tax regulation. Firstly, it is in reality acting as an impediment to building up a tax-paying culture in a narrow tax-based country like Bangladesh and thus hindering the expansion of a tax regime as viewed by the governmental agencies and policy-makers.[67] Such a perpetuating provision for tax holidays creates a distortion in the taxation mechanism and is opposed to the norms of equity and neutrality.[68] Secondly, due to the wider use of this facility, it has reportedly been abused by many enterprises and the misuse of this facility creates a scope for tax evasion after the expiry of the scheduled period. A recent NBR survey reveals that 90 per cent of industrial units that enjoyed tax holidays since the mid-1990s, abused it as they reported no profit after the expiry of the facility, while they reported profit during the holidays.[69]

It is argued that the growth of the garment sector to such a large extent that it accounts for a major share of foreign currency earnings is stimulated by the benefits of tax holidays.[70] Although this cannot be denied on the whole, it is however believed that the growth of this sector has been enhanced by other external factors.[71] Even if the tax holiday incentive were not given, the garment industry would have grown and the state would have been able to earn quite a substantial amount of revenue from the industry.[72]

D. Scope of money laundering

As per the current arrangement any income that accrues from poultry, fishery, livestock etc. was entitled to a tax holiday until June 2011 which has further been extended. This provision

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[66] Ibid.
[67] Ibid.
[68] See Ahsan M Mansur, Muhammad Yunus and Biplob Kumar Nandi, *An Evaluation of the Tax System in Bangladesh* (Policy Brief, International Growth Centre, 2011) <www.theigc.org/publications/policy.../evaluation-tax-system-bangladesh> 29 December 2013.
[69] Shuvronath, ‘Tax Holiday, Black Money Whitening Facility Likely to Continue’, *Bangladesh Budget Watch* online, 2 July 2009 <bangladeshbudgetwatch.wordpress.com/.../tax-holiday-black-money-whi...> 29 December 2013.
[70] Sarker, above n 64, 189.
[71] Ibid.
[72] Ibid.

was reportedly abused discriminately and therefore a lot of black money was laundered into the market through this mechanism.[73]

E. Creation of potentials for the abuse of tax incentives

It has been said earlier that under the current tax incentive regime, a tax holiday is offered for the extension of the unit of existing industrial undertaking. In reality, such a facility is grossly abused through fraudulent practice on the part of entrepreneurs. In many cases such a tax holiday facility is availed by creating an artificial extension unit without setting up a new unit, by showing a transfer of machineries from the existing unit to the said artificial unit.[74] There are also some instances that on the expiry of a tax holiday, the entrepreneurs in order to retain the benefit show the extension of a new unit, to which they divert their income from the now taxable unit through a mechanism of internal transfer pricing in a bid to use the system as a vehicle for a perpetual tax holiday.[75]

4.4.4.2 The consequences of other tax incentives

Apart from the adverse impact of tax holidays, the other incentives also have negative consequences as there are many potential means of their being abused and misused. Although accelerated depreciation is less costly, it has similar shortcomings to those associated with tax holidays. Exemption from capital goods and raw materials as applied in Bangladesh is prone to abuse. The important point is that a plethora of exemption and deduction facilities both from direct and indirect taxes creates a situation of high associated tax costs and expenditures in Bangladesh. A high tax cost never carries merit for building an efficient tax system in a country such as Bangladesh.

One study reveals that in 2005 alone the total estimated cost of deductions and exemptions is 93.45 billion Taka, of which 10.20 billion Taka is due to direct tax expenditure and 83.17 billion due to indirect tax expenditures.[76] Thus, indirect tax expenditures contributed to a higher revenue loss in that year.[77] Bangladesh's tax efficiency is lowest in the Southeast Asian countries, given the tax rate structure and it has also lowest contribution to GDP

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[73] Ibid.
[74] Ibid.
[75] Tapon K Sarker, *Incidence of Income Taxation in Bangladesh* <*citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.203.4065..*> 29 December 2013.
[76] M Golam Mustofa and Lutfunnahar Begum, *Tax Expenditure in Bangladesh: An Introductory Analysis* (Policy Analysis Note Series No. 706, Bangladesh Bank, 2006) <www.bangladeshbank.org.bd> 8 June 2013.
[77] Ibid.

ratio.[78] Under such a situation, although corporate income tax rates are high,[79] numerous exemptions, tax holidays, and depreciation allowances erode the tax base. Moreover, large disguised non-compliance and tax holidays compromise the vertical and horizontal equity of Bangladesh's tax system.

4.4.5 Reasons for Negative Impacts

There are certain reasons for the ineffectiveness and negative consequences of tax incentives in Bangladesh. The reasons for negative consequences can mostly be related to legal and regulatory loopholes and weaknesses such as the existence of a narrow tax base, lack of compliance monitoring in the regulatory system, lack of guiding principles, and above all, administrative corruption. The reasons for their ineffectiveness in attracting foreign investment is interrelated with the availability of other determining factors including political stability, transparent regulatory systems, infrastructure, skilled workforce, and the availability of natural resources etc.

A. Existence of a narrow tax base in Bangladesh

The tax base in Bangladesh is narrow. This is because the individual tax responsibility is low. Huge numbers of the population engaged in employment enjoy a tax exemption because of their incomes below the minimum liability threshold.[80] Moreover it is an agro-based country where the majority of the population is rural and based on agricultural activities, therefore enjoying exemptions and deductions facilities admissible to incomes from agriculture-related activities. Corporate income tax is the main source of building up the national tax base. Under such a situation because of numerous tax deductions and exemption facilities to corporate income and exemption from indirect taxes, the expenditure rate usually goes higher than the collected revenue, and thus impedes the establishment of a strong tax base or distorts the tax base. Compounding the problem is the corruption indulged in by many in calculating taxable income.

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[78] See Mansur, Yunus and Nandi, above n 68. In this study it is shown in 2011 Bangladesh has a 9.2 tax contribution to GDP ratio which is the lowest when compared with Sri Lanka, Pakistan, Nepal, India, and Bhutan which have 12.9, 10.0, 12.3, 16.7 and 14.7 respectively.

[79] In Bangladesh the corporate tax rate for a publicly traded company is 27 per cent; for a non-publicly traded company 37.5 per cent; for bank, insurance and financial companies 42.5 per cent; for a cigarette manufacturing company (not listed) 42.5 per cent; for a cigarette manufacturing company (listed) 35 per cent; for a mobile phone operator company 45 per cent, and for a publicly traded mobile phone company 35 per cent. See the National Board of Revenue (Bangladesh), *Income Tax at a Glance (2013-2014*) <http://www.nbr-bd.org/incometax.html> 7 January 2014.

[80] For individuals other than female tax payers or senior tax payers aged 65 years and above, the tax payable for the first two, 20,000 Taka (per annum income with deductions) is nil.

B. Lack of compliance monitoring in the regulatory system

Compliance monitoring is essential in any tax holiday system, especially for the continuing qualifying requirement. The conditions imposed for granting a tax holiday in a newly established industrial undertaking or physical infrastructural development include 30 per cent reinvestment and regular submission of income returns as a continuing qualifying matter which requires regular monitoring. In addition, in EPZ industries the export requirement of a certain percentage of production is also a continuing qualification. But the regulatory regime provided under section 46A and 46B of the *Ordinance* does not introduce such a measure. Without a formal monitoring mechanism, there may be potential opportunities for investors to avoid satisfying these conditions properly.

C. Lack of regulating principles for the operation of tax exemptions

The Ordinance empowers NBR to formulate the approval and rejection procedure of the application for a tax deduction, but it does not include any rule regulating the operation of tax facilities during the prescribed timeframe.[81] Moreover the jurisdiction of income tax authorities under this Ordinance does not cover specifically the exemption matter of corporate tax which is very essential in a country such as Bangladesh where the tax exemption grounds are plenty.[82]

D. Administrative corruption

Administrative corruption in the tax and tariff sector in Bangladesh is one of the major factors for the abuse of tax deduction facilities. It mainly happens in the case of assessing and computing the income and other matters of exclusion. A national household survey in Bangladesh reveals the bribe-taking practice of income tax officers in Bangladesh for assessing income and tax rate.[83] The potential opportunity for corruption is generally meagre in Bangladesh in the case of the approval of tax deductions as it goes through the set rules under the law and there is little scope of exercising discretion. But the absence of a regulatory principle for the continuity of this facility for long time creates scope for administrative corruption. At the same time, it creates the opportunity for investors to abuse

[81] See *Income Tax Ordinance 1984* (Bangladesh) s.46A (12) , 46 B (14).
[82] Ibid, s.6.
[83] Transparency International Bangladesh, *Corruption in Service Sector: National Household Survey 2012* (December 2012) 26 <http://www.ti-bangladesh.org/files/HHSurvey-ExecSum-Eng-fin.pdf> 29 December 2013.

this facility. Moreover, the duration of a tax holiday creates opportunities for malpractice in the absence of an accountability regime for the beneficiaries.

In addition to these reasons the lack of provision for the requirement of valuation of the assets for the determination of eligibility as well as the requirement of factual verification such as written confirmation from the appropriate authority or department may create the scope for the abuse of tax incentives.

4.4.6 Suggestion for Reforms

Given the law and practice of tax incentives in Bangladesh it can be fairly said that the ongoing system of tax incentives serves the purpose of economic gain and benefit more for the investors than the host country. Moreover, the incentives create a negative impact on gross revenue losses under the said circumstances. Therefore some reform suggestions are made in the following to create a balancing situation between investors and the host state Bangladesh and to eliminate the negative impact of tax incentives.

A. Strengthening tax base

Whereas the tax base in Bangladesh is narrow, the tax paying liability regime should be expanded by bringing individual professionals into tax regime and by decreasing or reconsidering the tax expenditure grounds for corporate income and other indirect tax deduction to a reasonable level with a minimum time framework.

B. Introducing a compliance monitoring measure in the legal framework

A compliance monitoring system should be introduced into the existing regulatory framework for continuing qualification for a tax incentive. Under this provision, a tax privilege may come to an end in the event of failure to comply with ongoing qualifying conditions as well as in the event of a violation.

C. Introducing guiding principles under the Ordinance

Whereas the incentives grounds are numerous and there is still the lack of separate regulating rules, operational rules for tax incentives from commencement to termination must be introduced in the form of a separate schedule under the tax ordinance.

D. Introducing a separate cell or department under NBR

The approval and other administrative or regulatory issues of tax holidays or ADAs are carried out by the income tax officer of the NBR along with his other duties. For the convenience of smooth and proper administration a separate administrative cell under NBR can be introduced to regulate the affairs of tax holidays.

E. Introducing a reduced corporate income system as an alternative

Whereas the tax holiday has been proved to be liable for the sluggishness of the existing tax system because of their wide misuse and high opportunity cost, the tax holiday system may be withdrawn as suggested by the Revenue Commission of 2003. If doing so appears incompatible with competing for foreign investment, tax holidays can be replaced by either the existing depreciation allowances or with a reduced corporate tax rate with a lower rate in the earlier years and a cumulative rate in the later years. In addition, tax credits and investment allowances can be a better alternative to tax holidays for they are much better targeted than tax holidays for promoting particular types of investment and their revenue cost is much more transparent and easier to control.[84]

From the experience as above the government should restrict this wide range of tax deregulation resulting from holiday provisions and create a balance either by providing a need-based holiday facility aiming at the growth of certain industries or replacing this by a reduced tax rate. This will enable Bangladesh to keep pace with the global trend of developing economies on the one hand, while on the other hand expanding the national tax base culminating in the rise of total income.

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[84] Tanzi and Zee, above n 59.

4.5 Legal Framework of Double Tax Avoidance and Its Practice

The avoidance of double taxation is an incentive adopted as a strategic practice based on separate bilateral treaty on double taxation between the home and host country to avoid paying tax for which the investor is subject to in the home country against the income generated abroad. It arises where the same profits are taxed in two or more states in respect of the same person (corporate or individual).[85] It is designed to promote the effectiveness of incentives available in the host country for foreign investment. The most important advantage of double tax avoidance is its ability to offer legal certainty to investment decisions under a valuable diplomatic link between the parties. It also assists developing countries to attract the foreign investment necessary for their economic expansion and thus paves a way for the prevention of potential tax evasion.

The Income Tax Ordinance of 1984 in Bangladesh introduces provisions as to how the issues relating to double tax avoidance will be regulated. It provides that the bilateral agreement may be concluded between the government of Bangladesh and that of other countries for the purpose of double tax avoidance and the prevention of fiscal evasion with respect to taxes on income leviable under this *Ordinance* and under the corresponding law in force in that country.[86]According to the *Ordinance*, the government is empowered to make necessary provisions for implementing the agreement. The concluded agreement shall include relief from tax payable under this *Ordinance*, determining the income of non-residents from local sources, recovery of tax leviable under this *Ordinance*, and corresponding laws and exchange of information for the prevention of fiscal evasion or avoidance of tax on income.[87] In the light of the above mentioned provision, Bangladesh has so far entered into Double Taxation Treaties (DTTs) with 32 countries.[88] In addition, the negotiations on DTTs are also in progress with about 18 countries.[89] Bangladesh has already approved a model text of DTT consisting of 29 articles. The objectives of this text incorporates: (1) to obtain a more effective relief from double taxation compared to relief gained under unilateral measures; (2)

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[85] See, OECD Centre for Tax Policy and Administration, *Glossary of Taxation* <http://www.oecd.org/ctp/glossary of tax term.html> 28 December 2013.

[86] See, *The Income-tax Ordinance 1984* (Bangladesh) ss. 144 (1).

[87] Ibid, ss. 144 (2) (a), (b), (e), (f).

[88] The DTTs are concluded with other countries including Belgium, Canada, China, Denmark, France, Germany, India, Italy, Japan, Malaysia, Pakistan, Poland , Romania, Singapore, Republic of Korea, Sri Lanka, Sweden, Thailand, The Netherlands, UK, USA, Norway, Turkey, Vietnam, Philippines, Indonesia, Switzerland, Oman, Mauritus, Myanmar, Saudi Arabia, and UAE. See UHY International, *Doing Business in Bangladesh* (2013) 32 <*www.uhy.com/wp-content/uploads/Doing-Business-in-Bangladesh.pdf*> 30 August 2013.

[89] The countries under DTTs negotiation with Bangladesh include Australia, Austria, Byelorussia, Cyprus, Finland, Greece, Hong Kong, Iran, Nepal, Nigeria, Norway, south Africa, Spain, Tunisia, and Uzbekistan. See Board of Investment of Bangladesh, *Hand Book* (2012) 32.

to create a favorable climate for the inflow of foreign investment into the country; (3) to make special tax incentives provided by Bangladesh fully effective for taxpayers of capital-exporting countries; and (4) to prevent evasion and avoidance of tax.[90]

A tax avoidance agreement between two contracting parties generally pursues either exemption or a tax relief method. Under the exemption method the particular income is taxed in only one of the contracting countries. Under the tax relief method an income is taxable in both countries, in accordance with the respective tax laws read with the double taxation avoidance agreement. The treaties are mostly adopted in combination of both methods whether they follow the OECD or UN model. If, under treaty, the capital exporting country adopts the tax-sparing policy and a tax right is conferred upon the source or importing country, the latter does not become subject to revenue loss. On the other hand, if a tax relief facility is provided both in the residence and source country and the source country in addition already has offered different fiscal incentives, this reciprocity of relief provisions leads to a large loss of revenue.

In order to attract the inflow of foreign direct investment, Bangladesh initially came into bilateral investments as well as double tax avoidance agreements with UK and North Ireland, Singapore, Canada, and Sweden.[91] Hence the initially concluded agreements, even the following agreements with mid-income level developing countries, are seen to have followed the recommendations, having their basis in the OECD model. This not only occurs in Bangladesh, but in the majority of cases of developing economies, as most capital-exporting countries are the members of the OECD and during the negotiations, their wording of agreement prevails. This is reflected by some heterogeneity among the treaties.

These agreements cover many taxable items, such as income from immovable property, business profit, profit from the operation of shipping and air transport, income of associated enterprises, dividends, interests, royalties, income of personal services, and so on.[92] The provisions in relation to the taxability of those items in Bangladesh as a host country, although they reflect a mixed approach in the application of tax sparing and tax relief by the counterparts, have restricted the taxing right of Bangladesh and some tax relief provisions

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[90] See the text of *Agreement on Avoidance of Double Taxation* (National Board of Revenue, Bangladesh) <http://www.nbr.bd.org> 25 August 2013.

[91] The DTT between Bangladesh and North Ireland was effective on 1 July 1978. DTTs between Bangladesh and Singapore, Canada, and Sweden were effective from 1 July 1980, 1 July 1982 and 1 July 1984 respectively.

[92] See for examples, *UK/Bangladesh Double Tax Avoidance Agreement, 1978,* art. 2; *Bangladesh/India Double Tax Avoidance Agreement* (1993) art.2; see also, the *Bangladesh Model of Avoidance of Double Taxation Agreement*, art.2.

have the potential to impact negatively on the revenue income of a poor tax-base country like Bangladesh.

The provisions that restrict the tax right of Bangladesh as a source country relate mainly to profit or income of the business enterprises. Under the double taxation treaties, Bangladesh is allowed to exercise its tax right to the income of an enterprise only when it runs its business through a permanent establishment.[93] In other words, tax credits or exemptions are only to be given by the capital exporting contracting party if the taxpayer conducts the business in Bangladesh through a permanent establishment. In the absence of such a situation, the resident state retains the sole right of tax. When the enterprise is found to carry the business in Bangladesh through a permanent establishment, which means that the enterprise has a fixed place of business such as a place of management, a branch, an office, a factory, a workshop, a store or other sales outlet, a warehouse in particular cases, a mine, oil or gas well, or any other place of extraction of natural resources,[94] Bangladesh will be entitled to taxing the business profit of the enterprise but only so much as is attributable to that permanent establishment.[95]

In determining the business profit, there are plenty of deduction measures in relation to the different kinds of expenses and interest incurred for the enterprise and its permanent establishment. It also includes that business profit gained by the reason of the mere purchase of goods or merchandise for the enterprise by that permanent establishment will not be attributed to it. Such a restriction in effect subjects Bangladesh as a source country to the exemption of certain categories of income from tax, which is even specified in advance under the existing applicable laws and thus affects its revenue income.

This type of restriction seems to be proper and has an equitable revenue effect if both the countries are equal in economic strength and investment flows from two sides, but when investment flows from one direction, that is, from developed countries to developing or least-developed countries, revenue sacrifices are always made by the developing source countries.[96] As a result, an asymmetric situation is created by the treaties based on the OECD

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[93] See for example, the *Convention Between Canada and the People's Republic of Bangladesh for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* (1980), art.7; Ibid, art.5; *Agreement between the Government of Malaysia and the Government of the People's Republic of Bangladesh* and the *Prevention of Fiscal Evasion with Respect to Taxes on Income (1982*), art.7.
[94] Ibid.
[95] Ibid.
[96] Y Peng, 'A Comparative Analysis of the Sino-Australian Income Tax Agreement' (1991)2(2) *Review Law Journal* 46, 76; M Rafiqul Islam, *International Trade Law* (Law Book Company, Australia, 1999) 294.

model between developed and developing partners by generating a potential revenue loss for the latter. It favours mostly residence over source taxation, particularly in those hosting countries that provide long time holidays for taxation to facilitate the infrastructural development of foreign enterprises.

Apart from the restriction provision in relation to the income of business enterprises that appears to be similar among the contracting parties choosing the OECD model, some other items such as dividends, interests, and royalties as in DTTs with Bangladesh are taxable by both the contracting countries with minor differences in the terms of condition,[97] while dividend income and royalties enjoy tax exemptions in Bangladesh. As such, capital gains may be taxed in both countries under the agreement, which is already exempted in Bangladesh. Another example is income derived from independent personal services which is only taxable in the residence country if the service is not paid in the other contracting country (the source country) for at least 183 days of a fiscal year. In Bangladesh the salaries of foreign experts under the industrial policy are tax-exempted by 50 per cent from the date of arrival up to three years. Under such a provision, it has to lose the right to tax the other 50 per cent for at least six months and in some cases more than six months on the basis of difference as to the calculation of date between the state policy and the bilateral agreements.[98] From the perspective of Bangladesh as a source country all of these evidence that the capital-exporting countries win the one-sided gains in revenue income, particularly the developed economies as their volume of investment is higher on average.

The afore discussion illustrates that Bangladesh follows the recommendations of the OECD model like other developing and least-developed countries under the influence of developed capital-exporting countries, and this in fact results in revenue income loss in general for developing host countries which are mainly net capital importers. Although certainly neither the OECD nor UN model is flawless which are pursued in DTTs, the UN model has been developed to maximise the benefit of tax revenue of developing countries from foreign investment by expanding their source-based jurisdiction to tax income.[99] It provides comparatively favourable and balanced guidelines to be relied upon in negotiating and formulating the agreements between developing and developed countries. So to attract foreign investment in developing countries, the favourable terms of tax sparing on the part of developed countries need to be the basis of negotiation. This will help foreign investment to

[97] See for example, *Double Taxation Avoidance Convention between the Government of the Republic of India and the Government of the People's Republic of Bangladesh* (1991) arts.11, 12, 13.
[98] See *National industrial Policy 2010* (Bangladesh) Ch.11.
[99] Islam, above n 96, 295.

enjoy the real benefit of tax incentives in developing countries, while on the other hand developing countries can escape the revenue losses which occur in some mutual reduction policies, in addition to gaining plenty of incentives offered by them. However, in the case of investment flowing from developing to developing or least-developed countries there is no model guideline apart from these two, thus they can choose a wording of agreement upholding a balance between development interests and incentives.

4.6 Transfer Pricing and Tax Evasion: The Current Regulation

Transfer pricing means the setting of the price by the MNC for the valuation of goods, services, know-how, and intellectual property exchanged among different divisions or affiliates under its ownership or control.[100] It may be said to be shifting fiscal resources from one part of an MNC to another.[101] It is a kind of intra-firm transaction determined by the central management of the MNC aiming at maximising its global after-tax profits as it provides opportunities for lucrative profit-shifting activities.

Under the cover of transfer pricing related companies artificially manipulate the prices of goods and services exchanged between them by adjusting records. The profit-shifting through transfer pricing may occur from the parent company of a high-tax country to affiliates of subsidiaries in low-tax or non-tax developing countries and vice versa. Such transfer pricing helps the MNCs increase its profit by shifting income from high tax to low tax countries and thus create potential scope for the evasion and avoidance of tax on income through the calculation of tax liability before the tax income of a parent company and its affiliates.

The tax pricing has a potential negative impact on both tax haven and non-tax haven developing countries. This issue affects the sovereign competence of tax heaven, particularly on economic matters, to MNCs. In non-tax haven developing countries the price shifting adversely affects their economies, tax revenue, market structure, and balance of payment. It is very much detrimental for a country whose tax base is narrow and where corruption is frequent, and moreover when the price setting is arbitrarily done by the companies. Therefore, an appropriate regulation of intra-firm transactions through transfer pricing is essential so that the host countries can control the use of transfer pricing in order to keep a

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[100] See OECD Centre for Tax Policy and Administration, *Glossary of Tax Terms*<http://www.oecd.org/ctp/glossaryoftaxterms.htm> 6 June 2013.
[101] Islam, above n 96, 297.

resident corporation's profit within their reach and to prevent foreign traders from gaining an unfair advantage over their domestic counterparts.

Intra-firm transaction is on the rise in Bangladesh with the country's economic development prospects through foreign trade and investment for almost last two decades. Therefore, it has been in effort to offer all kinds of incentives in order to attract more foreign investment, increase its exports, and particularly to develop its energy and infrastructure sectors. With more investment in energy and infrastructure sectors, there must be a corresponding rise in intra-firm transactions. Under such circumstances, the absence of regulation of transfer pricing by corporations in a country such as Bangladesh, with its narrow tax base, must have a harmful effect on the economy, and in the business sector a bureaucratic environment prevails.[102]

For a developing or least-developed country like Bangladesh there are many challenges in transfer pricing issues as it is the largest tax risk to be managed. Firstly, it is a challenge to understand the number and type of MNCs operating in its jurisdiction and the types of transfer pricing risks that are likely to arise. Secondly, transfer pricing analysis is complex as it is a multi-step process. Thirdly, it is difficult to devise rules without having full knowledge of the issues to be addressed and the problems that can arise. Therefore, every developing country needs to create a compliance regime that is proportionate to the perceived risks, realistic in terms of its impact, ensures administration of tax collection, and counters abusive transfer pricing planning. This was similarly essential for Bangladesh to secure tax revenue and enrich its tax base through transfer pricing matters, particularly after the increase of intra-firm transactions following the rise of investment in energy and infrastructural development sectors.

However, until recently there were no transfer pricing rules in Bangladesh. With a recent amendment in the *Ordinance of 1984*, a regime has been established for regulating transfer pricing.[103] In calculating the income or expenditure the law has followed the 'arm's length' principle[104] which is an internationally accepted basis for a transfer pricing method supported by both the OECD and UN Model. In terms of calculating the 'arm's length' price, it has followed the most appropriate method based on the nature of the transaction, the availability of reliable information, the functions performed, assets employed and risks assumed, or such

[102] Tanweer Akram, *Transfer Pricing Policy for Bangladesh* (Working Paper, 2002) Columbia University <papers.ssrn.com/sol3/papers.cfm?abstract_id=356800> 26 August 2013.
[103] See *Income Tax Ordinance* 1984 (Bangladesh),Ch..XI A.
[104] Ibid, s.107B.

other factors including the comparable uncontrolled price method, resale price method, cost plus method, and transactional net margin method.[105] In addition, a strong implementing policy and enforcement mechanism such as auditing, assessment, and reporting etc. have been suggested as legal requirements under the existing principles.[106] A person or corporate body failing to comply with these requirements will be subject to penalty.[107] In view of all these it is right to say that the current transfer pricing regulation as embodied in the *Ordinance of 1984* is comprehensive and well-designed in line with internationally applicable standards to counter tax evasion through the disguised roots of transfer pricing.

4.7 Non-fiscal or Financial Incentives

The government of Bangladesh offers many types of financial incentives to attract foreign investment, such as easy access to finance and corporate bank loans, low interest loans, capital equipment subsidies, financial loans for export related products, flexible regulation for the exchange of foreign currencies, facilities for repatriation of profit, facilities for subsidised infrastructure, land acquisition and ownership, a facility for utility service and other financial supports. Among these incentives only three types of financial incentives are chosen as the focus in discussion in pursuance of the objective of this chapter as mentioned earlier. They are corporate bank loans, incentives to export-oriented and export linkage foreign investment, and the facility for repatriation of profit.

4.7.1 Corporate bank loan facility

A bank loan with a low rate of interest is a very common incentive element across the world for both local and foreign investors. Crediting the investment for generating working and investment capitals may have a positive impact on the growth of the firms. Foreign investors reportedly enjoy full access to local capital sources. Banks in Bangladesh are allowed to extend working capital loans or term loans to foreign-controlled and foreign-owned firms or companies, whether manufacturing or non-manufacturing, operating in Bangladesh by upholding the normal banker-customer relationship.[108] Banks are also free to grant joint venture industries in EPZ loans in the local currency up to the amount of short term foreign currency loans obtained from abroad. The lending interest rate as fixed by the Bangladesh

[105] Ibid, s. 107C.
[106] Ibid, ss. 107 D -I.
[107] Ibid, s.107G.
[108] See, *Bangladesh Investment and Trade: Bangladesh Export Processing Zones* (updated 2012) Business info Bangladesh <http://www.bizbangladesh.com/export_processessing_zone.php> 3 January 2014.

Bank at the time of writing in 2012 is 13.49 per cent, although presently there is no lending rate cap.[109] Other commercial banks are also directed by Bangladesh Bank to keep their interests rates at a prescribed level to pave the way for industrialisation. Apart from banking loans, government also offers low-rate interest through some other financial institutes, the most prominent of which is *Bangladesh Shilpo Rin Songestha*.

The government also allows the investors borrowing abroad in foreign currency with the prior approval of BoI. Remittance towards the payment of interest and repayment of principal loans as per the agreed terms of BoI may be made through authorised dealers without the prior approval of Bangladesh Bank.

In the backdrop of this facilitating loaning scheme, the rate of firms' access into finance is gradually growing. In a study of 2003, firms in Bangladesh reported that around 55 per cent of their working capital and nearly 60 per cent of their investment capital on average came from retained earnings, while about 30 per cent of working and investment capital came from banks.[110] Just over 65 per cent of firms enjoyed an overdraft facility or line of credit.[111] The line of credit seems to be convenient in that it allows firms to borrow funds relatively quickly and easily, without excessive bureaucracy.

4.7.2 Challenges of a corporate loan and the regulation of its realisation

The low-interest loaning scheme has broadly come into practice in Bangladesh since the privatisation and private sector-led industrialisation and service has been launched as a governmental economic policy. It has incentivised to an extent both the internal and external rate of investment activity. It is an agreed-upon matter that such a financial incentive as available both in developed and developing economies is an internal motivational factor for maiden entrepreneurs. But the problem mainly lies, particularly in developing and least-developed countries, with the effective regulation of the crediting system and debt realisation by the banking sectors.

The banking sector of Bangladesh has experienced this kind of problem relating to non-performing loans. Although the data is not separately mentioned for corporate sectors, the ratio of non-performance loans was assumed to be very high in statistics given in a study up

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[109] See Bangladesh Bank, *Annual Report, 2012* <www.bangladeshbank.org> 26 August 2013.
[110] Bangladesh Enterprise Institute and World Bank, *Improving Investment Climate in Bangladesh* (A report, 2003) 32-33 <www.bei-bd.org/images/publication/whc4f4ba841685b8.pdf> 26 August 2013.
[111] Ibid.

to 2005.[112] This non-performance trend involves both micro and macro loan defaulters, where supposedly, a big percentage is corporate loans. The level of non-performing loans in 2005 is reportedly somewhat lower in Sri Lanka and India.[113] The causes of non-performing loans are usually attributed to the lack of effective monitoring and supervision on the part of banks (as required by the BASEL principles of bank monitoring and supervisions), the lack of effective lender's recourse to, weaknesses of the legal infrastructure, and the lack of effective debt recovery laws, policies and strategies.[114]

Non-performing loans have some severe economic and financial implications. If this remains unresolved for long time it may create the loss of current revenue, erosion of bank capital, and eventually lead to a financial crisis and low economic growth. One argues that a bank with a high level of non-performing loans is forced to incur carrying costs of non-income yielding assets that not only strike at profitability but also at the capital adequacy of a bank. As a result, the bank encounters difficulties in enhancing capital resources. In this backdrop, every country granting loans for investment should have a legal and policy mechanism for the recovery of both short and long term loan applicable to both individual and corporate borrowers.

In Bangladesh there are mainly two laws namely, the *Company Act 1994* and the *Bankruptcy Act of 1997* that regulate the corporate insolvency and bankruptcy affairs. The former deals with the state of liquidation of a company and the disbursement of associated payments as obligatory by law. The *Bankruptcy Act* is aimed at creating a loan recovery environment and to enable the speedy recovery of non-performing loans. As an enforcement measure or mechanism a Bankruptcy Court has been set up in addition to the *Artha Rin Adalat* (Money Loan Court). The *Artha Rin Adalat Act* was enacted in 1990 to address separately all issues of non-performance loans in order to ensure the safety and soundness of the banking system. Despite all these enforcement mechanisms, a recent study reveals dissatisfaction with their performance in terms of the rate of settlement of loan disputes as well as the rate of recovery of loans over the years. The main problem in relation to low recovery lies in the slow execution of the decrees alongside the lengthy procedural factors available in the existing legal framework. Therefore, in order to create a balancing situation between the liberalised corporate financing system in Bangladesh and the recovery of loans some legal and

[112] Bishnu Kumer Adhikary, *Non-performing Loans in the Baking Sector of Bangladesh: Realities and Challenges* (2006) Bangladesh Institute of Bank Management <www.apu.ac.jp/rcaps/uploads/fckeditor/.../RJAPS_V21_Adhikary.pdf> 26 August 2013.
[113] Ibid.
[114] Ibid.

management strategic reforms should be brought so as to facilitate the flow of investment and reduce the financial risks.

4.7.3 Incentives for export-oriented and export linkage foreign investment

One of the foremost objectives of NIPs in Bangladesh is to set up an export-oriented industrialisation with the assistance of foreign investment. Considering the wide gap between import and export volume it has experienced since soon after independence in 1971, and which is negatively impacting the economy, Bangladesh offers a handsome incentive package to export-oriented industries, with an ultimate goal of achieving export-induced development. This special incentive regime enumerates a plethora of fiscal, non-fiscal, and other commercial and business supports which are very succinctly detailed in the *Export Control Policy of Bangladesh* (periodically adopted every five years from 1980).

The fiscal incentives for exported-oriented industries are of a special character different from the incentives offered at the initial stage of setting up an industrial project. This type of incentive includes a whole range of import facilities for raw materials (particularly for thrust sectors as decided under the industrial policy), a 50 per cent income tax rebate on export earnings, payment of duty drawback through commercial banks, bonded warehouse facilities, duty-free importing of capital machinery and spare parts, lowering of the tax-rate at source, and refund of value-added tax on packaging materials.[115]However the fiscal incentives are conditional with the amount of export production.[116] It is notable that the entire export earnings of handicrafts and cottage industries are exempted from income tax and 80 per cent is applicable to others. An 80 per cent tax exemption from the income of export proceeds is now not only incorporated in the yearly adopted *Finance Act*, rather it has been incorporated as a provision on a permanent basis in the Income Tax Ordinance of 1984 itself.[117]

In addition to fiscal incentives, the non-fiscal incentives are many, among which the Export Promotion Fund (EPF) and promoting export financing are notable. The assistance and support provided out of the EPF to producers/exporters of new and non-traditional items including those meant for product development and product and market diversification

[115] See *National Industrial Policy of 1999, 2005 and 2010* (Bangladesh) Ch. 10.
[116] A business entity exporting at least 80 per cent of its manufactured goods or an industry contributing at least 80 per cent of its products as input to finished exportable, and similarly a business entity exporting at least 80 per cent of services including information technology related products are considered an exported-oriented industry (See the *National Industrial Policy of 1999, 2005* and *2010* (Bangladesh). See Ibid.
[117] See *Income Tax Ordinance 1984* (Bangladesh) s. 53.

includes: (1) venture capital on easy terms and low interests rates; (2) assistance in obtaining foreign technology and consultancy for product development and diversification; (3) assistance in fielding marketing missions abroad and participating in international fairs for the market compatibility of products; and assistance for participation in overseas training programs on product and market development.[118] In addition, under export financing programs, the exporters are issued credit cards to avoid the risks involved in carrying of cash or foreign exchange/travellers' cheques while undertaking business trips abroad.[119] The exporters may obtain export credit from commercial banks up to 90 per cent of their irrevocable letter of credit/confirmed contract. They will be charged for overdue interest by commercial in cases of export against an irrevocable letter of credit on sight payment basis.

Apart from export financing facilities, the government also offers cash incentives to the export sectors. In the fiscal year 2011, the Bangladesh Bank granted rates of cash incentives for the country's 19 export sectors.[120] Under this programme, the government issues cash every year with an increased rate. For example, it issued a cash subsidy to a total of 197 products from 19 sectors against 17 in 2010.[121]

Another initiative that has been taken in order for the expansion of export-oriented industrial ventures is setting up EPZs in the different part of the country under the *BEPZA Act of 1980,* and accordingly EPZs are set up in main divisional cities. The industries located in EPZs enjoy a highly attractive status in terms of a non-fiscal incentive package, including labour related deregulation, and quality of governance. In 1996, the *Private Export Processing Zones Act* was passed to bring in foreign investments or joint ventures or for setting up private export processing zones.

It is recognised that export-led growth is one of the FDI-induced developmental objectives in developing and least-developed host countries, and therefore they have undertaken an increasing number of incentive packages to export-oriented foreign multinationals to profile their investment projects so as to contribute to their export promotion. The expansion of export growth has many positive impacts on a country's economic development. It creates employment opportunities, increases the volume of country's international trade and market efficiency and competitiveness, and eventually leads to resolving the BoP crisis. In view of

[118] See *The National Industrial Policy 1999, 2005, and 2010* (Bangladesh) Ch.10.
[119] Ibid.
[120] See *Doing Business in Bangladesh* (The World Bank, 3rd ed. 2014) <www.worldbank.org> 29 December 2013.
[121] Ibid.

all these, it may be considered logical to offer fiscal and non-fiscal incentives to promote and boost export-oriented industries.

Despite all of the above, two things need to be taken into consideration for gaining a better result from such incentives as the incentives have some negative impacts. One consideration is whether the associated costs of both types of incentives may go higher for a country like Bangladesh than the amount of its total economic and social benefits. Another consideration is whether they are exporting enough of their products by limiting their imports through using local inputs. If there is no check on importing foreign raw materials, it may lead to causing the loss of foreign exchange. In South-East Asia, countries such as Malaysia, Thailand, Indonesia and the Philippines faced BoP deficits that were augmented significantly by the large inflows of foreign investment. In the case of Malaysia, according to the then Deputy Finance Minister, the rise in trade deficit in 1995 was mainly due to an increase in the import of capital goods brought in by foreign investors'.[122] He said foreign investment rose 26 per cent in 1995 to RM 20 billion, and imports of capital goods through these investment accounted for RM 18.5 billion.[123] Likewise, if the foreign companies do not export so much and turn to capture the local market by displacing products and services previously provided by local firms, this will be detrimental to local industrialisation. Therefore, the way of resolving such a potential problem should be that foreign or local export companies' entitlement to incentives needs to be conditional and properly regulated, such as: (1) incentives must correspond to the national financial capacity and; (2) incentives will be given to the companies if they export most of their products and limit their imports by maximising the local inputs. In addition, to make up for the higher financial burden an employment requirement can be added as a condition for incentives. Although the condition for the use of local inputs goes against the WTO restriction principle under TRIMs, its importance for reducing the BoP deficit and developing the national economy should not be overlooked.[124] For the enforcement of such conditions compliance policy measures such as monitoring and inspection, can be introduced by the Export Promotion Bureau of Bangladesh (EPB).

[122] See Martin Khor, 'The Need to Regulate Foreign Investment *'Third World Network* (6 March 2000) <http://www.twnside.org.sg/title/mail-cn.htm> 29 May 2013.
[123] Ibid.
[124] Ibid.

4.7.4 Guarantees for the repatriation of profits

4.7.4.1 Repatriation guarantee as a legal and policy incentive

The right to transfer or repatriation of funds is very significant to foreign investors as one of the core elements of investment protection. The guarantee provisions for repatriation of funds (capital, profits, and other incomes) in the laws and policies of the host countries assures the foreign parent companies that they will gain economically through their investment in another territory, and thus they influence their decision-making for investment. If there is strict restriction over profit repatriation legalities in a country, the parent firms do not feel encouraged, even if they find huge potential business profit. Foreign parent companies do not intend to take the risk of huge investments for their subsidiaries in an unknown economy lacking the legal guarantees of repatriation of funds. Therefore, most of the countries provide in their laws guarantees of transfer of funds either in one or different forms. The transfer of funds is generally treated as an incentive on behalf of the host country for foreign investors.

The right to the transfer of funds covers many things which are usually broader in industrial developed countries.[125] The transfer related legalities and guarantees include the capital or principal investment and additional amounts to maintain or increase an investment, the profits/ returns, the repayment of loans, the proceeds from liquidation or the sale of whole or any part of the investment, and compensation in the case of expropriation, war, civil disturbance, and similar events.[126] However, the scope of transfer-related issues is narrow in developing countries.

The legal guarantees for the transfer of property in the national legislations are found to be conditional and unconditional. However, the argument is that the best protection for foreign investors is unconditional which is mostly available in industrial countries. The majority of developing countries make these guarantees subject to foreign exchange regulation or additional restriction such as that profit may not be transferred until the income tax is met, or that capital may not be transferred prior to liquidation and so on. For example, India allows the free repatriation of profits once all the local and central tax liabilities are met.[127] Likewise,

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[125] Sherif H Seid, *Global Regulation of Foreign Investment* (Ashgate Publishing Limited, 2002) 37.
[126] OECD, *Towards Multilateral Investment Rules* (1995) Paris <www.oecd.org> 12 December 2011.
[127] For details see, *RBI Guidelines for Foreign Company Set-up in India and Repatriation of Income* (2007) <nriinvest.ucoz.com/ForeignCompanySetupGuidelines.com> 18 December 2011.

in case of an investment exit decision, profit can be repatriated only when all tax debts and other obligations are satisfied.

Bangladesh maintains a very liberalised and open policy in respect of the repatriation of property. The foreign investment law in Bangladesh provides for the guarantees of full repatriation facility of the invested capital, profits, and assets of the establishment when winding up the investment.[128] Section 8 of the *FPIA 1980* states that in respect of foreign investment, the transfer of capital and returns from it and, in the event of industrial undertaking, having such investment of the proceeds from such liquidation is guaranteed. The *National Industrial Policy* adding to this facility states that the repatriable dividend or profit, if reinvested, would be treated as a new investment in terms of facilities.[129] It means that investors, thereupon, will further be entitled to all available fiscal incentives.

The law does not apparently impose any kind of restriction on the repatriation of the said properties such as any statutory dues or a foreign exchange regulation requirement, the limit of the authorised repatriable amount, or the approval of the BoI or Bangladesh Bank.[130] The authorised dealers of foreign exchange may remit the profits of foreign firms and companies upon their application without the prior approval of Bangladesh Bank.[131] However the authorised dealers have to report to the Bangladesh Bank for outward remittance. The dealers, subject to post facto scrutiny by Bangladesh Bank, affect outward remittance of post-tax-profits and dividends on such investment.

In addition, in the case of investment exit, the prior approval of Bangladesh Bank is required for the repatriation of sales proceeds of non-resident equity investment both in public and private limited companies.[132] The foreign companies are required to follow the national company law procedures, including making a public announcement of the intention to wind up operations in their annual general meeting, or opting for court intervention for the same in

[128] *Foreign Private Investment (Promotion and Protection) Act 1980* (Bangladesh) s 8; see also *National Industrial Policy 2010* (Bangladesh) Ch. 2.
[129] See Ibid, Ch. 11.
[130] See Bangladesh Bank 'Guidelines for Foreign Exchange Transactions' (Vol.1 2009) Ch. 9 s.1 (3B).
[131] See Ibid, Ch. 10, para 28.
[132] See, Ibid, Ch. 9, section 1 (3B). It is noted that there being no established market price for such investment, Bangladesh Bank, while determining the remittable amount, works out the net asset value of the shares on the basis of audited financial statements as on the date of sales and the net asset value thus calculate is considered repatriable. If the net asset value so calculated exceeds the face value of the share of the company concerned, the capital gain derived from there may be repatriated.

the absence of a general meeting.[133] At the event of winding up of business the companies must organise to pay off their liabilities.[134]

The foreign investment law has only focused on the three categories of expatriation: capital, returns, or profit from capital and the sale proceeds in the event of liquidation of any industrial undertaking. The other items of repatriations such as repayment of loan and interest, technology transfer fees, compensation for expropriation or other losses, and the earnings of natural persons are not covered. These issues have been determined and settled by the provisions of the BITs of Bangladesh.[135] As per the treaty provision, the repatriation of the earnings of foreign nationals appointed in any commercial establishment is subject to the laws and regulations of the host state. In Bangladesh, the NIP prescribes that foreign citizens will be entitled to the repatriation of 50 per cent of their wages, and 100 per cent of the savings and retirement benefits according to the terms and conditions of appointment.[136]

4.7.4.2 The potential risks of repatriation and its regulation

An attractive investment climate is one where the foreign investment enjoys the freedom to remit profits and repatriate capital. But the abounded and unregulated exercise of this freedom may contribute to a BoP deficit through foreign exchange outflows. In the case of Malaysia's BoP deficit in the 1990s the high and swift increase in repatriation by foreign investors is identified as responsible for the problem.[137] According to the then Economic Planning Unit director general Ali Abdul Ahsan Sulaiman, outflows for investment income payments (particularly the repatriation of profits and dividends for foreign foreign-owned companies) was the single major contributor to the services account deficit.[138] The notion of foreign exchange outflows by repatriation contributing to a BoP crisis is very obvious. So when a country faces a continuing and substantial imbalance of its BoP situation caused by repatriation or other means, there are some solutions to counter such a problem. It may either adopt a foreign exchange control policy or restrict repatriation in certain circumstances, or it may persuade the foreign company to reinvest its profit to the foreign country.[139] The outflows of funds can be restricted under a situation considered to be detrimental to the

[133] *The Company Act 1994* (Bangladesh) s. 298.
[134] Ibid.
[135] See for example, US-Bangladesh BIT (1986) art. 3 <http://www.state.gov/documents/organization/43480.pdf> 20 January 2012.
[136] *National Industrial Policy 1999, 2005 and 2010* (Bangladesh) Ch.11.
[137] Khor, above n 122.
[138] Ibid.
[139] Ndiva Kofele-Kale, 'Host-Nation Regulation and Incentives for Private Foreign Investment: A Comparative Analysis and Commentary' (1990) 15 *N.C.J International and Comparative Regulation* 361, 383.

national economy of the host state. International law recognises that the host state can exercise the sovereign right to control the outflows of funds on financial and economic grounds.[140] The establishment of exchange restriction or control policy is essential for combating a BoP crisis. Kenya is one of the industrialised countries in East Africa that in the face of a shortage of foreign exchange has adopted an exchange control policy that drastically limits the profit repatriation.[141]

Although the relevant law in Bangladesh appears to be unconditional it reserves the right for the government to subject the repatriation facility to restriction or control in circumstances of exceptional financial and economic difficulties, and it must be in accordance with applicable laws and regulations.[142] Section 8(2) of FPIA 1980 states that the guarantee [for repatriation] shall be subject to the right which, in circumstances of exceptional financial and economic difficulties the government may exercise in accordance with the applicable laws and regulations in such circumstances. The exceptional financial circumstances and economic difficulties are indeed not defined or identified by FDI law or policy. There is no legal and administrative policy describing such circumstances. In this backdrop, it entirely relies on the government's discretion to define the exceptional financial situations or economic difficulties where it has the right to impose restrictions on the transfer of capital.

However, it may be assumed that 'exceptional financial and economic difficulties' refers to macro-economic instability. The interpretation may be inferred from some international instruments where exceptional economic situations or difficulties technically mean the circumstances when a state suffers from macro-economic instability caused by the high inflation of local currency, continuous budget deficit, and a balance of payment crisis.[143] At the event of macro-economic instability, to safeguard the national economy, the international finance and trade law recognise the state's control over the cash outflows caused by repatriation, tariff reduction etc. For example, the IMF Articles of Agreement allow

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[140] This means that the host state has 'the exclusive right to determine its own monetary unit, to give the unit legal meaning, to fix the exchange rate and to regulate, restrict or prohibit the conversion and transfer of foreign exchange. See R Dolzer and M Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, 1995) 85.

[141] See *Foreign Investment Protection Act 1963* as amended in 1984 (Kenya) art.6. It provides that foreign investors must comply with the requirements of the *Exchange Control Act*. It further provides that the enterprise has repatriation rights in the approved foreign currency at the prevailing official rates of exchange with respect to: (1) after-tax profit arising from or out of its investment of foreign assets, including retained profits which have not been capitalised; (2) the capital, i.e., the original book value of the investment specified in the certificate plus any retained earnings which have not been capitalised; and (3) the principal and interest of any loan specified in the certificate.

[142] See *Foreign Private Investment (Promotion &Protection) Act 1980* (Bangladesh), s 8.

[143] See for example, the text of IMF Articles of Agreement, art. XXVII and GATS, art. XII.

countries to impose capital outflow restrictions on BoP grounds.[144] In addition, GATS also allows restrictions with a BoP crisis and external financial difficulties.[145] Under GATS, the main purpose of allowing restriction on BoP problems is to maintain a level of financial reserves adequate for the implementation of a member state's programme of economic development or economic transition. The instances are also available in the Free Trade Agreements (FTAs) that allow transfer of funds with exceptions, that is, a temporary restriction can be imposed to safeguard the BoP and it has to be in compliance with the standard of fair and equitable treatment.

On the assumption of the potential risk of foreign currency outflows, many South Asian and South-East countries in regard to repatriation have exercised the 'sovereign right to control' policy, although they maintain a liberal foreign investment policy.[146] For instance, India, China, and Vietnam maintain some restrictive policies for repatriation, while they receive more foreign investment and are well-ranked for global investment flow.[147] In Vietnam, every case of repatriation requires the approval of its State Committee for Cooperation and Investment (SCCI) if the repatriated sum is greater than the initial and reinvested capital of the foreign enterprise.[148] In addition, it imposes a tax deduction on the basis of the amount of repatriated property.[149] The core objective behind this is to protect the interest of their national economy and to maintain a check-up on the outflow of cash that sometimes may impact adversely on the economy.

It is true that the aim of the liberal attitude of the existing legal provisions in Bangladesh. Though it is not absolutely liberal, may be to boost foreign investment, but in consideration of the national economic interest and to encounter the potential BoP crisis, some concrete restrictive policies should be imposed on the repatriation of profits. Firstly, tax-oriented requirements can be added if repatriation occurs after the expiry of the exemption period, if

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[144] See Ibid, art. XXVII.

[145] Article XII of GATS states that in the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments….to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

[146] See the Cuts Centre for International Trade, Economics & Environment, *FDI in South Asia: Do Incentives Work? A Survey of Literature* (Research Report, CUTS, 2003) <www.cuts-international.org> 10 January 2012.

[147] Ibid.

[148] John Quigley 'Vietnam Legal Regulation of Foreign Trade and Investment'(1980-1981) 24 (6) *International Trade Law Journal* 24, 31.

[149] *Law on Foreign Investment in Vietnam* 1996 (Vietnam) art. 44. It states that a foreign investor shall when transferring profit abroad, pay an amount of tax, either three per cent, five per cent or seven per cent of the profits transferred abroad, depending on the level of capital contribution such foreign investor made to the enterprise with foreign owned capital or the capital for the implementation of a business cooperation contract.

there is one. Secondly, a check-up formula can be introduced where the repatriated amount stands more than the original investment and re-invested property. In this respect, the counting method needs to be changed to compare the repatriated amount with the original investment, as sometimes the repatriated amount is found to be several times higher than the original investment, outstanding loans and tax obligations. A recent report reveals that the internal entrepreneurs alleged that some multinational companies in Bangladesh, particularly cell phone operators, repatriated large volumes of earnings while borrowing from the local banks, thus causing a dollar crisis there.[150] Thirdly, a continued monitoring system can be introduced under the Bangladesh Bank to intervene in the case of an emergency to safeguard BoP and to avoid inflationary pressure.

4.8 Whether Incentives Matter in Bangladesh

There is no recent primary data available that focuses specifically on the performance of incentive measures in influencing the flow of FDI in Bangladesh. It has also become rather difficult to assume the effectiveness of incentives as the rate of investments have fluctuated for the last couple of years and are not significantly increasing despite a glut of incentives. However, it is true that after the adoption of different laws and policies over last two decades offering liberalised FDI policies, including different types of fiscal and non-fiscal incentives and infrastructural support through the establishment of EPZs, the volume of FDI is gradually on the increase. Most recent studies on FDI attribute this success, although comparatively not up to the levels expected, to other vital factors, such as cheap labour, the availability of cheap raw materials, and lower real estate cost. An empirical study in 2007 has identified the low cost of labour as the first main motivational factor in Bangladesh on the basis of investors' views.[151] Seventy two per cent of the investors recognized it as the most vital factor for attracting FDI.[152] Only in the opinion of 47 per cent of the investors interviewed were incentive measures, including those of other governmental policy regimes', considered to be motivational factors for their investment choice.[153]This percentage indicates that for specific location choice for investment the investors' priority is not so much incentives as it is achieving low-cost products which may accrue from cheap labour and raw materials.

[150] Dr Dillip Kumer Sen and Chawdhury Rajkin Mohsin, 'FDI in the Context of SAARC Nations with Particular Reference to Bangladesh: An Analytical Study' (2010) 66 (27) *The Bangladesh Accountant* 75, 85.
[151] Shamima Nasrin, Angathevar Baskaran and Mammo Muchie, 'Major Determinants and Hindrances of FDI Inflow in Bangladesh: Perceptions and Experiences of Foreign Investors and Policy-makers' (Paper presented at the GLOBELICS-8th International Conference, Kuala Lumpur, Malaysia, 1-3 November 2010) 14.
[152] Ibid.
[153] Ibid.

However, it is not argued that this percentage indicates their dissatisfaction with incentive policy regimes. According to investors an incentive policy regime is largely perceived as very positive and attractive. But the recent unimpressive record of FDI flow in Bangladesh compared to that in other South Asian countries appears to show that the reality is to the contrary. This suggests that having in place an investment-supportive incentive policy regime alone is not enough for attracting FDI. There are other factors that must be associated with this policy of attracting FDI.

Considering the current trend of offering incentives, particularly in developing and least-developed countries, it is conceded that they have a positive impact on FDI location choice and indeed it creates a competitive edge among the host countries in motivating foreign investors. Bangladesh also might have designed its incentive policy regime in line with the ongoing global trend in order to compensate for its major barriers to FDI and to have incentives act as a driving factor for the increase of flow to an expected level. But this objective remains distant in reality for the barriers are deemed to be more important by the investors in their decision making. In consequence, the incentives are not a major priority for investors.

Some studies in recent times identify a number of major constraints to FDI flow, namely political instability, incompetence and a futile capital market, a lack of adequate infrastructural support, the absence of sound macro-economic stability, rampant bureaucratic corruption, and an overall fragile law and order situation.[154] In the face of all these barriers, incentives are not considered to be significant to investors, although the situation in relation to the effectiveness of an incentive policy regime varies from country to country on the basis of other factors required to be simultaneously present.

The insignificant role of incentives in the context of Bangladesh may be evident from another example. It has been said in a earlier section of the this chapter the incentives are chiefly meant for manufacturing corporations with a view to broaden the industrial sector so that may effectively contribute to the national development agenda by increasing employment opportunities and technology transfer, and by enhancing global market networking. But if the total volume of FDI is reviewed since 2000, the picture emerges that the increased rate of FDI flow in the service sector is manifold while the rate of flow in

[154] See Abdullahel Kafi, Mohammad Main Uddin and Muzahidul Islam, Foreign Direct Investment in Bangladesh: Problems and Prospects' (2007) 4 (1) *Journal of Nepalese Business Studies* 47, 55.

manufacturing sectors is relatively poor and slow. Statistical data based on Bangladesh Bank's FDI Survey of 2008 shows that the amount of FDI in manufacturing in 2007 was $289 million USD, in petroleum and gas $205 million, and in telecommunications $346.5 million. Five years earlier in 2003 it was $165.2 million, $88.1 million and $45.9 million respectively.[155] The FDI contribution in the manufacturing sector was about fivefold that of the telecommunications sector in 2000 when this service sector just began to rise.[156] The increase of FDI volume in telecommunications and energy gives testimony to a phenomenal growing state of the service sector in the current national economy. The rise in telecommunications may be attributed to the market size comprised of huge number of users in a populous country such as Bangladesh. On the other hand the sluggish character of growth in manufacturing evidences the futility of an incentive policy regime.

Given the above scenario, one can easily draw the conclusion that incentives alone, particularly fiscal incentives, cannot play an effective role in attracting foreign investment. In addition, the deregulation of fiscal issues through providing several kinds of incentives, direct or indirect, may create an adverse impact on the national revenue income as evident from the earlier discussion.

In fact, most of the studies on the relevant issues evidently reflect that the effectiveness of incentives is linked to the prevalent investment environment where they are offered; in this case what matters most is the quality of the investment climate. With the availability of a safe and secure investment climate granting fiscal incentives may be successful in attracting FDI. This explains why some countries do much better using fiscal incentives to achieve their foreign investment target. It is almost certain that lower taxes or tax exemptions are not able to compensate for a poor investment climate. The experiences of many developing countries suggest that fiscal incentives do not effectively counterbalance unimpressive conditions such as poor infrastructure, macroeconomic instability, and weak governance and markets. On the basis of experience from some econometric studies the OECD concluded that a low tax rate cannot compensate for a generally unattractive or weak FDI environment.[157] Some authors have supported this conclusion, stating that incentives will

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[155] S Bangladesh Bank, *Report on Foreign Direct Investment 2009* <www.bangladeshbank.org> 26 August 2013.

[156] Ibid.

[157] See OECD, *Tax Effects on Foreign Direct Investment* (Policy Brief, February 2008) <www.oecd.org/daf/inv/investment-policy/40152903> 26 August 2013; see also OECD, Tax Effects on Foreign Direct Investment: Recent Evidence and Policy Analysis (OECD Tax Policy Studies, 2007) <books.google.com.au/books?isbn=9264038388> 26 August 2013; Sebastin James, 'Tax and Non-tax Incentives and Investment: Evidence and Policy Implications' (Investment Climate Advisory Services of the

generally neither make up for serious deficiencies in the investment environment nor generate the desired externalities.[158]

Fiscal incentives may be beneficial and supportive of development if any investment strongly responds to them and revenue rises as a result. In addition, lost revenue from investments can be made up anyway and social benefits are gained from the increased investments. Another major condition for a tax incentive to be beneficial in developing countries, as viewed by the scholars, is that there must exist a well-structured revenue and governance system.[159] Without a well-established tax structure, corruption-free governance and proper policy planning, incentives will not drive the expected benefits for host countries; rather they will bring negative effects to their own economies and to international commerce as well.[160] Bangladesh reportedly lacks a corruption-free governance system in fiscal administration and the collection of revenue.

Contrary to the fiscal incentives, the financial and other incentives as discussed above such as low-rate bank loans, infrastructural support under EPZs, export-promotion incentives, and repatriation of profits, appear to be effective in attracting foreign investment to Bangladesh. In estimated FDI growth from the last part of the 1990s to 2003 and 2004 one study observes that after the expansion of the EPZ policy by the government the FDI inflow grew steadily. Out of 42 percent of robust growth in 2003, the EPZ area recorded an impressive 85 per cent increase.[161] It was conceded by the government that the increased rate of FDI in EPZ areas is mainly motivated by financial incentives. The export-promotion incentives as a part of the export-led industrialization policy also have contributed to the volume of FDI participation. The increase of FDI in EPZ areas has evidently contributed to employment generation, the spread of modern technological application, and product efficiency in domestic firms, and it has accelerated the integration of the economy into the international market through strengthening gradual export performance. It proves that financial and other incentives that guarantee a good investment environment, along with quality governance, are more effective than fiscal incentives in attracting foreign capital. However, the perpetuity of benefit from financial incentives leading to social-economic development is not ensured from the

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World Bank Group, 2010) <www.un.org/esa/ffd/tax/sixthsession/UseOfTaxIncentivesALL.pdf> 26 August 2013.

[158] *Morisset and Prinia*, above n 3, 6.

[159] Andres E Bazo Pisani, 'Do Developing Countries' Tax Incentives Attract Investment or Create Disaster? (Tax Notes International, October 27, 2008) <www.frpii.org/english/Portals/0/.../Tax%20Policy/Do%20Developing.pdf> 26 August 2013.

[160] Ibid.

[161] Bangladesh Enterprise Institute and the World Bank, *Improving Investment Climate in Bangladesh* (A Report, 2003) 32-33 <www.bei-bd.org/images/publication/whc4f4ba841685b8.pdf> 26 August 2013.

apparent inflow of the investment, if it remains unregulated, and some evidences of this are detailed in the preceding discussion particularly regarding bank loans, export promotion, and repatriation.

Nevertheless, the importance of fiscal incentives and non-fiscal incentives cannot be denied outright in a globally competitive economic situation which a country such as Bangladesh cannot afford to opt out of. Therefore it is wise to create a balance between incentives and regulations and thus incentives can become development-inducing, risk-free determinants of FDI.

4.9 Concluding Remarks

The purpose of this chapter was to evaluate the legal framework of fiscal and non-fiscal incentives available for FDI and their potential negative consequences. It is drawn from the above discussion that although the incentives are offered to attract FDI, their negative impacts on the revenue of the country are obvious and the regulatory mechanisms are inadequate. Among the fiscal incentives, tax holiday is the most prominent which, because of its long durable character causes a detrimental effect on the revenue income at the advantage of the existing weak tax base and lax regulatory system. In addition, legal provisions relating to financial incentives, particularly in relation to repatriation and export-linkage investment, do not appear to be favourable to host states in terms of economic interest or achieving the benefits of FDI. More importantly, the unconditional feature of repatriation has the potential to cause a BoP deficit.

It is nevertheless true that the reality of incentives cannot be ignored for a country such as Bangladesh wishing to remain competitive among similar economies in Asia for attracting FDI. They also help to compensate for the inefficiencies of other FDI determinants. Therefore, it is necessary to bring the incentives under proper regulation in the interest of the national economy. In order to drive benefits from fiscal incentives, as mentioned earlier, Bangladesh’s tax base should be strengthened with the development of separate regulatory mechanisms, such as compliance monitoring, regulating guidelines, accountability regimes, and the setting of the duration for incentives on a case basis.

In addition, in the case of non-fiscal incentives, the required conditions should be added in the legal or policy framework, such as:

1. A type of condition concerning the requirement of a valuation of the investment assets in order to qualify for a bank loan;
2. The incentive relating to export-oriented industries must be conditional with a performance requirement;
3. Tax clearance should be a prior condition for repatriation;
4. The governmental to restrict the repatriation of profit in economic and financial emergency situations. These should be clearly identified as per international standards as the Agreement Articles of IMF by the amendment of the existing legal provision under the FPIA 1980.

CHAPTER 5

FDI AND ENVIRONMETAL PROTECTION: LAWS AND REGULATIONS OF BANGLADESH

5.1 Introduction

The environmental effects and performance of FDI is one of the major concerns in host countries today. With the increasing trend towards the use of FDI, the economic activities of transnational corporations (TNCs) have multiplied as key contributors to it,[1] and at the same time attention has been drawn to the resulting environmental consequences. A number of disastrous incidents in recent years have augmented concerns about TNCs' performance in developing host countries, which they often treat as 'pollution heavens'.[2]

While it is admitted that in many developing countries FDI flow plays a central factor in the development process, the concept of the sustainability of this process has brought into the spotlight the environmental aspects of FDI. Many debates are in place as to the impact of its environmental performance and impact on sustainable development. As a result initiatives are undertaken at the international level for setting standards for the environmental responsibilities of TNCs. These influence the formulation of laws and regulations at the national level of host countries to interfere with TNCs' activities in order to protect their environment and promote their development objectives.

The international environmental standards for the operation of TNCs are mainly developed by the OECD Guidelines and Agenda 21.[3] The provisions under these instruments are non-binding and merely directive in nature. An initiative was also taken under the Multilateral

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[1] In 1969, the world had about 7,000 transnational corporations. In 1992 there were more than 37,000 TNCs and about 200,000 foreign affiliates, and in 1996 this figure rose to more than 44,500, which controlled more than 270,000 subsidiaries. In 2000 there were more than 62,000 TNCs and 820,000 foreign subsidiaries, and in 2008 the number of transnational corporations in the world amounted to 82,000 which controlled 810,000 subsidiaries. UNCTAD, *World Investment Report, Transnational Corporations Employment and Workplace* (1994) 15-17 <unctad.org/en/Docs/wir94ove.en.pdf> 10 March 2013; UNCTAD, *World Investment Report, Transnational Corporations, Agricultural Production and Development* (2009) 17 <unctad.org/en/Docs/Wir2009_en.pdf> 10 March 2013.

[2] One example is the 1984 Bhopal gas tragedy caused by the subsidiary of the US chemical giant Union Carbide that left more than 5000 people dead, injured more than 500,000 and created other human and environmental disasters. See VP Nanda, 'Export of Hazardous Waste and Hazardous Technology: A Challenge for International Environmental Law' (1988) *Denver Journal of International Law and Policy* 155, 165-70.

[3] See the *OECD Guidelines for Multinational Enterprises* (2000, updated in 2011), Ch. V <http://www.oecd.org/investment/mne/1922428.pdf> 10 March 2013; See *Agenda 21* (1992) s. III, Ch.30 <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> 10 March 2013.

Investment Agreement (MAI) that was nipped in the bud, because it failed to receive the required endorsement due to north-south conflict of interests. However, this issue has increasingly become a reference in International Investment Agreements (IIAs) and thereupon a regulatory regime for the environmental conduct of foreign multinationals is emerging based on mutual cooperation and cross-border management systems.

In keeping with the international web of environmental regulation, statutory standards are developing in most developing countries. An emphasis is being placed on pre-entry environmental requisites as well as a regulatory framework for post-entry operations. In some cases the environmental issue appears on recent FDI legislations as a special policy agenda. Nevertheless, the environmental issue is still mostly addressed by national environmental laws and regulations with equal application to local and foreign enterprises. However, in some country-specific laws guidelines have been adopted for regulating FDI based pollution-intensive industries in addition to some environmentally sensitive investment activities such as infrastructural development or natural resource extraction.[4]

The emergent laws and policies on the environment at national levels mostly provide guiding principles for environmental protection in general, and the regulation of corporate behavior in particular. Mainly they are principles relating to environmental protection responsibilities, institutional settings for environmental protection, environmental management systems and the overall administrative structure of environmental management. In matters of investment the laws address the aspects of approval procedures for FDI projects, prohibitive and permitted operations, procedures for the utilisation of natural resources, waste management mechanisms, responsibilities for the violation of obligations, compensation and dispute settlements and so on.

Foreign multinationals have been in operation in Bangladesh for last three decades as a source of FDI investments. The investments range over most of the industrial sectors, including some more environmentally risky and pollution-intensive sectors such as infrastructure, energy, minerals and marine resources. Their activities certainly have implications for the country's environment. Some recent incidents have contributed to increased concern for the environmental performance of multinationals. The recent held

[4] For example, the *Interim Provisions on Guiding Foreign Investment Direction of China 1995*, the *Nigerian Mining and Minerals Act 200, Nigeria Oil and Gas Industry Content Development Act 2010*, *Investment Act of 2007 (Indonesia*), and the *Nigeria Extractive Industries Transparency Initiative Act of 2007*.

Tengratilla and *Magur Chara* blowout incidents caused by the Canadian company Niko and the US company Unocal are striking examples thereof.[5]

Bangladesh is notable as one of the top-most risky countries in terms of environmental pollution, and corporate operation is one of the big players there, which is particularly accountable for land-based pollution, river pollution, deforestation, and so on.[6] This is mainly because of the absence of adequate and robust environmental regulations and enforcement mechanisms in consideration of the new sustainable development concept.

In this backdrop, a strong regulatory framework is essential in order to minimise the negative impacts of investments on the environment in order to ensure their significance for the national economy; by and large this means enabling sustainable development by improving environmental sustainability. As FDI operation has an immense impact on environment, the exigency of its integration into national environmental regulation with due specificity is paramount.

Bangladesh has adopted different laws, policies and institutional implementation and enforcement mechanisms since its independence for achieving environmental protection through industrial pollution control and management. They are primarily *The National Environmental Policy* 1992, *The Environmental Conservation Act* (ECA) 1995, and *The Environmental Conservation Rule* (ECR) 1997. As for institutional mechanisms it has a separate ministry for the environment under which a departmental regulatory body named the Department of Environment (DoE) is tasked with the regulation and protection of the environment by adopting or introducing guidelines, and implementing and enforcing the laws and rules.

These laws and policy have no specific reference to FDI-related environmental issues and the DoE has as such no special assignment for the environmental regulation of foreign investment projects. Nevertheless, FDI operations are subject to this law.

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[5] The Tengratilla blow-out had a disastrous effect on the ecosystem of the surrounding region by destroying the dense vegetation, villages, agricultural lands and other property. The soil of the region was seriously affected by the explosion. The soil not only lost its fertility, but also become inappropriate for the construction of heavy structures. See Omni Bangladesh, 'Tengratila Gas Explosion: Its Impact on Environment and Livelihood' on Omni Bangladesh <http://omnibd.blogpost.com.au/2013/04/tenratila-gas-explosion-its-impact-on.html>15 March 2013. The Magur Churra blow-out took place on June 14, 1997, and wreaked havoc on the infrastructure and equipment, the environment and the locality, causing damage to the tune of Tk 4,500 crore. See *Summary of Enquiry Report on Magur Churra Gas Field Blow-out* (Prepared by the National Committee to Protect Oil, Gas, Mineral Resources, 2000)<http://ncbd.org/?p=250> 12 March 2013.

[6] See *Margot B News*, 'Bangladesh Environmental Crisis Campaign' Margot *B News* (16 June 2010) <http://margotbnews.wordpress.com/2010/06/16/bangladesh-environmental-crisis-campaign> 10 March 2013.

For regulating the environmental performance of FDI, a specific environmental accountability needs to be created through the introduction of relevant principles in FDI legislation, enactment of specific laws or through BIT negotiations. In addition, the existing regulatory system needs to be made stronger and more effective with necessary procedural changes in implementation, enforcement, and compliance mechanisms.

In view of the above this chapter mainly focuses on the role of FDI law and BITs in creating FDI environmental responsibility. It looks at the present status of legal and institutional regulation on the basis of the laws and policies, and examines their strength and adequacy essential for ensuring environmentally-sound investment which is capable of contributing to the country's sustainable development agenda. In doing so, it begins with a general discussion on the impact of FDI operations on the environment and their accountability both in international and host state legislations.

Finally it aims to make recommendations for either the integration of environmental accountability and sustainability issues of FDI into FDI laws and policies and also in national environmental laws and policies of Bangladesh, or adopting specific law and regulation for FDI-related investments and also in bilateral treaty negotiations.

5.2 Environmental Implications of FDI: Some Evidence

As indicated above, the first and greatest concern to environmentalists at present is the scale of the impact of FDI activity on the environment. This is because as the main players of FDI TNCs, which are typically larger than domestic firms, are participating in investment in environmentally sensitive sectors on the basis of their requisite production capabilities and thus they are able to create potential risks to the environment. For examples, major natural resource extraction (e.g. mining) and the processing industry involve TNCs. The majority of global wood logging operations are carried out by TNCs. The lion's share of world trade and investment belongs to TNCs which hold about 90 per cent of all technology and product patents.[7]They also play a very active role in resource development industries such as mining, petroleum, and agri-business. It follows that as they account for the largest share of

[7] Harris Gleckman, 'Transnational Corporations' Strategic Responses to "Sustainable Development"', in Helge Ole Bergesen, Georg Parmann, and Øystein B Thommessen (eds), *Green Globe Yearbook of International Co-operation on Environment and Development* (Oxford: Oxford University Press,1995) 94.

economic activities, their impact on the environment must be extensive. To illustrate this more clearly some of environmentally damaging activities of TNCs are pointed out below.[8]

1. TNCs activities are responsible for more than half of the greenhouse gas emissions with the greatest impact on global warming.
2. TNCs predominantly control the production and use of ozone-destroying CFC and related compounds.
3. TNCs manufacture most of the world's chlorine, the basis for some of the most toxic chemicals including PCBs, DDT and dioxins.
4. TNCs are the main transmitters of environmentally unsound production systems, hazardous materials and products to the Third World.
5. In agriculture, TNCs control 80 per cent of land worldwide which is cultivated for export crops; and 20 firms account for 90 per cent of pesticide sales.

In addition, TNCs operation concerns a wide range of pollution-intensive and hazardous industries that have products or processes that may harm the environment or negatively impact upon it.[9] TNCs sometimes export hazardous processes through establishing highly polluting industries outside home countries and thereby create potential problems with pollution control, disposal of hazardous wastes, worker's health and safety, and the risk of major accidents.[10] There are many instances where their activities did not conform to the environmental standards and caused accidents in host countries.[11]

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[8] See Third World Network, *TNCs and Globalization: Prime Sources of Worsening Ecological Crisis* (1992) <http://twnside.org.sg/title/pri-cn.htm> 22 September 2012.

[9] The share of pollution intensive industries in total manufacturing FDI remains at twenty to fifty per cent in developing countries and thirty to sixty per cent in developed countries. See World Investment Report 1992, *Transnational Corporations as Engines of Growth: An Executive Summary*, UNCTAD<http://unctad.org/en/docs/wir1992overview_en.pdf> 23 April 2013.

[10] Robert J Fowler 'International Environmental Standards for Transnational Corporations' (1995) 25(1) *Environmental Law* 1, 9.

[11] For example, the accidents at Seveso, Italy; Bhopal, India; and Basel in Switzerland. The Seveso accident occurred in 1976 at a chemical plant in Seveso, Italy, manufacturing pesticides and herbicides. It resulted in the highest known exposure to 2,3, 7,8–tetrachlorodibenzo-p-dixin (TCDD) in residential populations. The chemical-release accident occurred when a batch process was interrupted prior to the completion of the final step-removal of ethylene glycol from the reaction mixture by distillation, due to conformance with Italian law requiring a shutdown of the plant operation over the weekend. It was reported that the safety operations handled by the company's directors and local government were badly co-ordinated and to some extent incompetent. See *Seveso Disaster* (Wikipedia, the free encyclopaedia) <http://en.wikipedia.org/wiki/Seveso_disaster> 23 April 2013; see also European Commission Environment, *Chemical Accidents (Seveso I, II and III) – Prevention, Preparedness and Response*<http://ec.europa.eu/environment/seveso/> 23 April 2013. The Basel accident was a major environmental disaster caused by a fire and its subsequent extinguishing at the Sandoz agrochemical storehouse in Schweizerhalle, Basel-Landschaft, Switzerland, on November 1, 1986, which released toxic agrochemicals into the air and resulted in tons of pollutants entering the Rhine river, turning it red. The chemicals caused a massive mortality of wildlife downstream, killing among other things a large proportion of the European eel population in the Rhine. See *Sandoz Chemical Spill*, Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/wiki/Sandoz_chemical_spill> 23 April 2013.

Instances of frequent use of potentially dangerous technologies and outdated machinery which are highly pollutant are very much evident in developing host countries. In 1985, the US' Westinghouse Electric Corporation sold a nuclear reactor to the Philippines which did not meet US safety standards.[12] There are other examples like this that can be found of TNCs which met neither their own standards nor the host countries. The Bhopal case is one of the worst industrial accidents in history which occurred due to supplies of outdated equipment in a pesticide plant.[13]

Those companies largely based on the continuing use of unsustainable production systems, in many cases displacing more sustainable systems or lifestyles, are likely to cause more environmental degradation. Because of their greater technological capacity and larger volume of production, TNCs usually have a negative effect on the environment when they undertake new production or export to an area. With the increasing spread and market penetration and share of TNCs and big business concerns, the damaging environmental effect has increased. This effect was confined once to Northern-based companies. But in recent years, there has been a significant increase in the foreign investment and activity of companies based in developing countries, particularly in East and Southeast Asia. Many companies are accounting for a large part of new and increased forest logging and deforestation in Indo-china, the Pacific, and South America.

The incidents of blowout in mining and oil operations by the TNCs, causing large-scale environmental pollution in different developing host countries, are pertinent here. As mentioned above, the explosion of the *Tengratila* gas field in Bangladesh led to millions of cubic feet of burning gas, causing damage to soil and the ecology.[14] A cluster of the forest-dwelling *Khasia*[15] natives sustained irreparable loss and sufferings from eviction, economic, social, cultural and physical trauma.[16] Moreover, the impact of radio-active materials on a large number of people and other species remains unknown.

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[12] See Fox Battlefield, 'Philippines Expected to File Suit Against Washington House', *New York Times* (online), 1December 1988 <http://www.nytimes.com/1988/12/01/business/philipines-expected-to-file-suit-against-washingtonhouse.htm>23 April 2013.

[13] Ved P Nanda & Bruch C Bailey, 'Nature and Scope of the Problem' in Gunther Hand and Robert E Lutz (eds), *Transferring Hazardous Technologies Substances* (Gruham and Trotman, 1989) 3.

[14]See for details M Nasreen, K Hossain and D Kundu, 'The Interrelationship between Poverty, Environment and Sustainable Development in Bangladesh' (2006) 3 (2) *Bangladesh e-journal of Sociology* <http://www.bangladeshsociology.org> 23 April 2013.

[15] Khasia is an indigenous tribal population in the Sylhet division of Bangladesh. See Philip Gain and Aneeka Malik(eds.) , *The Khasis of Bangladesh : A Socio-Economic Survey of Khasi People* (Society of Environment and Human Development , Bangladesh : 2007) 1.

[16] Nasreen, Hossain and Kundu, above n 14.

Mining and oil extraction activities cause soil degradation, deforestation, and pollution of the atmosphere. They contaminate water supplies and have a heavy impact on biodiversity as well. Such degradation is long-term and heavily impacts on human health. Among other diseases it causes respiratory and lung problems, skin rashes, allergies, tumours and can even result in death. The environmental damage caused by mining and extraction activities is often irreversible or else renewal takes a long time, thereby impacting on future generations as well.

There are many factual evidences of the negative impact of mining operation on the environment. A study by the OECD on the environmental effects of foreign investment in the mining sectors of Latin-America reveals that in Chile, some TNCs operating in mining are responsible for air and water contamination.[17] Sulfur emissions from copper smelters are one of the major environmental concerns for human health and the natural environment, affecting not only the immediately surrounding's natural ecosystems but also agricultural products.[18] Another example is the rivers *Lao* and *EI Chanaral* which due to large scale mining operations have been increasingly contaminated.[19] A study carried out by the *Universidad de Chile* shows that the river Loa has consistently exceeded the regulated levels for arsenic in irrigation and drinking water.[20] The mining operations, through air and water contamination and land degradation, may even create the effect of climate change.

On the issue of tropical deforestation, NGOs have pointed out that corporations such as British Petroleum, Shell, and Mitsubishi bear a large responsibility for forest devastation worldwide. In 1989, the *Sunday Times* directly accused British Petroleum and Shell of contributing to the depletion of the Amazon rainforest in Brazil.[21] More recently the Rainforest Action Network (RAN) accused Mitsubishi, together with its subsidiary Meiwa, of being the greatest corporate threat to the world's tropical, temperate, and boreal forests.[22]

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[17] OECD, *Environmental Effects of Foreign Investment versus Domestic Environment in the Mining Sector in Latin America* (2002) <http://www.oecd.org> 23 April 2013.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] See *The Sunday Times*, 20 June 1989: see for discussion Valerie de Campos Metto, 'Mainstreaming the Environment: Global Ecology, International Institutions and the Crisis of Environmental Governance' (2000) 7(1) *Human Ecology Review* 31, 37.
[22] Rainforest Action Network, *The Japanese Involvement in Tropical Timber Trade* (1991c, Fact sheet 23a) <http:// www.ran.org> 20 May 2014. See also Raphel Schaub, *Transnational Corporations and Economic Development in Developing Countries* (Master's Thesis University of Zurich, 2004 <www.pik potsdam.de/members/edenh/theses/masterschaub.pdf> 20 August 2012.

In view of the evidence of environmental damage caused by MNCs, it can be said despite their ability to use better environmental technologies and management practices than the local companies in the host countries do, their relative lack of accountability leads to large scale environmental damage. There are several associated contributory factors to this pattern: decisions are taken at home but the effects are felt abroad; environmentally sound plans are confined to paper work and not translated into real practice; and the host country government may fail to duly supervise and control environmental effects, or in many cases there is lax environmental regulation.[23] It also happens that MNCs sometimes make explicit decisions to cut costs and improve profits by opting for activities and process inconsistent with good environmental practice. Hazardous and polluting activities are exported from home countries to lesser-developed countries precisely to avoid the strict regulation at home.[24] Indeed, their tendency to evade environmental responsibility is aided by less stringent laws and regulations in the host countries and greater tolerance of the affected population.[25]

5.3 Legal Regulation of MNCs for FDI-related Environmental Operation

In the face of the need to regulate the TNCs environmental performance, the issue of environmental regulation and management has emerged as a grave concern among the national and international community. As a result, different guidelines, directives, regulatory forces and multilateral arrangements have been developed during the last couple of decades at the international level in order to regulate the environmental performance of TNCs.

In this process, the UN and OECD have played an important role and undertaken some essential measures to establish a regulatory framework on the basis of the expectation of the international community to ensure environmental sustainability, particularly in developing economies affected by the operations of TNCs, by promoting environmental safety and security. Alongside this, concern has grown among the home states to control the activities of their corporations by making them responsible for causing any environmental and other civil damage in foreign territory. Likewise, the need for regulating FDI operations of TNCs which has the potential to affect the environment is being felt strongly by the governments

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[23] Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?' (2002) 41 *Washburn Law Journal* 399, 403.
[24] For example, after the UK based Thor Chemical Company came under criticism from the UK Health and Safety Executive for exposing workers to mercury, it exported its processes and machinery to South Africa to carry on the same hazardous production while avoiding UK regulation. See *Sithole & Others v. Thor Chem. Holdings* Ltd., (1999) 96(9) L.S.G.32 See generally Jane H Ives, *The Export of Hazard* (Routledge & Kegan Paul, 1985).
[25] Anderson, above n 23, 403.

and policy-makers of the host countries suffering an increase in violations of and laxity in the compliance of international environmental standards. Therefore, efforts have begun through unilateral legislative reform by the host states or through bilateral treaty negotiations between home and host states to ascertain and regulate the FDI-related environmental responsibility of MNCs.

5.3.1 International regulation

In the recognition of the environmental implications of MNCs activities there has been a continued effort over the past 50 years by NGOs, governmental agencies, and international organisations to push for an international legal framework to regulate MNCs and their environmental practices through FDI operations in developing countries.[26] In response to this move, certain measures have been undertaken and standards have been set for MNCs environmental conduct, which are mostly soft in nature. However, judging from existing international regulations a few provisions appears to be binding that constrain the environmental practices of foreign investors such as the *Montreal Protocol*, which prohibits companies from relocating CFC production to developing countries.[27] Likewise, the *Basel Convention* prohibits the transfer of scrapped production equipment to developing countries.[28] The draft text of the now moribund MAI also contained specific environmental provisions for TNCs. The major instruments dealing with soft regulations which almost provide a regulatory framework include *Agenda 21*, the *OECD Guidelines for Multinational Enterprises* and the *OECD Guiding Principles for Accident Prevention*, the *Energy Charter Treaty* (a multilateral investment agreement signed in 1994), and the *Principles of Global Compact 2009*.

The *OECD Guidelines for Multinationals* in fact was designed first in 1976 with a set of soft directives to be carried out within OECD countries including a wide range of issues such as information disclosure, taxation, labour relations and the environment. Later in course of its regular periodic revision, a chapter was added in 1991 and further updated in 2000 which focused on the environmental responsibilities of TNCs operating in non-OECD countries. The chapter prescribes that 'TNCs should take due account of the need to protect the

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[26] Jorge Rivera and Chang Hoon Oh, 'Environmental Regulation and Multinational Corporations' Foreign Market Entry Investments' (2013) 41(2) *Policy Studies Journal* 243, 245.

[27] See the *Montreal Protocol on Substances* (1989) art. 2 A.

[28] See the *Basel Convention on the Control of the Transboundary Movement of Hazardous Wastes and Their Disposal* (1992) art. 4 (2). This is mainly a trade issue, not a production issue, although there may be broader cases where a TNC is transferring an old production technology to affiliates in developing countries.

environment, public health and safety within the framework of laws, regulations and administrative practices of the host countries where they operate'.[29] In this regard, some major suggestions are made for TNCs such as: (1) to adopt 'measurable objectives' and where appropriate, targets for improved environmental performance; (2) to hold consultation with affected communities and allow their access to information on the environmental activities; and (3) to assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle.[30] These suggestions can be used as recommendations to TNCs but they are not legally binding. They are merely to encourage TNCs to perform their environmental responsibilities in the place of operation.

In addition to these *Guidelines*, another voluntary standard was developed by the *OECD Guiding Principles for Accident Prevention*. It provides a key principle for ensuring safety measures in the installations of affiliates in non-OECD countries. It explicitly states that hazardous installation in non-OECD countries should meet a level of safety equivalent to that of similar installation in OECD countries.[31]

Agenda 21 came out of the United Nations Conference on the Environment and Development that took place in Rio de Janeiro, Brazil, in 1992 which was organised to bring the question of sustainable development to the forefront of development. It focuses on many social, economic and environmental issues specifically applicable to TNCs. A chapter of this document titled 'Strengthening the Role of Business and Industry' is exclusively meant for dealing with the operations of TNCs. The chapter provides some recommendations including annual reporting by the TNCs and other industrial actors on their environmental record as well as on their use of energy and natural resources. Its purpose was to promote sustainable development with implication for business.

In addition, for an effective regulation of TNCs *Agenda 21* sets 32 references to the responsibilities of TNCs in their production, consumption, and management levels, reflecting a sustainable development agenda. Accordingly the standards are set in eight different technical sections including, *inter alia* global corporate environmental management, environmentally sound production and consumer patterns, risk and hazard minimisation, and

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[29] See the *OECD Guidelines for Multinational Enterprises* (2000, updated in 2011), Ch. V.
[30] Ibid.
[31] See OECD, *OECD Guiding Principles for Chemical Accident Prevention, Preparedness and Response* (2nd ed., 2003) Chapter 2 <www.oecd.org>10 March 2013.

annual emission reporting.[32] In the area of global corporate environmental management, nine responsibilities are stated with suggestions for adopting worldwide common policies on sustainable development to ensure responsible and ethical management of processes from the point of view of health, safety and environmental aspects.[33] Similarly as part of environmentally sound production and consumption patterns, the emphasis has been placed on the integration of a cleaner production approach throughout the product life-cycle and the transfer of environmentally sound technology to affiliates or subsidiaries in developing countries.[34] The tasks and responsibilities articulated in Agenda 21, although non-binding may contribute to the formulation of a corporate code of conduct as well as improving the commitment levels of corporations in their operation.

The issue of the global environmental governance of TNCs in their investment activities historically began with the initiative of the UN Centre for Transnational Corporations (UNCTC).[35] In 1977 the UNCTC embarked upon negotiations on a globally applicable voluntary *Code of Conduct* for TNCs which contained provisions on environmental conduct and outlined the rights and responsibilities of TNCs. The purpose of this proposed *Code of Conduct* was to ensure that FDI does not have adverse consequences in economic, social and environmental areas. The negotiations for forming such a code continued from the 1970s to early 1980s, but it was never finalised or adopted.

However, in 2000 an initiative was taken through the *Global Compact* (*GC*), a pact between the UN and global business led by the then Secretary General Kofi Annan, that asked corporations to promise to become responsible corporate citizens by adhering to nine principles (which were later amended to ten in 2002) consisting of social, environmental, and human rights, and to incorporate them into their mission statements as well as their operations. It is simply a commitment by global corporations to consider mainstream environmental and social issues in their business operations. With respect to the environment, three major guidelines are proposed where corporations are asked to support a precautionary approach, to undertake initiatives to promote environmental responsibility, and to develop and diffuse environmentally-friendly technology.[36] The status of outlined principles in the *GC* is voluntary in nature and no monitoring mechanism has been built up under the UN

[32] See Gleckman, above n 7, 104.
[33] Ibid.
[34] Ibid.
[35]THE UNCTC was set up in the early 1970s, which was mandated to monitor the economic, social and environmental impact of TNCs, particularly those operating in developing countries.
[36] See *United Nations Global Compact* (2002) principles 7, 8, 9.

except the voluntary reporting to the Secretariat for the corporations that have signed on. Thus it is criticised for creating no real accountability on the part of corporations.[37] It has also been criticised by NGOs as a 'blue-wash', arguing that TNCs are not doing much to improve their environmental and social practices and are using the *GC* as a way to wrap themselves up in the UN flag.[38]

Given the above it has been settled that the governing framework for TNCs as produced by the international instruments so far do not establish any legally binding accountability of the corporations for damages caused by their operation, due to its being devoid of the character of a law-making treaty. It is however true that the *GC* has introduced the idea of environmental governance for the corporations engaged in cross-border operations that can be well pursued in formulating national frameworks for that purpose. The gap or absence of a legally binding mechanism under a multilateral mechanism to some extent has been removed by the negotiations of bilateral investment treaties for addressing environmental obligations of investor companies. In addition, TNCs should observe the international guidelines because they are the expression or reflection of the international community's expectations about appropriate corporate conduct.[39]

5.3.2 BIT's role for the environmental regulation of FDI

The incorporation of environmental issues in relation to FDI operation has become more common in International Investment Agreements, particularly in BITs. The first environmental issue was addressed in the 1985 China-Singapore BIT.[40] Ever since, over more than a decade, a sizeable number of BITs has made references to environmental issues as part of policy purposes between investors and host countries. Another ten years later, in 2005, the proportion of references in newly concluded treaties has increased and passed the threshold of 50 per cent of new treaties concluded in a given year.[41]

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[37] Jennifer Clapp, 'Global Environmental Governance for Corporate Responsibility and Accountability' (2005) 5 (3) *Global Environmental Politics*, 23, 28.
[38] Ibid.
[39] AM Rugman and Alain Verbeke, 'A Corporate Strategy Framework for the Analysis of Trade and Environment' (A paper presented to the AAM Conference, Autumn 1997); See also Michael W Hansen, 'Cross Border Environmental Management in Transnational Corporations' (Occasional Paper No.5, June 1999) <www.ikl.cbc.dk/departments/ikl/cbem> 22 October 2012; AM Rugman and Alain Verbeke, 'Corporate Strategy and International Environmental Policy' (1998) 29 (4) *Journal International Business Studies* 819, 827.
[40] Kathryn Gordon and Joachim Phol, 'Environmental Concerns in International Investment Agreements: A Survey' (Working Paper on International Investment No. 1, OECD, 2011) <www.oecd.org/daf/investment/workingpapers> 17 October 2012.
[41] Ibid.

Most references to environmental concerns as identified in one study reflect seven distinct policy matters.[42] These include: 'contextual language in preamble' establishing protection of the environment as a concern of the parties to treaty;[43] 'not lowering environmental standards' with a view to attracting investment; 'reserving policy space' pertaining right to environmental regulation; 'reserving policy space' for environmental regulation for specific subject-matter; 'right to regulate in relation to specific treaty provisions'; 'dispute settlement on environmental matters'; and 'inter-governmental consultation on environmental issues'. Although the environmental issues addressed in the BITs vary in their approach on the basis of the negotiations of the concerned parties, the issue of the right to regulation is the most common category of language. Most treaties vest this right with host states.[44] This is because with the increasing growth of FDI by MNCs environmental security and protection has become a significant concern among the host countries. Thus the host countries are largely motivated to negotiate the integration of regulatory aspects in the treaty texts with an objective to create accountability of the operating company for achieving the ultimate benefit of sustainable development.

The reference to 'environmental regulation' explicitly used in BITs contains a set of environmental issues within the purview of the objectives of environmental protection. These objectives include sanitary and phyto-sanitary measures protecting human, animal and plant life or health, conservation of living or non-living exhaustible natural resources, and the protection of national treasures of artistic, historic or archaeological value. To achieve these objectives, references are also available in some investment agreements through the application of prevention-control-conservation policies undertaken by operating corporations as well as host governments. The listed measures as available in the treaty texts include the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants; control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information thereto; and protection or conservation of wild flora or fauna including endangered species and their habitat, and specially protected natural resources.[45]

The reference of 'right to environmental regulation' in BITs creates the advantages of reciprocity of rights and obligations between the host state and the investors or other contracting party. This indeed creates an obligatory regime for the manufacturing

[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.

corporations of both contracting parties in their operational activities affecting the environment and enables the host countries to exercise freedom of control over their operations in the same areas. This mutually obligation-creating effort by BITs as growing in trend, although limited to agreed parties, can be elevated to the customary principles of international law to be bound by the parties and may be pursued in their national legislations.

The second more growing environmental reference in BITs as identified is 'not lowering environmental standards' to attract investment.[46] Once it was a common practice, particularly in developing or transitional economies, to provide regulatory incentives to investors even to the detriment of environmental protection. The most polluting industries tended to relocate in a country with a weaker environmental policy. The use of the phrase 'not lowering environmental standards' or a phrase similar in meaning provides guidance for contracting parties to shape their environmental regulation for foreign investment through treaty negotiation. It is not appropriate for the parties as revealed by the BIT texts to encourage investment by relaxing domestic health, safety, or environmental measures. The inclusion of this type of phrase obligates parties to respect existing environmental standards and discourages the states competing for investment against lowering environmental standards. In another words it suggests the contracting parties not to derogate from or offer to waive or otherwise derogate from respective international environmental standards as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment or an investor.

Apart from these two references in relation to environmental regulation other issues are gaining currency in BITs in order to provide for comprehensive environmental regulation of FDI. However, some environmental threats such as climate change and depletion of the ozone layer are still to take central stage among environmental concerns. Among other environmental references two issues are considered vital in this context, one being related to the settlement of environmental disputes between investors and host states. Another relates to the progressive promotion of environmental protection and cooperation. The reference to a dispute settlement mechanism as made in the Model BITs of NAFTA-based countries provides for procedural provisions of arbitral tribunals on environmental law parallel with ICSID. A relevant sample clause reads like the following:

[46] Such clauses have appeared in BITs since 1990 and in NAFTA since 1992. NAFTA, article 1114(2) reads: 'The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor'.

> … a tribunal , at the request of a disputing party or, unless the disputing parties disapprove , on its own initiative, may appoint one or more experts to report to in writing on any factual issues concerning environmental, health, safety or other scientific matters….[47]

The reference to the progressive promotion includes a general call for the strengthening of environmental standards. The relevant clauses in the BITs reflect the reaffirmation of commitments of the contracting parties under the environmental agreements to be implemented or recognised by their domestic legislations. The clauses also reflect on general cooperation in environmental matters. They read 'the contracting parties recognise that cooperation between them provides enhanced opportunities to improve environmental protection standards'.[48]

Given the environmental references in BITs as discussed it is evident that the relevant provisions may constitute a framework for environmental regulations binding for foreign investors. The bilateral treaties, although not law-making in general, create obligation in principle upon the respective parties, as stated earlier. However, they supplement the national legislations and in some cases complement them. In addition, the standards as set by the bilateral treaties for environmental protection and promotion may have influence on or be pursued in a national legal framework. But the difficulty is that BIT guidelines generally do not supersede or bypass the national law regulatory provisions as they are usually designed in pursuance of existing laws of contracting parties. Therefore a strong regulatory regime both in the home and host state is simultaneously essential.

5.3.3 Home state regulation for MNCs

As there are limited international regulations directed to the environmental conduct of TNCs in the foreign lands and the related provisions in BITs have not assumed the status of general principles of international law, home countries should have measures in place to address the foreign environmental practices of their TNCs. Such provisions are exceptionally rare as this practice may raise the question of extra-territoriality and have the potential to collide with the obligations of other trade agreements, BITs, and the national environmental laws as well.

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[47] See *Canada-Jordan BIT (2009); Canada-Peru BIT (2006); Mexico-United Kingdom BIT (2006); United States-Rwanda BIT (2008); United States-Uruguay BIT (2005); US Model BIT (2004), Article 32; Canada Model BIT (2004).*

[48] See *Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Peru BIT (2005); Belgium/Luxembourg-Tajikistan BIT (2009); Belgium/Luxembourg-United Arab Emirates BIT (2004).*

In the US, a proposal was made that US environmental standards should pertain to the US affiliates abroad. Most recently this issue has been included in NAFTA negotiations, but not succeeded in legislative action.[49] However, the US judicial system has established the accountability of the US companies for accidents at non-US production facility at courts.[50]

Although the investing companies, as per sovereign rule, are subject to host state regulation in their environmental conduct, all the home states of TNCs have power of control over them as their citizens to ensure that they conduct themselves in accordance with the standards in the international law on the environment. There is therefore a duty on the part of the home state to ensure TNCs' compliance with international environmental standards. A home state can make its corporations responsible for the violation of environmental standards in their operations in the host states through the exterritorial application of national laws. This practice has become popular in recent decades due to the universal character of issues such as the environment and human rights and the need to reinforce mutual and universal values and interests.[51] Recently, as in the case of human rights, the alleged violation of environmental standards is increasingly appearing in the litigation before domestic courts of home states.

In this respect, the practice of the US based on the *Alien Tort Claims Act* (ATCA) is well known across the economic world. As an example, The TNC Freeport-Mcmoran was sued in the US for the violation of environmental and human rights standards.[52] *Ken Wiwa v Royal Dutch Petroleum Company and Shell Transport and Trading Company*[53] arose out of the alleged violation of human rights and environmental damage caused to the Ogoni People of Nigeria, and the Court in Nigeria held that the case could be heard again in the US.

This kind of exterritorial application of domestic law in making their own companies responsible for their violation of international standards of environment and human rights has begun in the EU countries. With regard to the practice of the UK, a British citizen sued the Rio Tinto Zinc group in the UK for injury to his health when working for their

[49] A Neff, 'Not in their Backyards, Either: A Proposal for Foreign Environment Practices Act' (1990) 17 (477) *Ecology Law Quarterly* 477, 494.
[50] Michael W Hansen, *Cross Border Environmental Management in Transnational Corporations: An Analytical Framework* (Occasional Paper No.5, June 1999) <www.ikl.cbs.dk/departments/ikl/cbem> 19 October 2012.
[51] Shyami Fernando Puvimansinghe, *Foreign Investment, Human Rights and the Environment: A Perspective from South Asia on the Role of Public International Law for Development* (Martinus Nijhoff publishers, 2007)166.
[52] *Beanal v. Freeport-Mcmoran* (1 997), US District Court of Louisiana, F.Supp.362.
[53] (2000) 226 F. 3d 88, 96 Civ.

subsidiaries in South Africa. The House of Lords held that companies based in the UK may be subject to suits for wrongs committed by them or their subsidiaries abroad.[54]

Home state regulation through exterritorial application of domestic laws raises some debates. It is argued that it may lead to higher standards of environmental and civil rights protection with high potential for just, equitable, as well as effective solutions. Efficacy is the prime justification for its use. This practice is based on the idea of forging mutual and universal interests.

However, exterritorial practice is likely to raise a different set of problems, including excessive dependence on home countries and their legal systems, a lack of uniformity resulting in uncertainty and unpredictability, as well as possible conflict with international law and state sovereignty. If thought through realistically on the basis of present global references, only a few countries which are economically capable enough are applying home state laws, which cannot set a common principle of home state regulation in this area. Moreover, territoriality could lead to different home states applying different standards to different TNCs in different host states. It is not justified in a sense to transfer the host state's right to take action when a wrong has been committed by a company to that country's home state. This appears to be legal imperialism and interference with the sovereignty of other states. If the action is taken by both states as in the right to exercise legal jurisdiction on the basis of incorporation, registration and legal presence, that would be utterly unethical because of the application of the principle of 'res-judicata'. Therefore, it is logical that the host state will regulate the subsidiaries of foreign companies or affiliates engaging in FDI operation and make them responsible under its own law, if their performance affects environmental and social issues.

5.3.4 Host state's right to regulation of FDI by MNCs

The host state in principle deserves the right to regulate the operation of MNCs engaging in foreign investment from entry to exit. This right is prerogative and is confined to activity which takes place entirely within the territorial boundaries of the state. Under the cover of this right, a host state is entitled to adopt, maintain or enforce any legal and policy measures that it finds appropriate to ensure that the investment activity is undertaken in consideration of environmental protection. The right of regulation is seen as very vital for developing host

[54] Puvimansinghe, above n 51, 167.

countries in view of the development dimension of FDI and thus remains a stumbling block that cannot be avoided.

In 1992, although not directed exclusively to FDI operation, the Rio Declaration suggested the states in general, among others, to enact effective environmental legislation, to develop national law regarding liability and compensation for the victims of pollution and other environmental damage, and to require environmental impact assessments (EIA) for new projects.[55]

The previously aborted *UNCTC Code of Conduct* also asserted the right of a host country to regulate TNCs and the latter's duty to respect the territorial sovereignty of the host states. In this respect, the *Code* suggested a nexus be made between international and local laws so as to build up uniform environmental standards through state practice. According to para 41 of the *Code*, Transnational Corporations shall carry out their activities in accordance with national laws, regulation, established administrative practices and policies relating to the preservation of the environment in the countries in which they operate and with regard to international standards.

The progressive evolution of right to a clean environment as a human right and as a norm incorporating higher values also leads to an inflexible right for the state to interfere in order to protect the environment and to regard this interference as not amounting to a 'taking' which is not compensable.[56] But the right must be exercised on objective grounds**.** It means that the measures are induced by purely environmental considerations, no other things are intended. The environmental regulation should be motivated by the achievement of sustainable development in the host country. It must not amount to 'regulatory taking'. In *Elena* vs *Costarica* it was observed that the environmental regulation is permissible and such regulation should not be treated as expropriation in circumstances in which the primary motive for interference was protection of the environment.[57]

Given the above, the first principle for host countries would be that it is never appropriate to encourage foreign investment by relaxing or waiving domestic health, safety or

[55] See *Rio Declaration on Environment and Development 1992*, Principle 11. This principle states that States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.
[56] M Sornarajah, the *International Law on Foreign Investment* (Cambridge, 3rd ed. 2010) 11.
[57] Ibid.

environmental measures or their enforcement.[58] The host states should have laws requiring the environmental regulation of FDI. This has already become a fundamental phenomenon of FDI regulation internationally as endorsed by the OECD and most of the Free Trade Agreements (FTAs) such as *NAFTA*. It is notable that the OECD countries despite being the largest recipients of FDI are not much concerned about the environmental impacts of FDI and the reintegration of environmental issues into laws; because they have already a strong legal framework in place providing the structures and rules to ensure that investors act responsibly, including toward the environment.[59] On the other hand, although environmental regulation is highly crucial, host states of the developing economy often lack stringent legislation for this purpose, considering it to have the potential to create adverse economic consequences. They also often relax foreign investment laws and even though they are purportedly in the pursuit of sustainable development, rarely adopt a holistic approach in the sense of rationalising laws on FDI and broader social and environmental concerns.

But for development through FDI the developing host states should adopt a comprehensive regulatory regime in order to establish environmental control on FDI operation of MNCs. A comprehensive regulatory regime can be created from the host country perspective generally in two ways; by necessary amendment into FDI laws and also by effective modification or changes in the existing environmental legal regime or introducing specific environmental regulations for FDI. Broadly speaking, for this purpose foreign investment laws need to be holistic, and address the environment and development concerns with a cradle-to-the-grave approach, taking into account the rights and responsibilities of the different acts involved.[60] National investment laws should go beyond economic concerns allowing the host states to exercise sovereignty–based rights in deciding whether to grant entry to an investment or cancel an operation on the basis of negative environmental and social impact. Similarly, host countries' laws on the environment and development and their implementation need to be enhanced. The host state regulation for TNCs requires an international law basis, for legitimacy, credibility, acceptability, and efficacy.[61] Therefore, the national laws and policies should pursue the body of international law and multilateral instruments on the responsibilities of TNCs and sustainable development. Apart from the said two major legal instruments at the national level of the host country, addressing environmental issues through

[58] OECD, *Report on Trade and Environment to the OECD Council at Ministerial Level* (1995) <http://www.oecd.org> 22 October 2012.
[59] Greeta Goldenman, 'The Environmental Implication of Foreign Direct Investment: Policy and Institutional Issues' (Paper presented at an OECD Conference on Foreign Direct Investment and the Environment, Netherlands, 28-29th January, 1999).
[60] Puvimansinghe, above n 51, 171.
[61] Ibid.

BIT provisions as mentioned earlier can significantly contribute to creating a comprehensive environmental legal regime dealing with FDI.

In view of all the essential aspects of environmental regulation developed so far for a comprehensive and adequate environmental regulation of FDI, the host state's role should include three major issues into the legal framework, namely, (a) effective, predictable and transparent governance; (b) measures to hold investors responsible for their environmental practices; and (c) control to ensure accountability of those government officials who make decisions concerning whether to permit the investment to proceed and under what circumstances.[62] All these three are said to be simultaneously gaining currency in the formulation of environmental legal framework to be applied consistently and indiscriminately to all investors.

The rationale for the integration of these three points into a legal framework is that effective government is one of the essential elements which influence an investor's confidence about making a long-term investment in a country. In this sense, there is no conflict between economic development and environmental regulations as the effective governance and good management of the environment are widely recognised as a contributory element to corporate sustainability as well as sustainable development. Similarly, the allocation of investors' responsibility and integration of public accountability in policy with regard to environmental protection make a country's regulatory framework predictable, something which with investors are particularly concerned. At the same time, the responsibility of the government officials who are involved in policy making for the permission and approval of foreign projects, their operation and maintenance is paramount.

In view of the above discussion, it is reiterated that a combined approach of national investment and environmental laws and BITs in relation to providing a concrete environmental accountability regime from host country's own perspective is a better way. It is true that there are many challenges in formulating such a legal framework for environmental regulation in consideration of whether it is likely to give rise to a discriminatory practice for foreign investors. Nevertheless this is a growing initiative in developing host countries in the exercise of their sovereign rights in order to reap the real benefit of FDI in the truest sense.

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[62] Goldenman, above n 59.

5.4 Legal and Policy Regulation for Environmental Protection in Bangladesh

5.4.1 FDI law and policy

The legislation enacted in 1980 for the promotion of foreign direct investment in Bangladesh does not provide any provision creating responsibility for investors to ensure environmental protection in their performance. There has been no further amendment of this text to date until now to address any emerging global concern such as the environment or human rights or to cater for the current developmental need. This law is mainly intended to stimulate the investors by offering a combined approach of incentives and protection for investment, where duties and obligations of investors are absent entirely. Therefore it includes some very traditional and common contents of FDI legal regime as contained in most of the FDI-related laws of developing host states, such as the principles of fair and equitable treatment, safeguarding foreign investment from expropriation and nationalisation, and assuring repatriation of finance and profit. It can be argued that it is not essential that environmental issues be integrated into the original text of investment law, as the environmental issues of foreign investment are automatically the subject of existing national environmental law principles and regulations. But the advantage of mainstreaming the environmental issue into the legal framework is that the investment law would be more predictable by the investors, more specific and also more comprehensive. Textual specificity of any legal provision is very much important for its due application and enforcement.

This issue, however, can be introduced in the policy framework or in the admission and approval process designed for foreign investors by authorised governmental agencies. For example, in 1995 China promulgated two official documents regulating FDI. They are '*Interim Provisions on Guiding Foreign Investment Direction'* and 'the *Guiding List of industries for Foreign Investors'*.[63] Under these two official documents, the FDI projects are divided into four categories on the basis of economic and social prospects and priorities. One of them is a prohibited category that covers projects which are likely to jeopardise national security, adversely affect social and public interests, pollute the environment, destroy natural resources or impair the health of human beings.[64] These documents also provide guidance for policy implementing agencies in screening FDI with a view to maximising its benefits to the

[63] See for discussion Xian Guoming, Zhang Cheng, Zhang Yangui, Ge Shunqi and James X Zhan, 'The Interface between Foreign Direct Investment and the Environment: The Case of China' (Occasional Paper No.3 as part of UNCTAD/DICM Project Cross Boarder Environmental management in Transnational Corporations, Copenhagen Business School, 1999) <www.cbs.dk/departments/iki/cbem> 22 November 2012.
[64] *Interim Provisions for Guiding Foreign Investment* 1995 (China) art.7 (2).

development process and minimising its negative effects with special reference to the environment. Furthermore, it has also promoted a post-approval screening and monitoring system including the adoption of a mechanism of joint annual inspection and audit of foreign investment enterprises to ensure that TNCs operations are in line with host country's laws and regulations.[65] In addition, the *Regulation for the Implementation of the Chinese-Foreign Equity Joint Venture* stipulates that projects with a negative environmental impact should not be approved.[66]

In Bangladesh there is still an absence of any public document specifying the issue relating to environmental protection for foreign investors. Nevertheless, the national industrial policy as updated and revised periodically since 1992 with necessary reflection on latest economic developments, industrial and foreign investment policy re-orientation and priorities, underscores the need for environmental protection and provides a guideline for pollution management applicable to both foreign and internal investors. The review of the previous policies, particularly of 2010 reflects on three suggestions that are connected with environmental protection by investment projects or enterprises.

Firstly it lays strong emphasis on the protection of the environment and directs manufacturing enterprises to control environmental pollution by setting up effluent treatment plants (ETPs) and strictly compliance with environment-related law and regulations.[67] It also suggests the government adopt appropriate measures to assist private sector enterprises in the environmental management of their operation and to enable them to desist from such activities as may cause environmental pollution.[68]

Secondly the policy considers FDI not only as a means of complementing domestic resources for industrialisation, but also a source able to contribute to holistic development. It thus provides a condition for new technology to be brought in by the foreign investors in the country and strict screening of FDI will take place for that purpose. Foreign investors shall not be accorded permission to invest and conduct business in the country unless they bring in the latest technology.[69]

[65] Ibid, art.10.
[66] See *The Regulation for the Implementation of the Chinese-Foreign Equity Joint Venture* 1983 (China) art.5.
[67] *The National Industrial Policy 2010 (Bangladesh)* ch.13 (entitled 'Protection of the Environment').
[68] Ibid.
[69] Ibid, section entitled 'Policy toward Foreign Direct Investment'.

Thirdly the industrial policy has divided all industries broadly into two categories: thrust sector industries and regulated industries.[70] There are almost 30 thrust sector industries in which investments are encouraged with lesser regulation, and 17 regulated industries where investments are restricted.[71] The investments in the regulated sectors are subject to a strict registering process under the BoI, BSCIC and BEPZA. Their registration by the said agencies is conditional on the prior express approval of the concerned ministry. The main regulatory issues of these industries concern the environment, and worker's health and safety.

The policies as adopted under the NIP sound well and pragmatic as they reflect much concentration on environmental issues in investment. But the reality is that the condition for screening of new technology, while in the policy directives is yet to be translated into binding legal provision. In addition, the division of the industries seems to be based on the economic perspective and labour-intensiveness. The governmental incentives are allocated largely for thrust sectors as they contribute a greater amount of national revenue; these include the garments and leather industries. These industrial operations also have implications for the environment. But the environmental regulation at the entry stage is concerned only for potentially risky sectors, not in general. Environmental regulation is a lesser concern in thrust sectors due to their economic benefit. The regulation criteria for the environment and health and safety need to be imposed irrespective of economic concerns.

5.4.2 BITs and environmental accountability

Given one of the preceding sections it has been settled that reference to the environmental protection in BITs is a very recent trend. In the absence of any explicit provision in host state legal frameworks, introduction of such a provision in the BIT regime complements or acts as a make up for national legislations and creates mutual obligation upon the parties concerned. Bangladesh has thus far been in BITs with 36 countries among which 29 are reportedly enforceable.[72] The first treaty was with the US concluded in 1986 and from then until 2009 no treaty contains any reference to environmental protection or the environmental responsibility of the investors.

[70] Ibid, sections entitled 'Thrust Sector Industries' and 'Regulated Industries'.
[71] See for details in the chapter 3 of this thesis.
[72] See Board of Investment, Bangladesh, *Investment Handbook (2009)* 42 <http://www.scribd.com/doc/62008610/BOI-Handbook-2011> 09 December 2013.

In 2009 Bangladesh drafted a model BIT[73] text that contains an explicit reference to the environment and health and safety concerns. Immediately after the drafting of this model text, a BIT concluded with Denmark pursues this principle in the fullest term. The wording of the principle articulates a vital point of foreign investment from the host country development's perspective by prioritising the environment and human health and safety issues. It says that 'investment objectives should be achieved without relaxing health, safety and environmental measures of general application'.[74] In another words, it means that the development objective of FDI should not be achieved at the compromise of the protection of health and safety and by lowering environmental protection standards. So the general inference from this provision is that Bangladesh as a host country should take into prior consideration the issues of environmental protection and the protection of human health and safety in negotiations and in concluding BITs with the counterpart state.

It is also noteworthy that the model BIT adds a provision that suggests determining the accountability of the investors for his act or omission causing damage or destruction to human health and environment. The provision reads: If the Contracting Party in whose territory the investment is made, suffer from a loss, destruction of damages with regard to its public health or life or the environment, including natural resources by the investors of the other contracting party, then the first contracting parties shall be accorded adequate and effective compensation as per its laws and regulations, and if necessary as per international law, by the investor of the other contracting parties.[75] The substantive nature of these two provisions with regard to the environment and human life reflect on the requirement of environment protection and management in the operation of investment projects by foreign investors.

The incorporation of such an environmental reference in the model text is obviously a good attempt leading to mutual negotiations with investors to determine the nature and character of concerned regulatory measures. Accordingly, when it is placed in a BIT with another country it will gain legal status. However, there are subtle weaknesses and gaps noticed in the formulation of this provision. Firstly, the phrase 'environmental measures of general

[73] A model BIT acts as a guideline to address the incorporated issues for negotiations to draft a BIT to be binding mutually.
[74] See *The Reciprocal Agreement on the Promotion and Protection of Foreign Direct Investment between Bangladesh and Others* (2009) art.4.
[75] The *US Model Bilateral Investment Treaty* 2012 (entitled ' *Treaty between the Government of the United States of America and the Government of (Country) Concerning the Encouragement and Reciprocal Protection of Investment*) 2012, art 3 <www.ustr.gov/sites/.../BIT%20text%20for%20ACIEP%20Meeting.pdf> 20 May 2013.

application' in the text appears to be rather ambiguous in meaning, although it sounds encompassing. It is not clearly indicative to the laws applicable in the context either national or international. It may however be construed as environmental measures that emanate from general principles of international law, as well as the national legislations of the contracting parties. But the clarity and categorical expression of the provision is essential for better understanding of the extent of accountability, as is seen in some recent model BIT practices. For example, the US model text suggests compliance with domestic environmental laws and policies and multilateral environmental agreements to which contracting states are party.[76] It categorises the environmental measures and their application procedures[77] under a specific section and thus become so clear and transparent that can be recommendable for all other BITS as an ideal in the said respect.

Secondly, the wording of the provision is not direct and thus less reflective on the context of creating obligation. The wording needs to be in a manner that clearly indicates the nature of the provision or principle. This is evident from some model BITs of the Southern African Development Community (SADC). In imposing an obligation, firstly the model BITs state that investors and their investment shall not [establish], manage or operate investment in a manner inconsistent with international environmental standards adopted by the host states.[78] It also imposes a duty on the investor to comply with environmental and social assessment screening criteria and assessment process as required by the laws of the host states.[79]

Given the growing BIT practices, Bangladesh should redraft its model text so that it can more direct, focused, and categorical in setting principles imposing obligation on investors for compliance with environmental standards internationally applicable and integrated into domestic laws.

5.4.3 Existing Laws and Policies for Sound Environmental Regulation of Investment

The core legislation on the environment in Bangladesh is the *Environment Preservation Act* 1995 which establishes a legal framework for environmental regulation applicable to individuals and all local or foreign corporations. This Act is supported by the *Environment*

[76] Ibid, art. 12.
[77] For example, waste management and control measures, protection and conservation measures of wild flora or fauna etc.
[78] See the *SADC Model Bilateral Investment Treaty* (2012) art. 15.3 <www.iisd.org/itn/wp.../10/SADC-Model-BIT-Template-Final.pdf> 20 May 2013.
[79] Ibid, art.13.1.

Conservation Rules 1997 for its proper implementation. In addition to these two, there are plenty of environmental policies adopted so far in Bangladesh that act as soft directives for environmental protection, management, and regulation. A good number of them have been adopted from a sectorial approach. The major policies include *The National Environmental Policy 1992*, *The National Water* Policy 1998, *The National Energy Policy 1996*, and *The Petroleum Policy 1995*. All these efforts are intended for providing a sound regulatory regime for the environment.

In order to provide a sound regulation of investment-related environmental issues, the national legislation or policies on environment should be a new generation environmental law or policy in recognition of the interlink between investment and development and also should be modelled on recognised international standards that ensure environmentally sound investment. The new generation environmental laws or policies underscore the need for the integration of some essential regulatory elements in the legal or policy framework. The regulatory instrument mainly includes obligations relating to environmental impact assessment (EIA), a strategic management plan, and social impact assessment (SIA), principles relating to an internationally standard waste management system, and effective enforcement mechanisms (i.e. liability and compensation regime, environmental audit, effective administrative and judicial mechanisms). The simultaneous presence or interplay of these elements helps constitute a new generation of environmental legal regime capable of sound environmental regulation and thus ultimately enables investment-induced development.

5.4.3.1 The state of Environmental Impact Assessment (EIA)

EIA generally covers the impact on the environment *per se* of a proposed project, and also any specific risks associated with certain types of operations.[80] In the last couple of years, the understanding of this concept has been expanded to include social impacts such as the disruption of land use by indigenous people or forced resettlements that mostly appear in large infrastructural projects. EIA seems to be the best way to ensure that potential environmental impacts do not undermine the benefits of a proposed project. It can encourage the investors to consider the less environmentally harmful alternatives, or identify the way to bring about a change into the project design in order to lessen environmental impact. It can

[80] See Pacifca F Achieng Ogola, 'Environmental Impact Assessment General Procedures' (Presented at a Short Course II on Surface Exploration for Geothermal Resources organised by UNU-GTP and Ken Gen, 2-17 November 2007) <www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-05-28.pd> 26 May 2013.

also provide essential information for determining whether to place conditions on the project's operation in line with the forthcoming development objectives of the project. In view of this, EIA is considered to be a procedural requirement laid down by international law[81] and incorporated into national laws which is useful as an important tool for ensuring a holistic form of development through obtaining environmental sustainability.

Following the Stockholm Conference, Bangladesh's government, along with those of other developing countries, participated in the revolutionary process of protecting the environment through the promulgation of some ordinances, notably the *Water Pollution Control Ordinance* in 1973 and the *Environment Pollution Control Ordinance* in 1977. These two *Ordinances* had no focus on the application of EIA for controlling industrial pollution.

Later an attempt for overall environmental protection was undertaken with the adoption of the *National Environmental Policy* 1992. In the context of the vulnerable environment and climatic manifestations in the country, the policy was intended for certain objectives of environmental protection and promotion leading to overall development. The main objectives,[82] therefore, are to:

- identify and regulate activities which pollute and degrade the environment;
- ensure environmentally sound development in all sectors;
- ensure the sustainable, long term and environmentally sound use of all national resources;
- actively remain associated with all international environmental initiatives to the maximum possible extent.

In order to attain these objectives the policy embraces all major related sectors that have operational implications for environmental pollution or damage including agriculture, industry, health and sanitation, energy and fuel, water , land, and forest. For controlling the potentially polluting character of investment this policy for the first time introduces a mandatory EIA process including a precautionary principle, and a conservation and management policy. It necessitates undertaking EIA on new industries, new projects for

[81] International law principles are derived from some key agreements such as *Convention on Environmental Impact Assessment in a Trans-boundary Context* (Espoo, 1991), *Rio Declaration* (1992), *UN Convention on Climate Change and Biological Diversity* (1992), *Doha Ministerial Declaration* (1992), and *UNECF (Aarhus) 1992*, and the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 1998.
[82] See *the National Environmental Policy 1992* (Bangladesh) Ch. 2.

exploration and the extraction of fuel and mineral resources, and also for undertaking projects related to water resource development and flood control measures. Nevertheless, the policy does not create any statutory obligation for conducting EIA by the investors. However, this policy was an endeavour through which the government paid attention to the urgency of EIA in development projects. It was mainly out of the experience of environmental degradation resulting from industrial and agricultural development projects, particularly during the 1970s and 1980s when the government took on many industrial and agricultural development projects without due concern and attention to their environmental consequences.[83]

The obligation for EIA first came with the enactment of the *Environment Conservation Act (1995)* and *Environment Conservation Rules* (1997). The *Environment Conservation Act* provides for substantive obligations pertaining to the environmental management of industries. As part of this, it imposes obligation on all industrial projects whether private or public, local or foreign, to obtain an Environmental Clearance Certificate (ECC) for the approval of the project from the Department of the Environment (DoE). Section 12 of the *Act* stipulates that no industrial unit or project shall be established or undertaken without environmental clearance from the DoE in the manner prescribed by the rules, and any person affected or likely to be affected by such activities can apply to the Director General of the DoE seeking remedy of environmental pollution or degradation. The submission of EIA by the project proponent is one the procedural requirements for obtaining ECC. However, there is no direct or specific principle requiring the submission of an EIA report for obtaining the said certificate.

As a procedural requirement for ECC, the investors or entrepreneurs are responsible for commissioning EIA. The concerned environmental authorities review and examine each EIA document, its completeness and objectivity. But the limitation of the Act is that it does not set any standards and parameters to reviewing EIA and management elements the environmental clearance should be relied upon. However, clause 2 (f) of the section 20 requires that rules be made to evaluate and review the EIA of various projects and activities, and procedures be established for approval. In furtherance of these objectives, the *Environmental Conservation Rules (ECR) 1997* was promulgated. According to ECR, the responsibility to review EIAs for the purpose of issuing an ECC is entrusted with DoE, the main administrative agency for environmental governance in Bangladesh.

[83] Salim Momtaz, 'Environmental Impact Assessment in Bangladesh: A Critical Review' (2002) 22 *Environmental Impact Assessment Review* 163, 165.

With regard to the obligation of an EIA, the ECR 1997 categorises all industries into four: Green, Amber A, Amber B, and Red, in consideration of the environmental impact (e.g., low, medium and high) of their activities and location.[84] The Green category is the lowest in rank and the Red is highest in rank in terms of the negative impact of their activities on environment. The industrial projects of Green and Amber A are exempted from initial environmental examination (IEE) and EIA.[85] A mere 'no objection certificate' from the local authority is sufficient for a project of this kind to obtain environmental clearance and embark upon further activities. Only an IEE is essential for category Amber B for obtaining an ECC.[86] Both an IEE and EIA are obligatory for a new industrial project falling under the Red category of industries for granting an ECC.[87] However Red category projects also require a site clearance certificate before applying for an ECC.

An EIA is carried out pursuant to the EIA *Guidelines for Industries* prepared by the DoE that include three major stages; namely screening/scoping, identification of significant environmental issues and method of resolution, and adequacy of the mitigating measures and environmental management plan. The recommended steps by the DoE are almost similar to those mentioned in all literature, such as a base line study (similar to scoping) impact identification, impact prediction, and impact evaluation, mitigation measures, monitoring programmes, risk assessments, and resettlement and rehabilitation studies.[88] The normative screening process enables the DoE and the investors to decide on the appropriate steps to be followed in the environmental clearance process. Special emphasis is placed on site selection for industries with significant potential for environmental impacts, and investors are required to consider alternative sites keeping in view the criteria put forward by the DoE.[89]

Risk assessment is very important part of EIA for a new project particularly for mining and extractive activities. The recent some incidents such as *Tengratila* Gas field blowout and *Magurchara* blowout in Bangladesh evidence the failure of risk assessment in the projects

[84] See *The Environment Conservation Rules* 1997 (Bangladesh) s. 7.
[85] Ibid, s. 7(6a) &6 (b). There are 16 types of industrial units or projects based on its location and impact on environment which fall under the green category. There are 26 types of industries falling under the Amber A category. See Ibid, schedule 1.
[86] Ibid, s. 7 (6c). Sixty nine types of industries fall under category Amber B including garments, sweater, leather production, and fabric washing. See Ibid, schedule 1.
[87] Sixty nine types of industrial units or projects fall under the red category including mining, chemical manufacturing and road and bridge construction. See Ibid, schedule 1.
[88] Momtaz, above n 83, 167.
[89] Ibid.

due to corporate negligence that calls for stronger regulation of conducting EIA to improve corporate accountability.

Access to information and the consent of the people proximate to the proposed project is considered as one of the vital elements of the EIA process. The local people deserve the right to be informed about the nature of the project and its potential environmental and social impacts on them. The introduction of such an issue in the EIA process globally is intended to allow local people to take the opportunity to voice their views about the merits and demerits of new entrepreneurship from their own point of view. The decision-making authority for granting approval or permission is required to respect the public comment and take it into account for making a final decision. This process ensures community participation in the decision-making process for development. This is very much essential for a community-driven environmental regulation of investment. The DoE has recommended public consultation in its EIA guideline, but not as a mandatory requirement and there is no pre-approval communication process with the public about proposed projects.

There are many evidences that public consultation is duly held, but that the public opinion has not been taken into consideration for the issuing of clearance certificates by the DoE. The incident of the *Phulbari*[90] *Coal Mining Project* in Bangladesh is one example of a proposed project through foreign investment which sparked an enormous and violent mass protest by the locals against setting the project. It is reported that the proponent Asia Energy was issued an ECC even before the EIA report was submitted.[91] In the report the public consent requirement was virtually avoided. It was claimed by the investor that a public consultation meeting was held, but the people's views were not published. The government of Bangladesh acted dictatorially, undermining the people's view and consenting to the project.[92] Following this the people of the locality of the *Phulbari* coal mining project expressed their frustration through a violent protest.

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[90] Phulbari is one of the sub-districts of Dinajpur in Bangladesh with a population size of 151,939. Different communities like *Santhals*, *Oraons*, *Mundas, Rajbonshis* and Bengalis reside in this locality.

[91] Monoranjon Pegu, *The Phulbari Movement: Resisting Neo-liberalism in Bangladesh* <aihr.info/.../7-symposium-development-democracy-from-below-human> 27 May 2013; Asia Energy, *Bangladesh: Phulbari Coal Project: A Summary Impact Assessment Report* (2006) <http://www.adb.org/Documents/Environment/ban/39933-ban-sei.pdf> 27 May 2013.

[92] Ibid. In the recent case of the Rampal Coal Power Plant, a joint venture project between National Thermal Power Corporation of India and Bangladesh Power Development Board, the government of Bangladesh discarded the EIA's report on potential negative environmental impact on the biggest mangrove, Sundarbans. It approved the project and unveiled the process of construction with its counterpart government representative amid growing public protest. Even the government ignored Bangladesh High Court's showcase, 'Why the construction of the plant should not be declared illegal'. See 'Rampal gets Rolling', *The Daily Star* (Dhaka, Bangladesh) 6 October 2013; See also Chaitany Kumer, 'Bangladesh Power Plant Struggle Calls for International Solidarity', *Huff Post World* (online), 29 September 2013;

The avoidance of consultation with the people or ignoring their views is attributed to the absence of a binding legal requirement for public participation and the disclosure of information at the pre-approval stage. In addition there is also no legal obligation to present investment proposals for public opinion and scrutiny. As a result, any mass opposition or civil reaction always occurs after the post-approval situation and the government always stands in favour of the foreign entrepreneurs or development partners with administrative support which the local people lack.

Although there is no legal requirement, the DoE sometimes takes the potentially negative environmental impact into cognisance on the basis of public opinion, media reports, and field observation by their officials in order to decide on the granting of an ECC. In the year 2006, environmental clearance was given to 2,175 industries out of the 2,719 which applied.[93] The DoE website mentions why some projects are not given clearance, but it does not reveal the nature of the proposals nor any information on how public complaints against proposed projects are considered in the decision-making process. This is evidence that the local people's participation as important stakeholders is undermined or bypassed in the entire process of giving environment clearance.

In most cases, collecting public opinions largely depends upon the will of the entrepreneurs. This is because they design the means of consultation and dialogue in a way which often avoids real representation of the society and do not emphasise the potentially environmental negative impact of the project, their precautionary measures for safety and security, and the economic benefit of the locality etc. The consultation with project-affected persons as evident from some instances mainly involves compensation, resettlement and other social issues.[94]It primarily aims at motivating the locals and reducing their anger in the event of a potential loss. In practice, it is not meant for accepting public input into the decision-making process.[95] It is indeed a kind of propaganda and merely cosmetic.

<http://www.huffingtonpost.com/chaitanya-kumar/bangladesh-power-plant-st_b_3983560.html>14 December 2013; See also, 'How The Rampal Coal Power Plant will Destroy the Sunderbans', *Progress Bangladesh* (online), 8 October 2013 <http://progressbangladesh.com/how-the-rampal-coal-power-plant will-destroy-sun> 14 December 2013.

[93] See S Rizwana Hasan, 'Environmental Governance in Bangladesh: An Assessment of Access to Information, Participation and Justice in Environmental Decision Making' (Working Paper, The Access Initiative Bangladesh Coalition, 2009).
<http://www.apfedshowcase.net/sites/default/files/2006_BELA_Final_Report[1].pdf> 18 October 2013.

[94] For example, the Megnaghat Combined Cycle Power Project in 1995, the Jamuna Multiple Bridge Project, 1989, and the Gas Infrastructure Development Project in 1994.

[95] N Islam, 'Phulbari Coal Project: Reflections from a BHP Consultant' *Megh Barta 2008* <http://meghbarta.org/nws/nw_main_p02b.php?issueId=6&sectionId=30&articleId=576> 30 May 2013:

The simultaneous local people's opposition and governmental favour for foreign multinational entrepreneurs creates a problematic situation where the project appears to be development-friendly on one hand and detrimental to environment on the other. This is usually the case in projects for mining or energy.[96] It is true that any development activity through mining or energy often otherwise requires the compromise of environmental protection, and the loss of natural resources and safe and sound habitation. Under such a situation, it is appropriate not to take a single way solution, discarding the other way, rather it is better that both development and the environment be taken into consideration by creating a counter-balance situation. This counter-balance situation may be created by undertaking different alternative measures such as rehabilitation and compensation for persons affected by the operation of the projects, and measures for reducing the direct impact on land erosion, natural resources, and plant varieties. This issue should be settled even beyond the legal requirement if not between investors and the local people at the intervention of DoE as a public agency. Therefore, a legal binding can be imposed as a precondition on DoE to make the EIA of a new project public before issuing an ECC in its favour.

It is pertinent to discuss that EIA obligation for industries in Red categories as inferred from section 7 (6d) of the ECA 1997 will apply to the industries of all kinds of registered companies and partnership firms. The violation of this obligation ascribes responsibility to companies and their representatives for penal sanction as indicated in section 16 of the ECA 1995. The word 'company' in the section itself includes any statutory public authority, registered company, partnership firm, and association or organisation. The term 'registered company' covers domestic private and foreign private subsidiaries, partnership firms and foreign affiliates. So apparently the EIA application regime is large and it seeks to address industrial pollution control at the initial investment level and thereafter with a periodic renewal process. Nevertheless some legislative inadequacies and procedural inappropriateness are noticed in the current EIA system.

Phulbar Resistance Reflection on Pulbari Coal Project, *New Age* (Dhaka, Bangladesh) 14 September 2008 <phulbariresistance.blogspot.com.au/2008/09/reflection-on-phulbari-coal-project-htm.> 30 May 2013.

[96]The recent inaugurated a joint venture project in Bangladesh called the 'Rampal Coal Power Plant' is essential for overcoming Bangladesh's energy crisis, but at the same time it is proved to be detrimental to the surrounding environment, and is particularly likely to cause a huge negative impact on the Sunderbans, the natural habitat of biodiversity in Bangladesh. For details see, 'How Rampal Coal Power Plant Will Destroy The Sunderbans' *Progress Bangladesh* (online), 8 October 2013 <http://progressbangladesh.com/how-the-rampal-coal-power-plant-will-destroy-susnderbans>14 December 2013; see also Talukder Rasel Mahmud, 'Rampal Power Plant Violates Environmental Law', *The Daily Star* (Dhaka, Bangladesh) 2 October 2013.

Firstly the requirement for an EIA lacks specificity as a legal principle in the ECR 1997, and secondly, for all four categories, the 'no objection certificate' from a local public authority is a requirement for launching the project operation. The certificate must be associated with the application for this purpose. But the Conservation Act or Rules do not provide any guiding procedures for the local government authority in issuing a 'no objection' certificate. There is not even a directive for considering the institutional capacity and public participation in issuing the certificate.

Secondly in relation to project identification the Rules provide for chronic actions at different stages to be carried out until the project operation is embarked upon. The project level impact assessment as introduced in the Rules seems to be adequate. But the provision for monitoring at the post-project stage which is essential for the risk assessment of the production with respect to the environment is not in focus in the Rules.

Thirdly the EIA compliance monitoring and disclosure is an important component of EIA processes around the world to reduce opportunities for avoidance, particularly by the big entrepreneurs. The *ECA 1995* and ECR do not make any legal provision for periodic EIA compliance monitoring.

Against such a backdrop it is drawn that despite different institutional arrangements for implementing EIA system in Bangladesh the legislative control over the EIA system under the ECA 1995 has not yet been well established. Effective legislative control over carrying out EIA for proposed projects is needed for ensuring environmentally sound investment. For this purpose, some specific provisions must be added in the Act in the nature of guiding principles for its rules, guidelines, and procedures.

5.4.3.2 The state of waste management

Waste management is an important matter for environmental regulation of foreign or local investment at the operational level. The need for industrial waste management is underscored in national laws and the international environmental legal regime.[97] Even the international multi-stakeholder codes of conduct provide principles and guidelines for waste regulation

[97] See the below note 102.

and thus it becomes a crucial part of the sustainability reporting system famously known as the 'Global Reporting Initiatives'.[98]

For waste management the concept of the 3Rs principles (Reduce, Reuse and Recycle) has been developed and pursued in the environmental legal regime. The 3Rs principles are used as guiding principles for waste management at the levels of process of production and post-production. They not only encourage the prevention of potential pollution risks at the source level, but also the sustainable use of all kinds of waste such as hazardous, solid, and water waste.

In addition to the 3Rs principles two other methods have been developed which are also used for environmental waste management, namely, the environmental sound management system (ESM) and Cleaner Production. The ESM is a comprehensive system for sound environmental management that includes waste management in the process of production and post-production situation. The different OECD conferences (i.e., Cancun, Wien, and Washington) define ESM as a scheme for ensuring that wastes and used and scrap materials are managed in a manner that will save natural resources and protect human health and the environment against adverse effects that may result from such wastes and materials.[99] The ESM primarily encouraged the OECD member states. The ESM practice spread over the developing countries since ever the Basel Convention has explained this[100] and most of the developing countries have ratified the Basel Convention. It is meant for both controlling the cross-border movement of hazardous waste and internal industrial waste management.

The concept of Cleaner Production was introduced by the United Nations Environment Programme (UNEP) and is defined as 'the continuous application of an integrated preventive environmental strategy applied to processes, production and services to increase eco-efficiency and reduce risks to humans and the environment'.[101] The associated activities of

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[98] For examples, ISO 14001 (environmental management system) and the World Business for Sustainable Development and Fair Trade, US, have set standards for waste management as part of a total environment management system.

[99] See OECD, *Core Performance Elements for Environmentally Sound Management of Waste* (February 2003) <www.oecd.org/env/waste/39559085.pdf> 14 December 2013.

100 According to the *Basel Convention* ESM means taking all practicable steps to ensure hazardous wastes or other wastes are managed in a manner that will protect human health and the environment against the adverse effects which may result from such wastes. See the *Basel Convention on the Control of Trans-boundary Movement of Hazardous Wastes and Their Disposal* (1989) art.2(8) <archive.basel.int/text/documents.html>15 December 2013.

[101] See Aquatech (Environment, Economics and Information), *A Benchmark of Current Cleaner Production* (1997) Cleaner Industries Section, Environment Australia <www.environment.gov.au/archive/settlements/industry/corporate/eecp/pubs/benchmark.pdf> 14 December 2013.

this system involve measures relating to pollution prevention, source reduction, waste minimisation, and reuse of waste products. One of the major focuses of this process is waste management through recycling as the eventual goal of cleaner production is to achieve a 'closed loop' operation in which all excess materials are recycled back into the process.

The concern for a 3R process is reflected in general law on the protection of environment and in specific waste management laws and regulations both in developed and developing countries. The specific waste management laws are in place in the UK, the US, Germany, Switzerland and Australia.[102] Among the developing countries, Singapore, China, and Malaysia have developed a legal framework for industrial waste management. Some countries such as China have adopted law on the promotion of cleaner production processes. The legal framework at the national level usually addresses the process of production, responsibility for waste management, mechanisms for waste management, and governmental responsibility for enforcement. Therefore, the legal framework in particular applies to waste producers, such as industrial companies, waste carriers and waste disposal companies which operate in dumping sites. The main philosophy operative behind any such development is to achieve ecologically sustainable development in relation to waste management.

In Bangladesh there is no specific waste management law and the 3Rs principles are not pursued comprehensively in the existing environment legal framework established by the ECA 1995 and the ECR 1997. The mandatory requirement of submitting the layout of establishing effluent treatment plant (ETP) for Red category industries is an application of 3Rs principles under the ECR 1997. However, the Draft National Solid Waste Management Handling Rule, 2011, has used the 3Rs principle for solid waste management only. In addition, the National 3R strategy adopted in 2010 has made source segregation mandatory and gave directives to local governments to pursue organic waste recycling projects.

Although the obligation for an ETP is established for obtaining an ECC and validity for continued operation, the articulation of the obligation lacks clarity on its legal status as there is no specific principle directing the establishment of ETP. The wording of the section 7 of the *ECR* reveals that the EMP should contain a layout plan including the location for the effluent disposal system, and the plan and design of the ETP with full information about its

[102] For example the *Resource Conservation and Recovery Act* 1976 in the US, the *Environmental Protection Act* 1990 in the UK, the *Waste Management Regulation* 2012 in the UK, the *EU Waste Management Framework Directive*, and the *National Radio-active Management Act* 2012.

effectiveness.[103] Moreover, there is no clear mention that failure in establishing an ETP results in the rejection of an ECC. Without an ECC, industrial projects are not permitted to start trial production and other non-industrial projects are not allowed to begin operations.

The lack of a specific principle for establishing an ETP creates uncertainty as to what constitutes the responsible performance of operating companies either local or foreign. As a result factories confine their commitments to paperwork only. A study on the tanning industry in Bangladesh, an environmentally sensitive sector, reveals that except for BATA and the Dhaka Leather Complex, none of the tanneries has a treatment plant.[104] Most of the waste and effluents are left for natural decomposition in the environment, causing serious pollution problems affecting the soil, water, air, and human life.[105]

In addition to the lack of specific provision, the legal deficit for administrative control through monitoring and inspection as well as accountability for violation creates a big challenge for its effective functioning.[106] Entrepreneurs are often reluctant to invest money in the proper treatment of effluents, considering it to be a non-productive use of money. Sometimes, where industries already have ETPs, there is an unwillingness to operate the plant rightly because of high running costs. It is therefore reported that there is a flagrant violation of law in this sector.[107] The discharge of untreated chemical waste and chemical waste containing heavy metals into inland water bodies and agricultural lands is almost a regular practice of industries.[108] Without strengthening the legal regime in the treatment of effluents and strict monitoring this situation cannot be improved.

The important point with regard to waste management and its proper regulation is that the existing legal framework is very insufficient and inarticulate. There is no particular chapter for waste management focusing on the different types of waste, such as hazardous, solid, and waste water along with the responsibilities of the producers, owners, and enforcing authority. However, the *ECR 1997* recommends waste disposal standards for mainly industrial waste in

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[103] See Rafique Ahmed and Nick Hurvey, 'Evaluation of Environmental Impact Assessment and Practice in Bangladesh(2004) 22 (1) *Impact Assessment and Project Appraisal* 64, 74.
[104] S M Imamul Haque, 'Critical Environmental Issues Relating to Tanning Industries in Bangladesh' in Naidu et al. (eds) *Workshop Proceedings on Towards Better Management of Soils Contaminated with Tannery Waste* (Tamil Nadu Agriculture University, India, 1998) 23.
[105] Ibid.
[106] See Ministry of Environment and Forest, Bangladesh, *Rio+20: National Report on Sustainable Development* (May 2012) <http://sustainabledevelopment.un.org/content/documents/981bangladesh.pdf> 04 December 2013.
[107] Ibid; see also Margot B News, 'Bangladesh Environmental Crisis Campaign' on *Margot B News* (16 June 2010) <http://margotbnews.wordpress.com/2010/06/16/bangladesh-environmental-crisi-cam...> 23 November 2013.
[108] Ibid.

the annexed schedule 10 where emphasis has been placed on the compliance with the standards from the moment the industry starts trial production, or in other cases from the moment a project begins operation. But the obligation for non-compliance for the entrepreneurs is not determined. Hence the overall judgment that the existing waste management regime in the legal framework in Bangladesh is inadequate compared with contemporary developments in this area.

Nevertheless, the initiatives under different policies, strategies, and action plans as mentioned above are praiseworthy, but these need to be incorporated into the legal framework in order to create an obligatory binding force. In addition, the government may enact a separate law for waste management covering the screening of machineries transferred for foreign affiliates and subsidiaries including post project waste management regulation and enforcement.

5.4.3.3 Legal compliance and enforcement mechanisms

A. The state of environmental audit and compliance monitoring

Environmental audit is a vital element for the enforcement of environmental regulation which is carried out during the operational stage of the corporations. It has become a standard activity for corporate and non-corporate entities around the world mainly intended to evaluate the environmental performance of operation, and identify and quantify any environmental liabilities at a site such as past environmental damage.[109] It is also used to check compliance with established and proposed regulation, evaluate property transfer, establish existing levels of air pollution, water pollution and hazardous waste, and satisfy the environmental requirements of lending institutions worldwide. Thus, the environmental audit system has become an integral component of many comprehensive environmental programs. Its goal is to propose measures to address the environmental problems identified during an audit.

As in the EIA process, environmental audit for FDI performance has been undertaken as a mandatory issue in many countries. Mexico has adopted a national programme of

[109] Gretta Goldeman, ‘The Environmental Implications of Foreign Direct Investment: Policies and Institutional Issues’ in *OECD Foreign Direct Investment and Environment* (OECD publishing, 1999) <www.googlebook.com> 29 May 2013.

environmental audits for over 15 years to control industrial pollution.[110] Mexico in the beginning of the 1990s developed a legal framework focusing on industrial pollution, but it lacked addressing environmental problems caused by inadequate management of natural resources and non-industrial pollution.[111] To resolve this problem, the Mexican government adopted an institutional framework concerning environmental audit. In some East European countries, the environmental audit is a common practice in the operation of private and foreign investments, contingent on a package of social, environmental, and investment commitments.[112]

The environmental audit is introduced in the national environment regulatory framework as a step to measure the compliance with the EIA report and Environmental management plan (EMP). It therefore takes place following the EIA and EMP being submitted to the environmental regulatory authority. The methodology therefore applied includes the review of the EIA and EMP, making observation on environmental performance of the industrial plant and health safety aspects, and meeting with management and technical staffs. The setting of audit standards varies from state to state. Authorities and businesses also can apply the voluntary environmental audit techniques designed by ISO 14001 to assess potential FDI ventures.[113]

In Bangladesh, there is no explicit principle of environmental audit as a means of environmental regulation either in ECA 1995 or ECR 1997. The requirement for environmental audit can be inferred from the provision relating to the validity of an ECC. Certificates for all categories of industries are required to be renewed, with some expiring after one year, and some after three years. The renewal process depends upon annual audit. The DoE has introduced a monitoring and reporting system which is carried out by its official inspectors to examine the sources of possible effluents and mitigation of environmental pollution, and on the basis of their inspection report the renewal order is issued. As there is no general criterion prescribed by the ECR 1997, the renewal process often is merely a carrying out of paper-work without maintaining proper evaluation standards.

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[110] Ramon Alvarez-Larrauri and Ira Fogel, 'Environmental Audits as a Policy of State: 10 years of Experience in Mexico' (2008) 16 *Journal of Cleaner Production* 66.
[111] Ibid.
[112] Goldeman, above n 109, 82.
[113] ISO14001 details techniques of the Life-Cycle-Analysis, Environmental Impact Assessment and Environmental Audit. These all require investment in inspection, monitoring, regulation and enforcement to ensure effective implementation. See Global Environmental Management Initiatives (GEMI), *ISO 14001 Environmental Management System: Self-Assessment Checklist* (1996) <http.www.gemi.org> 30 November 2013.

Apart from annual audit for renewal there is no legal requirement for regular or emergency basis environmental audit or monitoring of corporate activities. Regular auditing can suggest the way for the minimisation of potential risks and the improvement of techniques for remedy. A study observes that regular audits could have identified the extent of problem and established the most appropriate techniques for remedying the situation in three disastrous incidents in Bangladesh such as *Magurchara, Tengratila* and *Phulbari* coal mine.[114] For example, it was known for some time that there were gas leaks at the *Phulbari* coal mine and that they were posing a serious threat to the environment and health of local communities.

However, there are some voluntary audit practices externally carried out in foreign industrial and infrastructural development projects on the basis of ISO 14001.[115] The World Bank also conducts environmental audit in its funded projects as a requirement of granting funds.

Nevertheless, due to the absence of a legal requirement for auditing there is no specific plan at government level for conducting a general environmental audit for investment projects. The voluntary level auditing is still in its infancy and very much limited to a small number of large multinationals and the sectors which have a global market. Their in-home and external auditing activities are mainly meant for retaining their corporate image in the global market without any obligation to local stakeholders. So, considering the need for environmental auditing for sustainable environmental protection it should be integrated as a legal requirement and conducted periodically to review the effectiveness of environmental management under the existing legal regime in Bangladesh.

B. Accountability and compensation measure

A liability and compensation regime pertaining to environmental damage is necessarily an integral part of a good national legislation for environmental conservation and management. The determination of liability can be seen as a means of legal compliance. It is said to be a mechanism for implementing a 'Polluter Pays Principle'.[116] The rational point of introducing

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[114] Shawkat Alam and Abdullah Al Faruque, 'Tragedy of Gas and Coal Exploitation in Bangladesh: Towards Ensuring Corporate Environmental Accountability'(2009) 12 (1) *Asia Pacific Journal of Environmental Law* 117, 147.

[115] For example, the Gas Infrastructure Development Projects, Meghnaghat Combined Cycle Power Project, and Jamuna Multi-purpose Bridge Project.

[116] This principle originally was adopted by the Organization for Economic Cooperation and Development (OECD) in 1972, and contemplates the internalisation of pollution-control costs. The principle was reaffirmed at the United Nations Conference on Environment and Development (UNCED or Earth Summit, 1992) in principle 16 of the *Rio Declaration*. See OECD, *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies* (26 May 1972)

a liability regime into legislation is to ensure that the persons or corporate body responsible for non-compliance resulting in environmental damage face the prospect of having to pay for restoration of the affected environment or compensating for the damage caused.[117] The other purpose it mainly serves that it acts as a means of penalising wrongful conduct and thus deterring environmental wrongful conduct and preventing environmental damage.[118]

For the said purposes with regard to formulating a liability regime the national system is normally linked to the existing environmental regulation and traditionally confined to penalty and compensation. For instance, if an industry fails to comply with the applicable environmental law, it will be held liable for any damage to the environment that resulted from its non-compliance in addition to administrative and penal sanction. But to serve as an effective vehicle for environmental protection the liability regime has to be expanded from traditionally recognised forms of penalty and compensable damage for non-compliance to cover the harm to environment itself. The traditional liability regime covers damage to persons and goods and contamination of privately (or sometimes publicly) owned sites. It usually does not cover damage to the environment as such.

The liability regime under the ECA 1995 in Bangladesh provides a mixed approach. The liability issue covers all procedural non-compliance which causes personal damage as well as environmental damage. In determining liability for causing damage to environment, it has adopted some remedial measures. For example, it imposes restrictions on the manufacture and sale of articles injurious to environment,[119] prohibits an act or omission that may cause directly or indirectly injury to the eco-system,[120] and imposes responsibility in the discharging of excessive environmental pollutant.[121] The restriction on manufacture is exclusively for goods made of polythene, polyethylene or polypropylene. The non-compliance with these said responsibilities incurs penal and compensable liability as detailed in section 15 of ECA 1995.[122] The penal and compensation standards rely on common law traditions applied in environmental offences. Non-compliance and the consequential damage

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<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=4&InstrumentPID=255&Lang=en&Book=> 2 December 2013; See also the *Rio Declaration on Environment and Development* (1992) <http://www.unesco.org/education/nfsunesco/pdf/rio_e.pdf> 2 December 2013.

[117] Stephen McCaffrey and Maria Cristina Zucca, 'Liability and Compensation Regimes Related to Environmental Damage' in *Training Manual on International Environmental Law* (UNEP, 2006) <http://books.google.com.au/books/about/Training_Manual_on_International_Environ.html?id=_RdE5j8P6iEC&redir_esc=y> 2 December 2013.

[118] Ibid.

[119] *The Environment Conservation Act* 1995 (Bangladesh), s.6A.

[120] Ibid, s. 7.

[121] Ibid, s. 9.

[122] Section 15 lists nine offences relating to the violation of different provisions as provided by sections 2, 3, 4, 6, 6A, 7, 9(1), (2), (3), 12 of the *Environmental Conservation Act 1995.*

it incurs does not amount to civil liability under this law irrespective of the actors, either individual or companies.[123] Therefore the amount of compensation is fixed here as an alternative to prescribed sentencing, not in consideration of the amount of damage to environment itself.

However, in the case of injury to eco-system under section 7 of the ECA 1995 the director general of the DoE is empowered to determine the compensation for damage and direct the actor to pay it or direct him to take corrective measures. The non-compliance with the direction of the director general will be subject to penal sanction under section 15(5). The director general is also empowered to file a suit against the actor in the competent court for the realization of the compensation or file a criminal case for non-compliance with the direction. For the determination of compensation the director general may engage any specialist or other persons.

The underlying principle of the section 7 provides scope for the calculation of the compensation in consideration of the environmental damage itself. Another evidence for the consideration of environmental damage in the determination of compensation concerning water pollution is available in the *National Water Policy 1998* as it states that industrial polluters will be required under law to pay for the clean-up of bodies of water polluted by them. There is nevertheless a gap in the text of section 7 that the principle for remedial measure for eco-system does not cover the all components of environmental damage as the injury to eco-system is a single component of environmental. It is better to be rephrased as 'remedial measure for environmental damage' in order to be more comprehensive.

5.4.3.4 Environmental regulatory mechanism

An institutional regulatory mechanism is considered to be essential for the enforcement of legal regulation established by a certain legal framework. It promotes and implements the legal enforcement mechanisms as well as adopts tools and methods for the proper implementation of the general principles of law. By and large, it provides administrative coordination, management, and monitoring of compliance status, introduces rules and guidelines for environmental reporting and auditing, and offers the scope of litigation. The success of legal arrangements largely depends upon the effective functions and roles of

[123] See *The Environment Conservation Act 1995* (Bangladesh) s.16. This section focuses on offences committed by companies, which includes the whole range of failure to perform or non-compliance with duties under this Act.

institutions as mandated by law. The institutional mechanism may be administrative, judicial, or quasi-judicial. The environmental legislation of Bangladesh recognises and mandates the role of all three kinds of institutions and they are accordingly in place in Bangladesh.

5.4.3.4.1 Administrative management

(i) Ministerial body for co-ordination and execution: An evaluation

In Bangladesh the institutional arrangement for environmental management can be classified into two; apex level institutions and working level institutions. Apex level institutions consist of Ministries and the chief executives who are involved in policy-making, reviewing plans, and overall supervision. On the other hand the working level institutions are affiliated by the different concerned Ministries' work as technical arms of the ministry and are responsible for implementing ministerial planning, management, monitoring and enforcement

As an apex level institution, the Ministry of Environment and Forest (MOEF), shoulders the overall administrative responsibilities for environmental management and protection. In managing and shaping the entire environmental sector and in the implementation of plans and policies it works with the Planning Commission, Department of Forests, Department of Environment, Ministry of Agriculture, Ministry of Fisheries and Livestock, Ministry of Water Resources, Ministry of Energy, Ministry of Health and Family Welfare, Ministry of Education, and Ministry of Housing and Public Works. The responsibility regime of MOEF includes:

A. The coordination of the activities of other institutions and ministries to ensure that environmental concerns are given due recognition in their development programs, and playing a role in policy advice and assisting the implementation of action plans;
B. Reviewing and monitoring the impact of development activities on the environment across all investment sectors;
C. Designing and promulgating policies and regulation of the establishment of industries and other development activities for the conservation of environment; and
D. The determination of safety and remedial measures for the prevention of accidents that may cause pollution of the environment.

It is however, pertinent to note that each of the Ministries has their own policy and programme frameworks providing a basis for addressing fundamental issues of environmental management and protection.

At the sponsorship of MOEF, two other high level committees have been formed; the National Environment Council (NEC), headed by the Prime Minister, and the Executive Committee of National Environment Council (ECNEC), headed by the Minister for the Ministry of Environment and Forest. They provide guidance to the sectoral Ministries and Agencies on matters of national environmental management. There are also sub-divisions of these committees at the local government level.

Despite different institutional arrangements, the performance of MOEF for creating environmental sustainability is not reportedly satisfactory. Its role for the implementation of action plans is frequently thwarted due to the fragile state of coordination between MOEF, DoE, and line ministries.[124] The inter-sectoral coordination between sectors such as water, fish, and forest is weak.[125]As the 'clearing house' of all line ministries for all development projects, it lacks institutional capacities in terms of the human, technological and financial resources necessary for proper implementation of policies.[126] Moreover it lacks technical expertise to effectively assess and monitor projects for environmental impact and therefore no progress or suggestion has yet been achieved. In the National Environment Management Action Plan (NEMAP) of Bangladesh[127] it is acknowledged that neither the fledging Ministry of Environment and Forest nor its Department of Environment has developed the institutional capacity to substantially address and tackle the problems of environmental management and protection.[128]The two other higher level committees are still cosmetic and not fully functional.[129]

MOEF, nevertheless, has gained some success in adopting some policy instruments in association with the line ministries such as the *National Water Management Plan, National Energy Policy, Actionable Policy Brief on Agriculture, Climate Change Strategy and Action*

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[124] Salahuddin M Aminuzzaman, 'Environment Policy of Bangladesh: A Case Studies of Ambitions Policy with Implementation Snag' (Paper presented to the South Asia Climate Change Forum, Monash University, Australia, 5-9 July, 2010)
<http://www.monash.edu.au/research/sustainability-institute/asia-projects/paper_salahuddin_aminuzzaman.pdf> 3 December 2013.
[125] Ibid.
[126] Ibid.
[127] The *National Environment Management Action Plan, 1995 (NEMAP)* has been formulated to provide action plans to respond to environmental issues and promote sustainable development.
[128] Aminuzzaman, above n 124.
[129] Ibid.

Plan and so on. But it has not developed any specific policy regulation for the establishment of investment projects for industrial and non-industrial sustainable development purposes.

(ii) ***The Evaluation of the functions of DoE as the main regulatory body***

A. The powers and functions of DoE

Aside from the apex level institutions, there exist four main regulatory institutions for environmental conservation including the DoE, the Forest Department (FD), the Water Resource Planning Organization (WARPO), and the Department of Fisheries. The DoE [130]is the key institution mandated by the ECA 1995 that belongs to overall jurisdiction for environmental planning, management, monitoring and enforcement. Given the authority of law, it is responsible for enforcing the environmental laws and rules and the implementing of policies, recommendations, and reviews of MOEF.

The legal mandate of DoE for national environmental protection and conservation covers a plethora of activities that basically include assessment and monitoring tasks such as on-site surveillance of environmental improvement components of development projects; promoting environmental awareness through public information programme; controlling and monitoring industrial pollution; environmental impact assessments, and by and large formulating guidelines for the agencies involved in activities affecting air quality, and soil and water conservation, afforestation, wildlife, critical habitats, fisheries and other natural resources. Under the administrative measures of the pollution control of industries DoE undertakes to:[131]

- Evaluate and review applications submitted by existing and proposed industrial units and grant ECCs provided all conditions are complied with by the concerned units;
- Monitor and examine sources of all possible effluents, publish reports thereon, ensure the mitigation of any environmental pollution, and determine from time to time the standard limit;
- Advising the Government on manufacturing processes and materials that may cause pollution;

[130] In 1977 the Environment Pollution Control Board was established in Bangladesh. Under this board in 1985 a Department of Pollution Control was formed. In 1989 a new Ministry of Environment and Forest was created and the Department of Environmental Pollution Control was renamed the DoE and brought under the control of the ministry.
[131] *The Environment Conservation Act 1995* (Bangladesh) s 4 (2).

- Declare Ecologically Critical Areas where the eco-system has degraded and has reached a critical state and control which operations or processes can be initiated in that area; and ensure regular dissemination of information regarding environmental pollution.

B. The DoE's role for reviewing EIAs and issuing ECCs

For the purpose of issuing ECCs, the DoE conducts environmental screening or reviews environmental impact assessment EIAs depending on the type of industries as prescribed by the ECR 1997. In reviewing an EIA it covers both the initial environmental examination and detailed impact assessment under its own guidelines formulated for this purpose. The formulation of a set of guidelines for EIA for industries is one of its major contributions to the environmental management regime. These guidelines have set forth specific procedures for different sectoral industries and non-industrial projects such as the EIA Guidelines for cement, textile, pharmaceutical, coal mining, and water sector development, and roads and bridges as indicated earlier. The guidelines pursue international standards such as the World Bank (WB) EIA system in particular. In fact, the guidelines for water sector development are basically based on donor guidelines, e.g. the World Bank' and Asian Development Bank (ADB).[132]

The EIA system in fact began to work as a method of screening of a proposed industry (although not as a legal requirement) after the 1992 industrial policy was adopted, as this document for the first time contained a special clause pertaining to pollution control of industry as indicated earlier. It began to take appropriate measures for preventing environmental pollution and maintaining ecological balance. Pursuant to this the Board of Investment (BoI), as a requirement of the approval process for a new national or foreign investment has added a condition in the sanction order, to the effect that entrepreneurs will comply with the rules and regulations of the DoE pertaining to industrial pollution. All industries either national or foreign thus undergo the EIA procedural regulation to achieve the ECC by the DoE to launch their operation.

However, there is a parallel with the World and the ADB in approving any development projects funded by them. The World Bank and the ADB have their own EIA procedure which they maintain for the approval of the projects. World Bank staffers, since 1989, have

[132] Momtaz, above n 83, 167.

been under obligation to screen all new investment projects funded by them. The environmental section of the World Bank examines EIAs for approval according to their regional strategies and guidelines for funded projects. This is often perceived as a case of an organisation imposing unnecessary obstacles in the smooth implementation of development projects beyond national regulation. Similarly the ADB maintains a separate examination procedure for the approval of EIA for any project funded by them in Bangladesh, as it has developed a new environmental operational strategy for Bangladesh in order to address the major environmental problems with categorisation of the projects like the World Bank.[133] These kinds of activities by the donor agencies may lead to the creation of a dual standard in EIA quality and hinder the independent management of the DoE as the principal authority of development projects at the national level.

In addition to EIA, the DoE also provides for EMP after the EIA procedure is complete in order to mitigate project-induced negative environmental impacts and enhance the positive environmental impacts of the project interventions. Therefore, the management plan is implemented during the project period and also in the operation and maintenance period. The DoE has formulated an environmental management framework that includes mitigation and enhancement measures, compensation arrangements, environmental protection and monitoring activities, peoples' participation, a responsibility and reporting framework, and organisational and institutional arrangement.

The DoE has only legal mandate under ECA 1995 and ECR 1997 to conduct EIA and EMP for the environmental regulation of industries at the project and strategic levels. There is no legal mandate to conduct EIA and EMP in other non-industrial infrastructural projects or plants. Therefore DoE' formal preparation for EIA mostly is confined to manufacturing industries. However, the *National Water Policy 1998* provides for maintaining a formal EIA process by the DoE in all water resource development projects.[134] For infrastructural development projects and mining the DoE conducts an EIA and EMP on the basis of an *adhoc* procedure as mentioned earlier. Therefore, it is contended that the application of an *adhoc* procedure creates the potential for avoiding adequate EIA reporting and due implementation. This occurs mostly in the case of more environmental sensitive investment

[133] ADB projects are classified into three categories, namely category A for significant impacts, category B for some impacts, and category C for no impacts.
[134] It is evident that both in the *Phulbaria* Coal Mine Project and recently approved *Rampal* Thermal Coal Power Plant the government ignored the EIA report on the ground of development interest. See Pegu, above n 91 and Mahmud, above n 96.

projects where the government pays little attention to its ultimate development interest and overrides concerns the environmental protection. [135]

C. The monitoring system of the DoE and the publication of reports

To ensure the effective implementation of EMP, it is inevitable that a strong monitoring system be designed and carried out. This is because the environmental monitoring system provides information that acts as a basis for making management decisions during strategic and implementation stages. It also provides a basis for evaluating the efficacy of environmental screening, the categorisation process, the impact assessment process, and mitigation and enhancement measures, and suggests further necessary actions.

The DoE has developed an inspection and monitoring system for the implementation of environmental management and therefore it designed a comprehensive manual in collaboration with the Canadian International Development Agency (CIDA) in 2008. According to this manual inspection and monitoring are conducted by the DoE's department of inspection for the purpose of verifying the compliance, investigating the suspected violators, and using enforcement tools to obtain compliance. [136] To ensure an effective monitoring system, the manual has suggested for pre- and post-investment inspection and monitoring arrangements applying efficient and standard monitoring procedures. All aspects of an inspector's compliance monitoring shall be guided by the *Draft Directive for Enforcement and Compliance of ECA, 1997*. Thus the standardisation of the monitoring procedure in recent times testifies to the DoE's willingness to strengthen its role in enforcing the relevant laws and rules for environmental management established by the ECA 1995 and ECR 1997, although it does not prescribe a periodic monitoring schedule. It is however argued that the Department does not have regular monitoring capacity and arrangements.[137] This is mainly attributed to the inadequacy of logistic supports and lack of the required manpower and expertise.

It is noteworthy that the follow-up disclosure of monitoring reports has gained wide recognition in the national environmental legislations in recent years as an element of

[135]Aminuzzaman, above n 124.
[136] See the *Inspection and Enforcement Manual 2008* (Department of Environment, Ministry of Environment and Forest, Bangladesh) s. 2.1 <*www.doe-bd.org/Enforcement_Manual.pdf*> 1June 2013.
[137] Khandaker Mainuddin, 'Environmental Governance in Bangladesh' in *Additional Studies on National Environmental Governance and Cross-sectoral Issues* (2008) <http://pub.iges.or.jp/modules/envirolib/upload/817/attach/eng_part3.pdf> 06 December 2013.

effective environmental regulation. The DoE is legally mandated to publish and disseminate information on environmental pollution on the basis of its monitoring and inspection.[138] But the reality is, the data and information of the DoE is often not disclosed to the general public.[139] Even the compliance reports submitted to the DoE by all industries every year under the legal requirement are not made public.[140] Under such a situation, there is a potential chance of getting manipulated information due to malpractice by the DoE officials.[141] Moreover, the absence of information or manipulated information deprives the people of their right to access to information as well as hindering the process of rectification.

However, sometimes the data and information on monitoring is posted on the Internet in such a way that it reaches particular environmental groups, not the public at large. This technical mode of dissemination bars most people from understanding the consequences and implications. Therefore, the data and information on general monitoring need to be published regularly and in a comprehensive manner. But the problem is, the mode of publication is absent in the relevant law, there is not even a provision under the ECR 1997 requiring EIA reports to be subjected to disclosure and public scrutiny.

D. Remarks on the activities of the DoE

In view of the above discussion it is right to reiterate that the DoE is the main organisation under the Ministry of Forest and environment which functions as regulatory body for the controlling of environmental aspects of all industrial and non-industrial sectors since the beginning of the 1990s, and with the legal mandate of ECA 1995 and ECR 1997 has undertaken different initiatives for the effective regulation of environment-sensitive investment projects and in enforcing relevant laws. But due to several institutional weakness and lacuna in the legal framework, the DoE has not yet been proved to be an effective organisation in practice to enforce regulatory measures to control industrial pollution. There has been some success in water development sectors, but in industrial sectors, its performance in the implementation of environmental management system is not satisfactory and in some cases remains a great challenge.[142] Some factors are identified as responsible for this; they are namely, a lack of regulatory and institutional capacity, lack of inter-agency links, procedural inefficiency, lack of in-house skilled and efficient professionals, regulatory

[138] The *Environmental Conservation Act 1995* (Bangladesh) s. 4(2) (f).
[139] Hasan, above n 93.
[140] Ibid.
[141] Ibid.
[142] Momtaz, above n 83, 165.

limitation, and an overall lack of implementing capacity, and most importantly administrative corruption.[143]

Institutional capacity for implementing various action measures by the DoE depends upon the organised coordination between the DoE, the Ministry of Environment and Forest and other line ministries. But there is an absence of such coordination among the ministries and the enforcing organisations as mentioned earlier.[144]

The lack of inter-agency links mainly refers to the absence of joint efforts or a linking programme between the BoI and the DoE for investment-related environmental issues. It has been mentioned earlier that the Board of Investment as a regulatory body for overall investment requires entrepreneurs to comply with environmental regulation of the DoE as a condition for project approval. But in many cases the investors show reluctance for compliance and they are not made liable to encounter any disciplinary action under the BoI. This situation creates an opportunity mostly for the MNCs of the developed countries to exercise their political advantage. This occurs because of absence of linking or joint initiatives between these two agencies.

The legal limitation of the EIA and EMP system as introduced by the *Conservation Act* and *Rules* affects the jurisdiction of the DoE. As per the *Act*, the EIA is only meant for industrial plants or projects with a view to preventing industrial pollution. However, under different policy regimes responsibility for EIA observation has been conferred upon the DoE. On account of this legal gap or shortcoming, the huge areas of investment, particularly infrastructural development with its massive environmental and social impacts, remain beyond the purview of legal obligation. Although, the DoE conducts EIA in other non-industrial sectors on the basis of *adhoc* procedures, the procedural uncertainty may lead to the ineffective or weak implementation of the system. On the other hand, the presence of donor agencies as parallel to the DoE in their own funded project approval leads to the creation of a dual standard in the regulatory mechanism.

Despite the limitation of law, the DoE plays the role of ‘clearing house’ for all development projects under different ministries. But it does not operate itself the EIA in the newly proposed plants, rather it relies on the prepared EIA report from the investors. Investors hire consultants to get it done and the consultants often perform it in such a way that it favours

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[143] See Aminuzzaman, above n 124; Mainuddin, above n 137; Momtaz, above n 83.
[144] Ibid.

the entrepreneurs. It is the job of the consultants to satisfy the proponent's requirements rather than carrying out the objective of an EIA to ensure the social and environmental soundness of the projects, as they look more into their own professional and monetary interests and are free from official responsibilities and accountability. Indeed, there is no code of conduct for the activities of the consultants. Thus there are many instances where the DoE has approved EIA reports submitted by entrepreneurs on the basis of recommendation by their expert consultants, but afterwards the project has encountered severe criticism and protest from commons and civil society organisations.

One problem is that although the DoE is the approval authority, there is a lack of skilled EIA and EMP professionals within the department to make meaningful judgments on EIAs conducted to obtain ECCs. It also suffers from the shortage of basic facilities, equipment, and logistic support to implement the legal directives and polices. Its lack of implementing capacity, inability to conduct proper EIA or to implement mitigation measures (meaning waste management) has been identified as the biggest constraint to creating a strong environmental regulation for investment purposes.[145]

Apart from significant legal and procedural weaknesses, the wider level corruption indulged in by its officials (such as bribery, misreporting, and negligent inspection) in approving industrial plants and other pollution management activities is another big hurdle to attaining the objective goal of the existing environmental protection policy. It is reported that many local industries are operating without having the required environmental clearance and are blatantly violating the ECA 1995 and the ECR 1997 due to corruption in the agency.[146]

The opportunity for the scope of corruption is mainly attributed to and facilitated by the absence of a strong accountability regime for officials deciding whether to permit an investment and under what circumstances it may proceed. This is considered to be a vital part of a legal framework for sound environmental regulation of investment as indicated in an earlier section.

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[145] Robbert Goodland and Jean-Roger Mercie, 'The Evolution of Environmental Assessment in the World Bank: from "Approval" to Results' (Environment Department Paper No 67, World Bank, 1999) <http://documents.worldbank.org/curated/en/1999/01/1960915/evolution-environmental-assessment-world-bank-approval-result> 6 December 2013.

[146] For instance, the extremely hazardous tannery which falls into the 'red' category of industries under the *Environment Conservation Rules, 1997* has been operating since 1972 without the necessary clearance and pollution-fighting devices (see Hassan above n 78, 18).

In view of the said institutional incapacities, legal gaps, and regulatory shortcomings, the DoE needs still to go a long way to be an effective regulatory institution, despite its successful role at times in environmental management. By overcoming the existing shortcomings through maximisation of inter-ministerial cooperation, procedural improvement of the DoE activities, the increase of in-house experts, and the adoption of a good governance mechanism, it will be able to perform as an effective regulatory body competent in controlling environment activities of all kinds, including industrial and non-industrial development projects, irrespective of the origin of the entrepreneurs.

5.4.3.4.2 Environmental litigation

The scope of litigation for environmental harm and necessary judicial arrangements pave a better way for the enforcement of environmental laws and regulations. It ensures the people's right to access to environmental justice. The scope for litigation by the affected parties or recourse to judiciary or judicial intervention can help reduce the environmental harm resulting from industrial or development activities simultaneously with administrative measures. The successful interplay of both litigation and administrative measures create a sustainable environmental regime.

In Bangladesh the environmental litigation both of a civil and criminal nature is legally recognised for individual victims and the practice of judicial intervention by the apex court has emerged in recent years on the basis of public interest litigation (PIL). The ECA 1995 provides a list of environmental offences[147] to be tried by the competent criminal courts. The offences are defined as the violation of any provision or non-compliance with any direction under this Act as a criminal offence. According to this Act the right of prosecution or suit for compensation is not directly conferred upon the individual victims at the event of the violation of any substantive principle causing environmental damage. It is said that the court will not take cognizance of an offence or suit for compensation without the written report from the Director General of DoE or any authorised inspector.[148] The victim should come through the Director General or authorised inspector with a request to accept a compliant about an offence or claim for compensation.[149] Such a provision in a true sense curtails individuals' right to access to justice.

[147] *The Environment Conservation Act 1995* (Bangladesh), s. 15.
[148] Ibid, s.17.
[149] *The Environment Court Act 2000* (Bangladesh).

Apart from the scope of judicial enforcement by the traditional criminal court a further development has taken place through the enactment of *Environmental Courts Act 2000* as a supplementary to the ECA 1995. This Act proposes to establish a special environmental court in each administrative division in Bangladesh with concurrent jurisdiction (i.e. to try both civil and criminal cases) and the basis of instituting a case is a violation of the 'environmental law' as established by the ECA 1995 and the ECR 1997 and other environmental laws to be specified by the government in official notification.[150] However, the government has not yet declared any other environment law to be dealt with by the environment court. In addition, despite being a special type of court it has no separate rules of procedure for the adjudication of the environmental cases. It follows the procedures laid down in the *Code of Criminal Procedure 1862* as well as in the *Code of Civil Procedure 1994* on the basis of the nature of cases.[151] The environment court indeed plays the role as the judicial enforcement body of the ECA 1995 and therefore the same prosecution restriction for individual litigants is affirmed by this Act.

Introducing a special environment court is no doubt a good way for enforcing environmental protection, but courts are not able to achieve stated goals due to certain factors. Firstly, the court is not composed of especial judges having expertise on environmental issues, but the judges act here in addition to their general duties at the court of same rank. Secondly, the court has no *suo moto* power to take environmental pollution issue and investigate it. Thirdly the court is dependent upon the Department of Environment for bringing legal action. Same as under the ECA 1995, *the Environmental Court Act* 2000 provides that only person authorised by the Director General of the Department of Environment can inquire into matters for the purpose of trial by the this Court. The Court has no independent power to take any compliant directly from the aggrieved individuals.

The restriction on direct prosecution by the individual victims in regard to environmental damage practically appears to discourage the spontaneous exercise of the right to access to justice. This is because the intermediary bureaucratic intervention between the complainant and the judicial court may delay the scope of legal remedies and create venues for potential corruption, administrative malpractice, and political indulgence, particularly when the opposition polluters are financially powerful like foreign multinationals, big local companies, and public sector companies. This provision may be said to be a stumbling block in effective functioning of the Court that requires to be amended for the interest of environmental justice.

[150] Ibid, s.5.
[151] Ibid, s.8 (1).

There is also a legal deficit is that under this Act the DoE administration enjoys impunity for their irresponsible act or omission. There is no provision either in the ECA 1995 that defines the liability of the DoE officials for their negligent treatment, indulgence in corruption for issuing ECCs without due scrutiny of the EIA process, and non-performance of statutory duties such as monitoring and regular inspection etc., that may eventually contribute to environmental damage. Even the jurisdiction of the court does not specify trying offences relating to non-compliance with EIA and EMP.

Despite the said shortcomings at the level of subordinate judiciary it is however true that in Bangladesh a landmark development has been achieved in recent times in the case of environmental litigation by the role of the Appellate Division (AD) of the Supreme Court. In the decision of the AD in the FAP-20 Case[152] the people's right to environment has been interpreted as a right to life under Articles 31 and 32[153] of the *Constitution of Bangladesh* and the jurisprudence of *locus standi under* Article 102[154] has been expanded with the recognition of the case for environmental violation as a PIL. As a result of this decision, a phenomenal development has occurred with respect to environmental ligation. The scope of litigation has been broadened on the basis of PIL against all environmental performance by the government authorities or their sponsor for approval of any local or foreign investment project which has potential to cause environmental damage.[155] Thus it acts as an effective way of ensuring environmental protection.

But there are two things that need to be considered in the application of PIL. One relates to the enforcement of the decision flowing from PIL. Another is creating a check and balance

[152] *Dr. Mohiuddin Farooque v Bangladesh and Others* (1997) 49 DLR (AD) 1 (called as FAP -20 case).

[153] It has been held that ' right to life' under Articles 31 and 32 of the *Constitution* not only means protection of life and limbs necessary for the full enjoyment of life but also includes among others, the protection of health and normal longevity of an ordinary human being.

[154] *The Constitution of the People's Republic of Bangladesh* (as modified up to 2013), Article 102 (1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by the Part III of this *Constitution*.

[155] For example, the case of *Bangladesh Environmental Lawyers Association v Secretary, Ministry of Environment and Forest* concerned the neglect, misuse, and lack of coordination by the government authorities in relation to Sonadia Island, a precious forest area and rich ecosystem. Authorities were alleged to be preparing the land for industrial purposes destructive of the environment, eg. shrimp cultivation, thereby destroying the habitat for fauna and flora, and weakening natural disaster prevention benefits. Petition dated 10 October 2003 <www.elaw.org> 7 December 2013; In *Bangladesh Environmental Lawyers Association v. Bangladesh and Others*, the Supreme Court ordered the closing of ship breaking yards that were operating without the necessary environmental clearance and a verity of actions to be taken by the government to prevent future environmental harm including establishing a committee to ensure the regulations are created and followed. Writ petition number 3916, 2006, judgment delivered on 6 July 2006 unreported <www.clcbd.org/.../bangladesh-environmental-lawyers-association-bela-vs> 7 December 2013.

for the application of PIL. If the enforcement does not keep pace with the jurisprudence, the whole process will become futile and counterproductive. Therefore, an effort must be made to ensure the expedient enforcement of orders.

It is true that the recourse to PIL broadens the scope of people's participation in environmental litigation, which ultimately leads to their participation in a sustainable development process. PIL as a tool has engendered an element of accountability, and created space for a human face in development.[156] It can afford a viable mechanism for compliance with sustainable development norms and help the development process become more holistic.[157] But as with any tool there is the possibility of its being abused and misused.[158] There is a tendency to use it to unnecessarily interfere with and oppose development projects for political reasons or other reasons including religious, cultural, and personal reasons. Therefore there should be checks, balances, and limitations through the adoption of rules for the application of PIL in order that it should be steered towards the attainment of environmental sustainability, not the mere opposition of development projects.

5.5 Concluding Remarks and Recommendations

The chapter has made an effort to evaluate the responsibility of foreign investors for their environmental performance and the host state's right to regulate them in their operations affecting the environment. In this process it has focused on the status of existing FDI laws, policies, and bilateral treaties to determine how they establish the relevant responsibility regime for FDI-related environmental performance. Along with this, it has reviewed existing national environmental laws and policies with an in-depth analysis of different recognised regulatory methods applicable to investment operation to evaluate their strength, adequacy and effectiveness.

It is drawn from the discussion that the responsibility principle regarding environmental performance of investors is missing in the core FDI law as it only underscores investors' right to the protection of their investment and properties without reflecting on corresponding duties. However, there is an emphasis on environmental regulation of FDI in National Industrial Policies since 1992. The requirement of the importation of new technology and

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156 Shyami Fernando Puvimansinghe, 'Towards A Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest' (2009) 10 (1) *Sustainable Development Law and Policy* 41, 48.
157 Ibid.
158 Ibid.

categorisation of the industries on the basis of regulation is really praiseworthy, but it is better that these be elevated to legal status to be effectively binding on investors.

The reference to environmental accountability has been made in the Model Bilateral Treaty of Bangladesh. It lacks the articulation, clarity, and adequacy necessary to create a concrete accountability regime. However, it establishes a scope of negotiation for environmental accountability in forthcoming bilateral treaties.

Bangladesh does not have any separate laws or standards for the environmental regulation of FDI or any laws governing their environmental performance and making them accountable to this effect. The ECA 1995, ECR 1997 are main legal instruments regulating environmental issues of both local and foreign companies in relation to entry and operation. The existing legal framework established by these legislations given the features of a sound regulation cannot be said to be perfect. The review of framework relating to ETP, EMP, waste management, compliance and enforcement mechanisms reveals that the existing framework is inadequate for ensuring effective environmental protection leading to attaining the desired development goal.

For particular evaluation, the EIA system adopted by DoE is not comprehensive, the public participation element is not well-emphasised, and SIA method is not properly accommodated. The environmental audit and compliance monitoring are incorporated as substantive principles in the body of law.

The institutional regulatory mechanisms also infected with different legal and practical shortcomings for the enforcement of environmental laws and policies. The main problem with the ministerial body is the lack of coordination among different committees, and excessive reliance on paperwork. The ministerial committees suffer from the institutional incapacity to substantially address the environmental problems.

As regards the regulatory body the DoE, it is true that it has developed different methods for environmental regulation, remarkably a modern EIA method and inspection and monitoring manual. However it has not yet adopted a permanent EIA method for mining and other infrastructural development-oriented activities of companies which have a potentially adverse impact on the environment. In addition, it has lack of institutional capacity, lack of

inter-agency link, procedural inefficiency, lack of in-house efficient and skilled professionals and overall lack implementing capacity.
As regards judicial mechanisms the establishment of the environmental courts is a good effort but it suffers different types of legal and provisional deficit and limitations and moreover is not free from bureaucratic interference.

The above shortcomings call for an urgent reform to be brought in national FDI-related legislation, agreements, and more importantly an environmental legal framework so as to offer an effective environmental accountability and regulatory regime for FDI operation. To this end, the chapter puts forward the following recommendations:

1. A principle pertaining to the environmental accountability of foreign investors should be incorporated into the core FDI legislation.
2. The environmental responsibility issue needs to be categorically negotiated in all forthcoming bilateral agreements and re-negotiated for all existing ones at the time of extension or renewal. The existing BIT model treaty needs to be modified detailing the responsibility principles in its entirety.
3. A separate regulatory framework can be adopted as in China for example, the Guiding List of Industries for Foreign Investors, and the Regulation for the Implementation of Chinese-Foreign Equity Joint Venture.
4. The DoE-adopted EIA system needs to be re-designed with the expansion of its application for all industrial and non-industrial FDI projects to include a mandatory local consultation method and social impact assessment guidelines.
5. The ECA 1995 and the ECR 1997 should be amended to incorporate principles requiring a mandatory environmental auditing and compliance monitoring system and to detail the principles of waste management including hazardous, solid, chemical, and water waste.
6. For establishing effective enforcement mechanism for environmental performance of FDI a separate monitoring cell needs to be formed under the DoE to work at the district level.
7. The Environmental Courts needs to be strengthened with the expansion of the jurisdiction to any kind of violation of environmental laws, administrative negligence, and right of direct prosecution or litigation by the victims.

The above fundamental changes, if progressively brought about in the legal and regulatory framework, will ensure environmentally sound investment leading to the ultimate sustainable development goal.

CHAPTER 6

FDI AND HUMAN RIGHTS PROTECTION: THE LAWS AND INSTITUTIONAL ARRANGEMENTS OF BANGLADESH

6.1 Introduction

The protection of the human rights of the citizens of host states is currently a growing concern in international and national FDI legal regimes. This is because of the increasing adverse effects of FDI activity on human rights and the environment in developing countries. The incidents of certain FDI operations in manufacturing, mining, and development activities in third world economies demonstrate their extensive social and human rights implications.[1]

The fatal disaster at the subsidiary of TNC, Union Carbide, in Bhopal, India, in 1984 is a remarkable example of the impact of negligent operation of FDI. It left more than 5,000 dead and 500,000 injured, caused severe birth defects to more than 100,000 children, and exposed many people to toxic gas, major economic hardship, massive environmental damage and human misery beyond the realms of imagination.[2] Parallel examples are available in other geographical areas in Asia and Africa, notably the activities of Freeport McMoran in Indonesia which lead to the violation of human rights and environmental damage; Royal Dutch Shell in Ogoniland, Nigeria, which caused deaths, human suffering and destruction of the environment; and Texaco in Ecuador, which harmed indigenous people and their environment.[3]

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[1] See UNRISD, *States of Disarray: The Social Effect of Globalization* (Executive Summary of an UNRISD Report for the World Summit for Social Development, 1995)UN, Geneva <www.unrisd.org/80256B3C005BCCF9/.../$file/Statesof_Dis_ES.pdf> 20 December 2013; see also Peter Stalker, *States of Disarray: The Social Effects of Globalization* (Diane Publishing, 1998) <books.google.com/books/about/states_of_Disarray.htm?id> 20 December 2013; see also UNRISD, *Visible Hands: Taking Responsibility for Social Development* (2000) <www.unrisd.org/.../FE969439D82B52480256B670065EFA1?> 20 December 2013.

[2] Shyami Fernando Puvimanasinghe, *Foreign Investment Human Rights and the Environment: A Perspective from South Asia on the Role of Public International Law for Development* (Martinus Nijhoff Publishers: 2007) 1; MR Anderson, 'Litigation and Activism: The Bhopal Case' (1993) 12 *Third World Legal Studies* 177, 179; CM Abraham and Shusila Abraham, 'The Bhopal Case and the Development of Environmental Law in India' (1991) 40(2) *The International and Comparative Law Quarterly* 334.

[3] Ibid; see also Lyuba Zarsky, 'Global Reach: Human Rights and Environment in the Framework of Corporate Accountability' in Lyuba Zarsky (ed.) *Human Rights and Environment: Conflicts and Norms in a Globalizing World* (Earthscan Publication Limited, 2002) 32.

Some human rights issues are violated in FDI-led manufacturing, mining and development projects, affecting individuals and communities. The most common violations concern labour rights and forced eviction or involuntary resettlement. The labour right infringements include the deprivation of the right to freedom of association, forced labour, arbitrary hiring and firing, and inadequate wages and working conditions. Forced eviction is a common practice in development projects and extractive operations. This constitutes a gross violation of human rights, in particular the right to adequate housing,[4] and exposes the community to other potential rights violations, including to a person's land rights, the ability to earn a living and sustain a household and family or cultural connections, access to water, access to health care and access to education.[5] In addition, in some projects, particularly in mining and other extractive projects, the environmental consequences can be devastating to a community's fresh water supply or food sources, affecting people's right to life, food and water, and the natural resources.[6]

These human rights issues raise the question of the responsibility and accountability of investor companies or agencies under international law and the national laws of host countries. The positive effects of FDI is well argued as contributing to the development process of a country, but the negative human rights' implications hinder and frustrate the attainment of this goal. Thus regulation by the host countries as well as international regulation is warranted to ensure that responsibility is taken for the protection and promotion of human rights in order to reap the full benefits of FDI in the truest sense.

For regulating FDI operations affecting human rights, a binding legal regime needs to be created at the international level determining the responsibility of investors, since this is still lacking. However some soft standards have been developed as directives for the operation of MNCs in connection with human rights issues.

The home states of the investor companies can play a role through their own laws, policies, and regulations in connection with the operation of their companies in a foreign country which relate to human rights issues. However this raises the question of the legality of ex-territorial jurisdiction in a foreign case.

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[4] See The UN Commission on Human Rights, *Forced Evictions*, (CHR Res.1993/77 (1)). <http://www.ohchr.org/EN/Issues/Housing/Pages/ForcedEvictions.aspx> 20 December 2013.

[5] See Adam McBeth, 'The Shift Towards Emerging Economy Financing of Development Projects: Implications for Human Rights Standards' in Rowena Maguire, Bridget Lewis and Charles Sampford (eds.) *Shifting Global Powers and International Law: Challenges and Opportunities* (Routledge, 2013) 228, 229.

[6] Ibid.

In fact, host states deserve the sovereign right to regulate investor companies' operational activities for the protection of human rights. The host state can do this mainly in two ways: (a) by creating a specific accountability regime under FDI legislation or/and BIT provisions; (b) enacting or improving the existing relevant legal regime addressing human rights issues as mentioned earlier; or (c) strengthening the implementation, enforcement mechanisms, and remedial measures. So to assess the position of a host state in regulating FDI activities which have the potential to affect labour rights, the right of resettlement after forced eviction, and the right to a clean environment and the preservation of natural resources, an in-depth investigation of FDI laws and BITs and the relevant national laws, their implementation and enforcement mechanisms is required.

Bangladesh has been persistent in its efforts to augment the flow of FDI in manufacturing, mining, energy and other development projects for achieving economic development in its entirety. For the regulation of FDI in general it has adopted FDI legislation and concluded many BITs for creating mutual obligations for FDI operation. It has laws relating to labour regulation, mining operation, private and indigenous land acquisition and reacquisition. It has also adopted some policies and regulation for the protection and conservation of natural resources. Now the question is how far these legal instruments applicable in FDI operation consider the protection of human rights issues, and whether there are adequate enforcing mechanisms.

This chapter therefore attempts to review FDI legislation and BITs in view of the need for the integration of human rights accountability principles into the FDI legal framework. It also critically analyses the existing laws and the functions of legal mechanisms to examine and assess their adequacy, strength, and capability for the protection of human rights issues in relation to labour, forced eviction, and the destruction of natural resources in order to propose improving the legal principles, if necessary, in line with international standards and practice. The legal analysis here will mainly be focused on labour rights and rights of resettlement in consequence of forced eviction.

In achieving its purpose this chapter firstly reflects on the evidences of the negative impact of FDI operation by TNCs on human rights in developing countries in general and Bangladesh in particular. Secondly, it focuses on the development of standards of human rights regulation of FDI by MNCs at the international level and the recognition of a host state's right to regulate. Thirdly, it focuses on human rights protection, particularly labour rights, under the FDI legislation, BITs, and the existing labour legislation in Bangladesh. Fourthly, it focuses on the protection of rights related to involuntary resettlement in the existing legal regime.

This chapter argues that without taking human rights issues into consideration, the objective of development through the increment of FDI will not be properly achieved. It therefore recommends the integration of this issue in relevant laws and bilateral treaty negotiations in line with development which is supportive of human rights.

6.2 The Evidence of Human Rights Violations in FDI Operation

While FDI is often perceived as a driving factor for the local development of host countries, there have been plenty of allegations against investment operations regarding the violation of human rights in developing countries. The most notorious human right violations by investor companies, prominently TNCs, include, as indicated earlier, labour right infringements (such as the use of forced labour, gender inequality, inadequate health and safety, and the suppression of rights to the freedom of association and speech), the violations of the right to culture and religious practice, forced eviction, and the gross infringement of environmental rights.[7]

Labour rights abuses are common in host countries. Although it is often argued that through FDI, investor companies not only influence economic growth but also contribute to the improvement of the labour conditions in developing countries, their activities are the subject of controversies. In particular, there are allegations that they exploit the workers by requiring them to work in 'sweatshop' conditions, that is, paying low wages while subjecting workers to coercive, abusive, unhealthy and unsafe conditions in the workplace.[8] The negligent activities of MNCs, of which many have been litigated under the *ATCA of 1789* of the US and tort laws of European countries, are mostly in connection with causing workers' health and safety problems.[9]

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[7] David Kinley and Sarah Joseph, 'Multinational Corporations and Human Rights: Questions about their Relation' (2002)27(1) *Alternative Law Journal* 7.
[8] See UN Committee on Trade Development, '*Multinational Corporations in Least Developed Countries'* (2000) <http://www.libertyparkusafd.org/lp/Hancock/reports/multinational%20Corporations> 19 October 2013.
[9] See for example, cases litigated in the UK Court are Thor Chemicals Holdings Ltd., RTZ Corp. Plc., and Cape Plc. For more details see Marion Weschka, 'Human Rights and Multinational Enterprises: How can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad?' (2006) 66 Haidelberg Journal of International Law Z625-628 <http://www.zoaerv.del/> 22 January 2013.

The main reason identified for the violation of labour rights is that TNCs hold a substantial amount of power, enabling them to quick access to a large quantity of relatively cheap labour as well as influence over the host governments.[10] Their location choice is prominently determined by the availability of cheap labour, hiring and firing opportunities, and lax labour regulations. As a result, workers are exposed to hazardous working conditions, low wages, over-exertion, and overall abuse. The governments of the developing and least-developing host countries do not take or are not willing to take any action against the investor companies in the fear that if the investors leave, they will be left with exacerbated unemployment problems.[11] Because of the fear of widespread unemployment, the strong bargaining power of the TNCs, and lax labour regulations, the governments of developing countries fail to enforce human and labour rights effectively.

There is also evidence of TNCs' alleged complicity in the host state's police and military operations to resist and repress those who are opposed to any development project on the ground of its negative impact on their lives. For instance, the California-based energy giant Unocal was litigated by Burmese villagers for its alleged direct complicity in abuses committed by the Burmese military, which was its partner in a natural gas pipeline joint venture.[12] Royal Dutch Shell was branded for complicity in human rights offences committed by the Nigerian government.[13] British Petroleum was smeared by the accusations of abuse in its Columbian operations.[14] Freeport McMoran was accused of enabling Indonesian repression of indigenous groups in *Kalimanton*.[15] Chevron was accused of sanctioning the killing of *Ijaw* protestors at a well site in Nigeria.[16]

The reason for the direct or tacit support of governments for human rights violations may be different from the host country's perspective. But it is generally assumed that TNCs often

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[10] Ibid.
[11] Alexander Hijzen, *Working Conditions in Foreign Operations of Multinational Enterprises* (2008) Vox <http://www.voxeu.org/article/working-conditions-foreign operations-multinational -enterprise> 18 January 2013.
[12] *Doe v Unocal* (9th Cir., 2001) 248 F 3d 915 (It is noted that the allegations included killing of tribal people, raping of village women, destruction of property, torture and forced labour); Also see for example, Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 (1) *City University of Hong Kong Law Review* 1, 2.
[13] *Wiwa v Royal Dutch Shell* (2nd Cir., 2000) 226 F 3d 88.
[14] 'TNK-BP at War with Itself', *The Economist* (London) 19 July 1997, 39 <www.economist.com/node/11670616> 12 December 2013.
[15] See Richard Vietor, 'Freeport McMoran' (Case Study No.796-124, Harvard Business School March 1998) <http://www.hbs.edu/faculty/Pages/item.aspx?num=23898> 12 December 2013; see also Debora Spar, 'Foreign Investment and Human Rights' (1999) 42:1 *Challenge* 55,70; see also Russsel Mukhiber, 'The Ten Worst Corporations of 1996' (December 1996) 7 (12) *Multinational Monitor* 7, 12.
[16] Pratab Chatterji, 'Rights-Indonesia: Oil Giant Accused of Aiding Army Atrocities', *Inter Press Service News Agency* (online), 29 December, 1998 <www.ipsnews.net/.../rights-indonesia-oil-giant-accused-of-aiding-army-at> 12 December 2013.

find the host governments accommodating their interests even when their corporate activities are opposed to the common interests of the country's people.[17]

The TNCs' investment activities sometimes become a threat to the life of the local people through forced eviction or other means which affect their land, homes, and water resources. The potential threats to human life mostly occur in mining operations, and a good number of foreign multinationals are engaged in excavation activities across developing countries. Nigeria, South Africa and some countries of South America have experienced vulnerable human and environmental situations in the course of excavation projects by foreign multinationals[18] in recent decades, which are indicated to an extent in the preceding chapter. In India, Coca-Cola was associated with the gross violation of human rights, the violent suppression of community resistance, depletion of water resources through uncontrolled water mining, damage to agriculture and paddy fields, drying out of wells, dumping of toxic sludge, and abuse of labour laws.[19]

Recently, a widespread opposition by the mass and civil society orgnisations in Bangladesh over the *Phulbari* Coal Project (a project between Asia Energy and Bangladesh) was grounded on the potentially disastrous effects of its operation on the surroundings. It is reported that the project threatens to destroy the homes, lands, and water sources of as many as 220,000 people and forcibly evict tens of thousands of people.[20] As regards land destruction and displacement, it is likely to destroy 14, 660 acres of land, 80 per cent of which is fertile farmland.[21] The destruction of farm land would decrease food security in a nation in which nearly half of all people currently live below the nitration poverty line. It would also evict or impoverish 50,000 indigenous people belonging to different tribal groups. Paula Palmer, the director of Culture Survival's Global Response Program notes that the project threatens some of Bangladesh's most vulnerable indigenous peoples, who trace their

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[17] Ibid.
[18] See Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?' (2002) 42 (3) *Wasburn Law Journal* 399, 405.
[19] See *Permatty Grama Panchayat v State of Kerala* (Case against Coca-Cola state of Kerala: India) (2004) 1 KLT 731<http://www.indiankanoon.org/doc/1161084/> 12 December 2013.
[20] Heather P Bedi, *UN Special Rapporteur Human Rights Condemnation: Corporate Land Grabbing for Coal Mining in Bangladesh* (paper presented at International Conference on Global Land Grabbing, 11 October 17-19, 2012) LDPI International Coal Mine Accountability Project, *Phulbari Coal Mine, Bangladesh* <http://www.accountabilityproject.org/article.php?list=type&type=43> 17 January 2013; See also the International Coal Mine Accountability Project, *The Phulbari Coal Project: A Threat to People, Land, and Human Rights in Bangladesh* <http://www.accountabilityproject.org/article.php?list=type&type=43> 17 January 2013; see also Shawkat Alam and Abdullah A Faruque, Tragedy of Gas and Coal Exploitation in Bangladesh: Towards Ensuring Corporate Environmental Accountability (2009) 12 (1) *Asia Pacific Journal of Environmental Law* 117,137.
[21] Ibid.

ancestry in the region back 5,000 years.[22] He adds that indigenous leaders fear that if their small communities are broken apart and dispersed, they will not be able to maintain the cultural traditions, religious practices, and languages that have sustained them for thousands of years.[23] The surprising point of the project agreement is that despite the eviction of households and destruction of firm land, the operating company is not under any obligation to provide replacement land to those who are displaced and evicted.

Apart from land destruction and human displacement, water security and public health are also threatened in the region where the water scarcity problem has already been markedly worsening. Reportedly about half of the people in *Phulbari* do not get enough water to meet their needs. Despite this situation, the mining process of draining water to dry out deep pits in preparation for coal mining is likely to lower the water level by 15-20 metres for more than six miles beyond the mine's footprint.[24] The public health will also be at grave risk for those who are living or working in the vicinity of coal extraction and coal-fired power.

In view of the growing rate of human rights violations or the potentially negative impact of FDI operation on human rights the arrangements for the legal protection of human rights of the aggrieved people is crucial. The legal remedies for the violation of human rights have noticeably been invoked so far under the jurisdiction of home states. This is evident from the amount of litigation under ATCA and the laws of some EU countries relating to the violation of MNCs' 'duty of care' resulting in human rights abuses, vulnerable workplace health and safety conditions, and environmental damages. The main challenges the host countries face and are thus far unwilling to take any direct legal action towards under their jurisdictions may include inadequate laws and regulatory arrangements, rampant corruption, and lax government policies towards the regulation of MNCs operating in their territories.

Above all, the political and economic pressure exerted by MNCs' home countries is also a challenge. In addition, at the international level, the legal personality of MNCs under international law is still unsettled and therefore the nature of their legal accountability for human rights violation remains ambiguous. The responsibility regime of MNCs for human rights developed so far is voluntary and they prefer to comply through voluntary initiatives. Under such a situation, in order to protect different human rights issues potentially affected

[22] Ibid.
[23] Ibid.
[24] Ibid.

by FDI operation, a regulatory regime needs to be created both under international law and host states' national laws and BITs frameworks.

6.3 The Regulation of MNCs Operation Affecting Human Rights

6.3.1 Human rights and MNCs' responsibility under international law

Determining the legal responsibility of MNCs for human rights in their FDI operations is still a difficult task in international law. This difficulty may be ascribed to two main reasons. Firstly, according to international human rights law, only the states are under legal obligation to adopt measures to protect human rights. In another word, it is a state duty to introduce measures to ensure that economic activities on their territory do not hinder or affect human rights.[25] The states are traditionally bound by the existing international standard-setting documents such as the *Universal Declaration of Human Rights* and International Covenants for the protection of human rights.

Secondly, the legal personality of MNCs is also in question and the subject of much debate. Many jurists, scholars, and commentators have questioned the attribution of an international legal personality to corporations. The authors of a leading American case book hold that such corporations are private, non-governmental entities; they are subject to applicable national law, and they are not an international legal person in a technical sense.[26] In an article of the *Harvard Law Review* in 2001 it is stated that international law is virtually silent with respect to corporate liability for the violation of human rights. [27] It has neither articulated the human rights obligations of corporations nor provided mechanisms to enforce such obligations.[28]

On the other hand, a section of the scholarly community supported by human rights activists argues that international human rights law imposes direct duties on corporations and other private actors.[29] Terming the condition of international legal personality for the attribution of

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[25] Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities* (2009) International Institute for Sustainable Development <http://www.iisd.org> 21 January 2013.
[26] Lori F Damrosch et al, *International Law: Cases and Materials* (West, 4th ed., 2001) 249.
[27] J Sarkin, 'Development in the Law-Corporate Liability for Violations of International Human Rights Law' (2001)114 *Harvard Law Review* 2025, 2030-31.
[28] Ibid, 2025-26.
[29] See, Jordan J Paust, 'The Reality of Private Rights, Duties and Participation in International Legal Process' (2004) 25 *Michigan Journal of International Law* 1229, 1242-43.

rights and duties as an orthodox view, they say that international legal personality follows the attribution of rights and duties.[30] Finally they argue for holding the MNCs accountable as corporations are international legal persons because they already in certain international law settings possess rights and duties and the capacity to enforce those rights.[31] Rosalyn Higgins, the former president of the International Court of Justice also treats MNCs as a participant in the international legal system as having the capacity to bear some rights and duties under international law.[32]

Despite these two opposing perspectives, there exist a number of international documents, recommendations, and guidelines developed over the last few decades in the face of the expansion of MNCs activities and as a consequence of demand from NGOs and international civil societies to hold MNCs responsible for the protection of human rights. These documents are considered to be part of international law. They are mainly the *OECD Guidelines for Multinational Enterprises 2000*, the *ILO Tripartite Declaration for Multinationals 1976*, and the *UN Norms on the Responsibilities of Translational Corporations and Other Business Enterprises with Regard to Human Rights 2003*. These documents do not directly impose human rights legal duties on MNCs, as they are soft law in nature. They may nevertheless provide a legal basis for the orderly management of international relations arising out of MNCs activities' affecting human rights. Furthermore, it is possible that some soft law provisions have hardened into legal provision.[33]

The OECD Guidelines are based on an intergovernmental agreement that encompasses a set of recommendations to multinational corporations providing voluntary principles and standards for responsible business conduct consistent with applicable laws in the areas of employment, environment and human rights, combating bribery and others.[34] With respect to

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[30] Olivier de Schutter, 'The Challenge of Imposing Human Rights Norms on Corporate Actors in Transnational Corporations of Human Rights' in Oliver de Schutter (ed.), *Transnational Corporations and Human Rights* (Hurt Publishing 2006) 32, 33.

[31] Nicola Jagers, 'The Legal Status of Multinational Corporations under International Law' in Michael K Addo (ed.) *Human Rights Standards and the Responsibility of Transnational Corporations*, (Kluwer Law International, 1999) 259, 261.; see also Jonathon I Charney, 'Transnational Corporations and Developing Public International Law' (1983)1983:4 *Duke Law Journal*, 748, 764 (stating that the accountability of corporations to international legal rules appear to be linked to the extent of their ability to be direct participants in the international legal process).

[32] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: 2nd ed., 1995) 115; See also Menno, T Kamminga, 'Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC', in Philiph Alston (ed.) *The EU and Human Rights* (Oxford University Press, 1999) 558.

[33] Marion Weschka, 'Human Rights and Multinationals Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad?' (2006) 66 *Zeitschrift fur Auslandisches Offentliches Recht und Volkerrecht* (*Zoa RV)* 625, 628.

[34] See *The OECD Guidelines for Multinational Enterprises* (2000) Ch. IV, V, VI, VII <http://www.oecd.org/corporate/mne/1922428.pdf> 12 December 2013.

human rights in particular, it states that corporations should respect the human rights of those affected by their activities consistent with the host government's obligations and commitments.[35] The wording reveals non-legal voluntary standards of the Guidelines which at best can be followed by the MNCs of the OECD and non-OECD countries as a code of conduct. However, it is simplistic to presume by the latter part of the said statement that MNCs can be equated with states in terms of the legal human rights obligations that can and should be placed on them.[36] They have the same range of obligations for the protection of human rights as the host state's governments do.

The *UN Draft Norms* set out sweeping human rights duties for corporations that would apply directly, as a matter of international law. Although the *Draft Norms* do not possess the status of any binding international treaty, they contain a plethora of duties and obligations TNCs should abide by in their activities.[37] The *Draft Norms* recognise the general obligations of TNCs as parallel to the states' in promoting universal respect for, and observance of, human rights and fundamental freedoms.[38] In a general obligation clause, it is stated that 'within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, and ensure respect of, and protect human rights recognized in international as well as national law'.[39] However, in the same paragraph the primary responsibility of promotion and protection of human rights are conferred upon the states, including even to establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by the TNCs and other business enterprises.[40] In the light of the said statement it can fairly be said that the UN Norms suggest for TNCs responsibility to respect human rights within their sphere of activity and influence,[41] and ascribes the responsibility of states either home or host to

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[35] See Ibid, General Policies 1.1.

[36] Kinley and Joseph, above n 7, 10.

[37] The duties and obligations include ensuring the right to equal opportunity and non-discrimination treatment, right to the security of persons, rights of workers, respect for national sovereignty and human rights obligations with regard to consumer protection, and obligations with regard to environmental protection.

[38] The rights and fundamental freedoms encompass the right to equal opportunity and non-discriminatory treatment, the right to security of persons, workers' rights, a right to development, indigenous peoples' right and a whole range of civil and political as well as economic, social and cultural rights, such as the right to adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion, and freedom of opinion and expression. See *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (2003) arts. 2,3,5,6,8,9,12.

[39] Ibid, art.1.

[40] See Ibid, art.17.

[41] The phrase 'within their respective spheres of activity and influence' may be construed as including subsidiaries as well as affiliate sister concerns and also the supply chain. It also includes the operational

regulate and ensure the implementation by the corporation of human rights as set for in the Norms or any other relevant national laws.

John Knox argues that the draft Norms open the norms to converse duties owed by individuals to the state and impose direct human rights duties on corporations.[42] In his opinion, domestic enforcement is the most effective method of promoting compliance with human rights norms.[43] In addition to direct enforcement by the state governments, the domestic courts with the power to award civil damages against human rights violators can play a key role in ensuring effective compliance.[44]

Apart from the UN Norms, there is also a recent development of 'Guiding Principles on Business and Human Rights[45] 2011 (hereinafter called Guiding Principles) at the auspices of the UN. These principles are in fact developed by the special representative of the UN Secretary General under which states as well as TNCs and other business enterprises are attributed responsibility for the protection of human rights. The responsibility of TNCs' and other business enterprises responsibility relates to human right issues potentially affected by their business operation. The attributed responsibilities are soft law in nature, expressed as a 'good' practices guide.

The Guiding Principles are designed and grounded in recognition of (a) states' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) the role of business enterprises as specialized organs of society performing specialized functions, required to comply with applicable law and to respect human rights; and (c) the need for rights and obligations to be matched to appropriate and effective remedies when breached. These principles set out the obligations of states and TNCs separately unlike the UN Norms in order to establish that corporate responsibility exists independently of state's abilities and willingness to fulfil their human rights obligations. The uniqueness of the Guiding Principles is the simultaneous reflection of fundamental and operational principles ascribing

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workplace as well as the locality where they operate in any form. See Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Rutledge, 2012) 153.

[42] John H Knox, 'Horizontal Human Rights Law' (2008) 102(1) *American Journal of International Law* 1, 37; See also Natalya S Pak and James P Nussbaumer, 'Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses' (Working Paper No. 45, Hertie School of Governance, Berlin, November 2009) <www.hertie-school.org/fileadmine/images/downloads/working../45.pdf>22 January 2013.

[43] Ibid.

[44] Ibid.

[45] The document is called in full Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.

the obligations that apply to TNCs and all other business enterprises regardless of their size, sector, location, ownership and structure.

The principles mainly prescribe two types of responsibility: (b) to avoid infringing on human rights of other and (b) to address adverse human rights impacts with which they are involved.[46] It means that the business enterprises are required to avoid causing or contributing to adverse human rights impacts through their own activities and take all adequate measures 'to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships'[47]. The responsibility to protect human rights in their case refers to internationally recognised human rights as expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, 1998.

With regard to meeting corporate responsibility to protect human rights, the Guiding Principles suggest for adopting policy commitment by the enterprises to be complied with by all persons internally or externally linked to its operations, and the application of due diligence process to identify, prevent and mitigate the impacts on human rights in addition to the application of processes to enable the remediation of human rights impacts they cause or to which they contribute. Home states and host states are also attributed the responsibility to protect against human rights abuse by business enterprises within their jurisdiction through effective policies, legislation, regulation and adjudication. It is noteworthy that although the Guiding Principles in their entirety are premised on soft regulation, the wording or phrasing reflecting on state's responsibility to protect human rights abuses by enterprises appears to be of binding nature.

The *ILO Tripartite Declaration* suggests MNEs to comply with a guideline in the fields of employment, training, conditions of work and life, and industrial relations.[48] As regards human rights protection, the focus has been on the equality of opportunity and treatment, on wages, benefits and the conditions of work, on health and safety, on the freedom of

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[46] See Guiding Principles on Business and Human Rights: Implementing the United Nations " Protect, Respect and Remedy" Framework (2011) , chapter II, Fundamental Principle 11. The principles states 'Business enterprises should respect human rights. This means that they should avoid infringing on human rights of others and should address adverse human rights impacts which they are involved'.

[47] Ibid, fundamental principle 13.

[48] ILO, *Tripartite Declaration of Peoples Concerning Multinational Enterprises and Social Policy*, adopted by the Governing Body of International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th Session (Geneva, November 2000), (2002) <http://www.ilo.org/public/english/standards/norm/sources/mne.htm> 22 January 2013.

association and the right to organise, and on collective bargaining for smooth industrial relations. The *Declaration* only contains labour and employment-related human rights. Although this *Declaration* is a non-binding instrument, it has been adopted on the basis of combined consensus and commitment of compliance of the parties including MNEs that merits an equal character of a binding instrument. Moreover, this *Declaration* is supported by corresponding ILO Conventions binding upon the states upon ratification.[49] As the underlying ILO-Conventions are binding on states, one might conclude that ILO-implementation mechanisms rather exert indirect 'pressure on a company via … pressure on the government of its country'.

Given the statements of above mentioned multilateral instruments, a framework of the responsibility of MNCs for the promotion and protection of human rights in their operations in a foreign land has been established, although the nature of responsibility is voluntary on account of the absence of any law-making binding force of those instruments. The voluntary nature of this responsibility is different from other international soft law regimes as the host states are conferred the power to formulate legal and administrative regulatory framework to protect human rights against the violations by the corporations. Therefore, much weight has been given to the effects of MNCs activities having human rights implications, and this is gaining currency in the foreign investment regime as being the matter of negotiation in bilateral investment treaties between home and host states. Although a bilateral treaty in principle does not create any general principle of international law, it may create a trend of mutual obligation upon the state parties to regulate the corporations involved in investment by incorporating human rights provisions for holding the investors MNCs responsible for the violation of human rights under international law.

6.3.2 BITs for creating responsibility regimes for TNCs operation

As with environmental concerns, currently human rights are becoming the subject matter of negotiations in BITs as investors are beginning to come under obligation for the protection of human rights in their operations in host countries. The reference to human rights in BITs is

[49] For example, the corresponding conventions *inter alia* are the *ILO Convention No.138 concerning Minimum Age for Admission to Employment*, *Convention No. 182 The Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, *Convention No. 155 Occupational Safety and Health*, *Convention No.87 Freedom of Association and Protection of the Right to Organise*, *Convention No.105 Abolition of Forced Labour*, and *Convention No. 111 Discrimination (Occupation and Employment).*

still rare;[50] however, the trend is growing mostly in the issues of health, morals, and public affairs in line with a formula that has been used in international trade law.[51]

The demand for the incorporation of human rights into BITs is not new. This kind of proposal continues to be made by many scholars with an objective to ensure and strengthen the legal accountability of TNCs for human rights violations because of its being absent in the existing relevant documents of international law. It has been proposed that BITs should incorporate two human rights provisions:[52]

1. inclusion of an international human rights responsibility standard as a benchmark on the human rights reporting system for TNCs in host countries; and
2. authorisation for courts in home countries to have jurisdiction over ex-territorial human rights violations of TNCs whether these have been perpetrated directly or indirectly.

As both provisions are interrelated and complementary their incorporation into BITs may help to create an effective human rights responsibility regime for MNCs in their operation in host countries. The first provision may play a crucial role for levelling the playing field for all investing corporations in the host countries, having no regard for their country of domicile. It thus creates a legal certainty and specificity of particular human rights responsibilities of corporations. Likewise the second provision provides for a judicial mechanism to take action against the violation of agreed standards of human rights by TNCs.

Similarly with regard to creating a human rights responsibility regime for MNCs through investment agreements, the International Institute for Sustainable Development (IISD) has long moved a motion for such an inclusion in investment agreements along with a remedy mechanism for individuals.[53] In the course of offering a set of model provisions to promote sustainable development in the host countries, IISD adds a provision on investor's responsibility that the investor and investment should uphold rights in the workplace and in the state and community in which workplaces are located.[54] Investors shall not undertake or cause to be undertaken, acts that breach such human rights. As regards remedial measures, the provision underlines that the investors shall be subject to civil action under the judicial

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[50] M Sornarajah, *The International Law on Foreign Investment* (Cambridge, 3rd ed., 2010) 227.
[51] Ibid.
[52] Iman Prinhondono, 'Incorporating Human Rights Provisions into Bilateral Investment Treaties: A Quest for Possibilities' (2012) 2(2) *International Journal of Public Law and Policy* 129, 130.
[53] H Mann, et al. *IISD Model International Agreement for Sustainable Development Negotiators*, (IISD, 2nd ed. 2006) < www.iisd.org/pdf/2005/investment_model_int_handbook.pdf> 25 January 2013.
[54] Ibid.

process of their home states for their alleged acts or decisions in relation to investment leading to significant damage, personal injury, or loss of life in the host states.[55]

The model provisions of IISD or the provisions proposed by academics at different stages have never been seen to be introduced in any bilateral investment treaty. Nevertheless, these provisions can act as a useful guide for host and home countries to arrive at a consensus in drafting investor liability provisions in the future. The introduction of these provisions will bring ground-breaking changes to the traditional BIT setting which apparently tends to be biased towards the investor's interests. With little variation, most BITs provisions are primarily filled with commitments from host countries to provide favourable conditions for investment through ensuring a strong guarantee of the protection of investors' rights. Provisions regarding the investors' responsibility for environmental and social issues such as human rights and other matters of public interest are quite absent. As a result, the investment treaties in many cases appear to be imbalanced and one-sided. Accommodating these issues in treaties through negotiations between host and home states may contribute to creating a responsibility regime for human rights and a better likelihood of implementation as the issues are mutually agreed upon. Such an attempt would help to make BITs balanced and more development-oriented for the host state. However, the proposal for ex-territorial jurisdiction of home state courts may affect in principle the sovereign right of the host state to regulate foreign business entities within its own territory.

6.3.3 Host states' right to regulation of MNCs concerning human rights

Under international human rights law derived from treaty and non-treaty instruments the primary responsibility for the promotion and protection of human rights lies with the states. This does not necessarily mean that other private entities such as MNCs can violate human rights with impunity.[56] As a primary duty bearer under international law a state should ensure that MNCs do not infringe human rights in their operations at a place where they are located. The state's primary responsibility enables it to exercise the exclusive sovereign right at the event of a violation of human rights by other non-state actors. As per the traditional view of international human rights instruments, 'indirect' responsibility can be imposed on corporations provided under domestic law in accordance with states'

[55] Ibid.
[56] Sarah Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 46 *Netherlands International Law Review* 171, 175-176.

international obligations.[57] In view of this, the host state has every right to protect against the infringement of human rights by MNCs through national laws and its own law enforcement mechanisms. Holding MNCs responsible under national law is based upon the recognised principle of state sovereignty under international law underpinned by the argument that through incorporation or registration under national law of the host country the subsidiaries or affiliates of the MNCs acquire a legal personality. Hence they are capable of suing or being sued under the jurisdiction of the host country.

However, the host states encounter some practical restraints in controlling MNCs in all these respects. Given the economic power of the MNCs and their international mobility, as well as the dependence of many countries on international direct investment, the developing host countries fail to take action against them for violating human rights on their territory.[58] Such an action by a host state often is considered by MNCs as being an anti-corporation action. As a result they may react to state sanctions with the relocation of their business to another host state. Moreover, even before a state enforces human rights law against them, MNCs can threaten to close down their business in that country, which is a disincentive for imposing any state sanction in the fear of losing foreign investment, jobs, and technical expertise.[59] In addition, despite their willingness to prosecute violator companies, many developing and least-developed countries are incapable of initiating the necessary legal procedures, as they lack adequate supporting laws and financial resources as well as a well-functioning and non-corrupt judicial system. Given this situation the home states' regulations are relied upon and taking advantage of different gaps and weaknesses in host states' regulations the home states take the lead in litigating against human rights accusations in their own courts in the exercise of ex-territorial jurisdiction.

It is argued that as 90 per cent of all MNC subsidiaries and affiliates have their parent companies in developed countries,[60] it is more effective to bring them under legal action in their country of origin for the violation of human rights committed in developing or least-developed host countries. Having recourse to home state jurisdiction appears a better way to avoid the host states' problems as outlined above. The courts of developed countries are well-equipped, non-corrupt in practice, and due to higher procedural standards are capable of

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[57] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) *The American Journal of International Law* 819, 832.
[58] See Brian Roach, *Corporate Power in a Global Economy* (2007) Global Development and Environment Institute Tufts University <http://ase.tufts.edu/gdae > 25 January 2013.
[59] Ibid.
[60] RJ Fowler, 'International Environmental Standards for Transnational Corporations' (1995) 25 *Environmental Law* 1, 9.

efficient investigation and thus bringing the violators to justice.[61] In addition, international law also recognises the right of home states to exercise ex-territorial jurisdiction over their nationals committing wrongs abroad.[62] There has been a long-standing practice of litigation against violators in the courts of home states pioneered by the ATCA of 1979 in the US.

Despite the fact that the application of ex-territorial jurisdiction by the home states is recognised in international law, the prosecution of MNCs by home states faces some difficulties owing to the extra-territoriality of an offence. The difficulties relate to three main factors, namely corporate legal personality and nationality, state sovereignty and *Forum Non Conveniens*.[63] The first problem relates to home state ex-territorial jurisdiction over subsidiaries and the affiliates. The home state must have the jurisdiction over the parent companies, but from the point of view of legal personality, subsidiaries operating abroad are absolutely independent from the parent companies as separate corporate bodies.[64] Hence, they are subject to the legal order of the host state and take on the host state's nationality.[65] The principle of territoriality in a real sense is that each separate entity belonging to an MNC is subject to the laws of the state where it is located and has established its business.[66] Therefore, the requirement of nationality for the justified application of ex-territorial jurisdiction would not be met if subsidiaries of MNCs are prosecuted by the home state for human rights abuses in the host country. This would be perceived as interference into the *domaine reserve* of the host state and as a violation of its sovereignty.[67]

However, on the contrary, it is argued that concepts of state sovereignty and domestic jurisdiction are not absolute, rather qualified and the limitation and restriction is supported and justified by gross violations of fundamental international human rights norms.[68] The international community agrees that the violation of fundamental human rights (such as

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[61] Joseph, above n 56, 177.
[62] Ibid, 178; see also PT Muchlinski, 'Human Rights and Multinationals: Is there a Problem?' (2001) 77 *International Affairs* 31, 42.
[63] See Weschka, above n 33, 629.
[64] See P Blumberg, 'Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems' (2000, supplement) 50 *American Journal of Comparative Law* 493, 493-494. (British Petroleum consists of over 1000 'separate interrelated corporations acting under common control).
[65] The determination of a legal person's nationality is very complex and controversial. The majority believes that the country where the company is registered under national law is decisive for the determination of its nationality (see Bercelona Traction Light and Power Company [1970] ICJ Reports, p.3). Others hold that the company's nationality is determined by the state where the chief administration office is situated. Still others trust that the country where the company is economically controlled from should be the main criterion for determining its nationality. This control theory could be interesting for human rights protection against MNCs. Unfortunately, the ICJ rejected this in the *Bercelona Traction* case.
[66] See K Schmalenbach,'Multinationale Unternehmen and Menschenrechte' (2001) 39 *Archive des Volkerrechts*, 57, 62.
[67] Ibid,73.
[68] Ibid,75.

torture, slavery, forced labour, genocide, ethnic cleansing, summary executions, and racial or religious discrimination) that form part of the principle of *jus cogens* allows interference with the state sovereignty of the violator state by means of external control. No state can ever claim that such violations are their internal affairs or belonging to their *domaine reserve* and out of extra-territorial control.[69] This is because the states are obliged to respect all these norms as so-called obligations *erga omnes*.[70] In this case the enforcement by the home state of the principle of *jus cogens* does not amount to an infringement of the host state's sovereignty.[71] Under this situation, the application of extra-territorial jurisdiction of the home state over MNCs in the case of the violation of human rights foreign territory is possible, although they are not entrusted with any such duty under international law. Otherwise, the home state's initiative to regulate its MNCs for human rights protection in foreign territory would be inappropriate. The notable point is that home state regulation of MNCs is only possible where the state sovereignty is not infringed or there is no potential threat to infringement.

In addition to this, the Anglo-American doctrine of *forum non coveniens* acts as an obstacle for the exercise of efficient home state jurisdiction over MNCs operating abroad. According to this doctrine, courts have the discretion to decline to hear a case where there exists a foreign court more appropriately situated to hear the matter.[72]

Given the discussion, although both jurisdictions encounter some problems, the majority number of complaints is lodged by foreign victims against MNCs directly in their home countries. This does not mean that law, judicial, and administrative mechanisms in host countries are totally absent. While MNCs are subject to laws of both countries, when comparing the adequacy of the judicial mechanism in the host with the home state, victims prefer foreign- developed home state courts, although home countries are not obliged to hold their nationals responsible for conducting abusive behaviour abroad under international law.[73] Conversely, the hosts states directly or indirectly under national law and international law have the right to interfere legally with all negative activities detrimental to human rights, health and safety. But in reality host states are reluctant to resolve cases of human rights abuses allegedly committed by MNCs. This has been either because of the lack of the

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[69] See M Shaw, *International Law* (Cambridge, 5th ed., 2003) 224-225, 252.
[70] This terminology was used by International Court of Justice in *Case Concerning the Barcelona Traction, Light and Power Company Limited*, Judgement of 5 February 1970 ICJ Report 1970, 32. The judgment establishes the concept of obligations *erga omnes* with regard to human rights.
[71] See Schmalenbach, above n 66.
[72] See Joseph, above n 56, 178.
[73] Ibid, 181.

independence or strength[74] of the judiciary or the absence of substantive or procedural laws. For instance, in the Bhopal case, plaintiffs and the Indian government insisted that this case should be heard by a US court. The argument was that Indian law is lacking in substantial and procedural law to deal with such a complicated case against an MNC.[75] Thus there is a need for the existence or adoption of host state legal regulation in this area which consists of respective laws and policies, strong judicial and other enforcement, and compliance mechanisms. At the same time the obligation for the protection of human rights needs to be addressed duly in bilateral investment treaties.

6.4 Regulating FDI Operation for the Protection of Human Rights in Bangladesh

It is already said that industrial or other development activities by MNCs or inter-governmental agencies in a host state may have implications for human rights violations in different ways that mostly concern the labour and employment, health and safety of the workers, the environment, and involuntary relocation and displacement through land acquisition.[76] The MNCs in their FDI operations can infringe human rights directly, e.g. by using child and forced labourers, by suppressing trade unions, by requiring their employees to handle dangerous substances without the necessary health and safety precautions, by establishing inhuman working conditions in general, by discriminating against women or ethnic or religious minorities in the workplace, by evicting people forcibly from their homes without adequate compensation, and by polluting the environment and destroying the livelihood of the people living in the region etc.[77]

On the other hand, MNCs can indirectly be complicit in or benefit from human rights violations committed by host states in order to protect their business, e.g. if company facilities are guarded against peaceful protesters by the state military with the use of excessive violence. These are very common occurrences in all least-developed and developing host countries and Bangladesh is not an exception. In order to control and regulate MNCs operations affecting labour and other human rights legal initiatives can be taken under constitutional provisions, by creating a responsibility regime under FDI laws,

[74] Ibid.
[75] McBeth, above n 5, 229.
[76] FDI's implication for the violation of labour rights, health and safety issues are evidenced from the facts of different cases tried by the courts in the UK and US under ATCA such as *Thor Chemicals Holdings Ltd*. (1980), *Connelly v RTZ corp. Plc* (1997), *Lubbe and Others v Cape Plc*. (2000). The violation of environmental and land rights is evidenced from different cases and incidents of Nigerian Oil Company cases such as *Wiwa v. Royal Dutch Petrolium, Bowata v. Chevron Texaco* etc.
[77] Weschka, above n 33, 630.

policies and BITs, or by introducing international human rights standards into national legislations, and above all by strengthening the enforcement mechanisms.

6.4.1 Constitutional guarantee

The Constitution of Bangladesh like most other countries attributes the responsibility for the protection and promotion of human rights only to the state. Part III of the Constitution reflects on the state or governmental responsibility for the protection and promotion of human rights, recognising it as a violating-actor.[78] The trend for attribution of responsibility to non-state entities such as corporations for the protection of human rights has not yet developed in general through state constitutions. The reason for this is based on a very common argument that corporations are unlikely to act in a manner that deliberately seeks to violate fundamental human rights;[79] that as business organisations they are not concerned with espousing such policies.[80] However on the contrary, states are far more prone to act in a manner that causes the violation of fundamental rights, whether due to the abuse of power by law enforcing agencies or in effect of a concerted state policy. The attribution of responsibility for the protection of human rights to corporations[81] under the constitutional process appears to treat corporations as quasi-public institutions and thus gives them constitutional status which they neither deserve nor need in order to be useful in the social order. The extension of such responsibility makes them appear equal in status with the state and also more important that they should be. Rather, it is better to regulate them under private law as private entities and make them responsible for the violation of human rights through the normal operation of the law.

It is true that the primary responsibility for the protection of human rights is attributed to the states as recognised by international human rights treaties and endorsed by the respective state constitutions. This does not mean that the attribution of responsibility to corporations for the same will place them at a status equal to host states and thus undermine their status. This is because the corporations are treated as independent legal actors under international law and in many cases they violate human rights with the indirect support of the host state itself. In addition, there is a likelihood of sharing responsibility with the host states for the

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[78] See 'Doing Business in Difficult Places', *The Economist,* 20 May 2000, 127.
[79] Ibid.
[80] Muchlinski, above n 62, 44.
[81] For example, in the *Doe v Unocal* case the litigants brought the claims under the ATCA against US-based oil company Unocal for egregious human rights violations committed by the Burmese military in connection with the construction of the Yadana-pipeline from Burma to Thailand. Allegedly, Burmese army units were hired in order to secure and protect the project. See Weschka, above n 33, 636.

violation of human rights where the corporate investment is shaped by a 'joint venture' with the state. It is evident that the host state government directly or indirectly indulges corporate abuses of human rights in the case of major development projects.[82] So the extension of responsibility to corporations for the promotion and protection of human rights under the constitutional framework in certain areas will have immense significance for creating obligation and accountability for violation. Otherwise, the MNCs will be able to escape national regulatory control, arguing that attribution of responsibility is absent for them both in international law-making treaties and constitutional laws of the host states.[83] The extension of responsibility through constitutional provision may reduce the opportunity for MNCs to escape local regulation as it will give certainty to the question of responsibility for human rights violation.

In the Constitution of Bangladesh, the protection of some labour and employment rights, and property rights, is guaranteed along with state responsibility for enforcement. The labour and employment rights include prohibition of forced labour and[84] discrimination on the grounds of religion and other factors,[85] equality of opportunity in public employment,[86] the freedom of assembly and association,[87] and the right to property.[88] In all these respects a constitutional provision can be developed to ensure a proper sharing of responsibility by corporate entities with the state for the violation of human rights. If a corporation itself engages in violation of those rights, it will be directly liable for those violations in an individual manner. If it is a state-sponsored violation, the liability can be determined on a joint basis with the host state. Instead of sharing the responsibility the constitutional provision can be introduced placing the state at the heart of responsibilities for the protection of human rights, and the responsibility of the corporations for violation of human rights as a subordinate concern.

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[82] For example, in the DOE v Unocal case the litigants brought the claim under the ATCA against the US based oil company Unocal for egregious human rights violations committed by the Burmese military in connection with construction of the Yadana pipe-line from Burma to Thailand. Allegedly Burmese Army units were hired in order to secure and protect the project. See WESCHKA, above n 33, 636.
[83] Muchlinski, above n 62, 44.
[84] Article 34 states "all forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law".
[85] Article 28 states "the State shall not discriminate against any citizens on grounds only of religion, race, caste, sex and place of birth".
[86] Article 29 states "there shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic".
[87] Article 38 states "every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality and public order".
[88] Article 42 of the notes that "subject to any restriction imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law".

It can be otherwise argued that there is no need to attribute responsibility to corporations in a specific manner for the violation of fundamental rights under constitutional provisions. This is because the state's responsibility for the protection of human right is already attributed under international covenants, not in the sense that the state will take action if violation occurs by state agencies, but that the state has been conferred the right to take action against all who violate, either individuals or corporate.

6.4.2 Labour and other human rights concerns of FDI

6.4.2.1 FDI legislation

Although there is a difference of opinion as to the attribution of responsibility to corporations for the violation of human rights, majorities of academics agree that states can and should include corporations into effective regulatory systems for the protection of rights in order to achieve social and economic goals.[89] A socially responsible state has a duty to adopt policies that help to facilitate the well-being of its citizens. One way to achieve this goal is adopting a proper system of regulation which demands that corporations perform fundamental rights at work and also in their relations with other stakeholders and the larger community. This requires mainly the adoption and establishment of regulatory regimes, particularly in the areas of labour and employment rights, as the majority of human rights affected by the activities of foreign multinationals in their operations concern core labour and employment. The attribution of responsibility to the MNCs engaging in FDI operations through introducing relevant legal provisions in FDI legislation is considered to be one of the most effective ways for regulation. Also, the embodiment of such a provision creates legal specificity and certainty for foreign investors.

Many developing and least-developed host countries are undertaking such an attempt under FDI legislations. The South American socialist countries have introduced labour issues with due emphasis in their foreign investment laws.[90] In Asia, the foreign investment law of Vietnam has articulated the responsibility of foreign investors for the protection of labour rights in compliance with its respective national legislations. Article 26 of the *Law on Foreign Investment in Vietnam* stipulates that employers and foreign and Vietnamese employees must comply with the provisions of the law on labour and other relevant

[89] See Puvimanasinghe above n 2, 170; P Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, 1997) 109; Joseph, above n 56, 75-76; Weshka, above n 33, 625.
[90] For instance, Venezuela, Bolivia, and Ecuador.

legislation, and respect each other's honour, dignity, and traditional customs. In recognition of the right to participate in political organisation, article 27 states that enterprises with foreign-owned capital must respect the rights of Vietnamese employees to participate in a political organisation and socio-political organisation in accordance with the law of Vietnam. The labour code of Vietnam also has clearly described the responsibility of foreign-owned enterprises operating in its territory in relation with Vietnamese and foreign workers. According to Article 3 of the *Code*, enterprises with foreign-owned capital in Vietnam are subject to the provisions of the code and other provisions of the law of Vietnam.

In Bangladesh, the foreign investment law does not prescribe for the regulation of labour issues related to FDI. It deals only with the rights of the foreign investors in respect of the protection of investment property from nationalisation or expropriation, and does not set their obligation for the promotion and protection of labour and employment rights.[91] However, foreign enterprises, along with other registered local public and private enterprises, are explicitly subject to the provisions of existing labour laws. The jurisdiction of the existing BLA 2006 extends to any establishment, mining, infrastructural development projects, and commercial establishment.[92]

It may be argued that the introduction of such principles may create overlapping in terms of a responsibility regime. Indeed, under FDI legislation an attempt is made to the extent that it creates an obligation to follow the national legislation on labour issues. It is not intended to deal with the responsibility regime as the labour law does.

6.4.2.2 BITs

A BIT is another means of attributing human rights responsibility by making specific reference to it. There is a growing tendency in Bangladesh and other countries to refer to human rights issues in BITs. This began with the drafting of a model agreement in 2009. The model text only covers the protection of public health or life and natural resources, which has been pursued in an immediate draft text of a BIT between Bangladesh and Denmark in 2009. Significantly, it has been embodied as a principle of the agreement, not merely included in the preambular clause, and therefore it is subject to remedy and would be binding on the contracting parties. The Article 2 of the text reads as follows:

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[91] The interests of foreign investors are articulated in sections 7 and 8 of the *Foreign Private Investment (Promotion and Protection) Act* 1980.
[92] See the *Bangladesh Labour Act 2006*, (Bangladesh) ss. 2 (31) and (32).

> Investments objectives should be achieved without relaxing health, safety and environmental measures of general application. If the Contracting Party in whose territory the investment is made, suffers from a loss, destruction or damages with regard to its public health or life or the environment, including natural resources by the investor of other Contracting Party, then the first Contracting Party shall be accorded adequate and effective compensation as per its laws and regulations, and if necessary as per international law, by the investor of other Contracting Party.[93]

The underlying principle of the said article includes the safety and health issues of labour rights, without including the other concerned labour and employment issues in connection with human rights whose violation often occurs in manufacturing, mining and other development project in developing and least-developing countries.

In fact, the insertion of labour and employment issues in BITs is infrequent at the global level. As regards labour, most BITs focus on the permission to employ foreign workers, their immigration and wages. The US was the first country to address labour issues in its BITs in 1994. These were embodied in the preamble of the text reflecting on an objective philosophy for compliance with labour rights as incorporated in the laws of contracting parties. There was no provision in the text detailing the specific labour standards. Nevertheless, it reflects the commitment of the US to be subject to the labour regulation of the contracting host states.

Traditionally, BITs did not aim at regulating labour or employment.[94] Since the US broke new ground by addressing these issues in the preamble, a considerable amount of experimentation has been seen and the trend has gained increasing strength in the new millennium. States have begun to include new provisions in this connection, mostly in their model BITs but also in some new agreements in force. The model treaties are mostly developed by the US (2012), Canada (2004), Austria (2008) and Belgium/Luxemburg (2002). On the basis of these BITs, the countries so far have concluded many treaties with developing and least-developed countries.[95] This trend affirms the commitments of the states

[93] See the *Agreement Concerning Promotion and Reciprocal Protection of Investment between the Government of Bangladesh and Denmark* (2009) art.2.
[94] Luke Eric Peterson, and Kevin R Gray, 'International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration' (Paper prepared by the International Institute for Sustainable Development (IISD) for the Swiss Department of Foreign Affairs, 2003). See The US *Model Bilateral Investment Treaty (Treaty Between the Government of the United States of America and the Government of (Country) Concerning the Encouragement and Reciprocal Protection of Investment* (2012) art. 12, 13 and the preamble <www.state.gov/documents/organization/188371.pdf> 12 December 2013.
[95] For example, Canada since the development of its new *Model FIPA in 2004* concluded BITs with Romania (2009), Slovakia (2010), Peru (2006), Latvia (2009), Jordan (2009) and the Czech Republic (2009); Australia has since the development of its new *Model BIT in 2008* concluded two BITs with Kazakhstan (2010) and Tajikastan (2010); Belgium and Luxemburg have since the development of their new *Model BIT in 2002*

to attempt to foster 'global sustainable development' as an overarching goal of foreign investment through the protection of human rights and the environment.

The BITs of these countries have introduced in this regard a clause phrased as the 'non-lowering of standards in labour matters'. For example, the *Belgium Model BIT* notes that it is 'inappropriate to encourage investment by relaxing domestic labour legislation'. [96] Article 1 of the *Belgian Model BIT* encompasses legislation aiming to protect *some* internationally recognised core labour rights.[97] The objective of non-lowering of core labour standards is to declare generally that it is illegitimate or unaccepted to lower standards in labour matters (similarly in environmental or other matters) for the encouragement, attraction, or retention of the investment. Thus it establishes a principle that the given level of protection shall not be lowered by the contracting parties or regulatory bodies when dealing with investors and their investments.

In order to create a mutual obligation for the protection of labour rights, Bangladesh can pursue this idea of non-lowering of labour standards in general or can categorise the internationally recognised labour standards its new Model BIT in 2009. It could also move to negotiate with new counterparts or re-negotiate with its existing counterparts. The ultimate benefit of the integration of any such provision in BITs is that it provides scope for protection through the application of international dispute settlement mechanisms such as the ICSID.

6.4.3 The labour regulation of FDI operation in Bangladesh

6.4.3.1 Labour legislation as applied for FDI operation

There is no separate legislation in relation to labour regulation in FDI operation. The main legal instrument of labour regulation in Bangladesh is the *Bangladesh Labour Act 2006*

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concluded a large amount of BITs, (29 in total) including with Azerbaijan (2004), Bahrain (2006), Barbados (2009), Belarus (2002), China (2005), Nicaragua (2005) and so on. The United States have since their development of their new *Model BIT in 2012* not concluded any BITs, yet. They have, however, concluded BITs since the introduction of the 2004 *Model BIT* with Uruguay (2005) and Rwanda (2008). The 2004 US *Model BIT* already included relevant, labour and employment related treaty language.

[96] *Belgium Model Bilateral Investment Treaty* (2002) art. 6(2). It is stated in the article that the Contracting Parties recognise that it is inappropriate to encourage investment by relaxing domestic labour legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment. Art. 6 (3) also states that the Contracting Parties shall strive to ensure that such labour principles and the international labour standards set forth in the Agreement's definition of labour legislation are recognised and protected by domestic legislation.

[97] Ibid, art.1.

(hereinafter called the BLA). This is the only Act that regulates labour issues in general as it consolidates all previous laws respecting labour and employment after being revised in 2006.[98] The BLA applies to both local and international entrepreneurship affecting labour issues. In terms of jurisdictional extent the law applies to all industrial and commercial establishments located in Bangladesh[99] irrespective of the nationality or residential background of the entrepreneurs either local or foreign. The industrial establishment as defined under the BLA includes all transport services, mining, quarry, gas-field or oil-field, plantation, factory, newspaper establishment, and other infrastructural development establishments such as construction, re-construction, repair, alteration or demolition of any building, road, tunnel, drain, canal or bridge, and ship-breaking.[100] Likewise, the term commercial establishment includes all stock-exchanges, brokerage offices, insurance offices, commercial undertakings of industry and agencies etc.[101] The jurisdictional purview appears to be encompassing the sectors where FDI is involved.

In terms of labour issues, the BLA covers the majority of labour and employment rights as per Bangladesh's commitment to international labour and human rights conventions. But interestingly, the BLA is applicable to all investment sectors except for industries located in EPZs (where the majority of entrepreneurship is based on FDI) in relation to the right to freedom of association and other industrial relations. The issues relating to trade union and collective bargaining in EPZs are dealt with by *The EPZ Workers Association and Industrial Relations Act*, *2004* as amended in 2010.

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[98] It is noted that before the adoption of the *Labour Act of 2006*, there were about 46 laws in force in Bangladesh encompassing labour and industrial sectors. After the enactment of the *Labour Act*, twenty five of the prevailing enactments stood repealed and were amalgamated with the new Code. The laws are The *Workmen's Compensation Act, 1923* (VIII of 1923); *The Children (Pledging of Labour) Act, 1933*; *The Workmen's Protection Act, 1934* (IV of 1935); *The Doc Labourers Act, 1934* (XIX of 1934); *The Payment of Wages Act, 1936* (IV of 1936); *The Employer's Liability Act, 1938* (XXVI of 1938); *The Employment of Children Act, 1*038 (XXVI of 1938); *The Maternity Benefit Act, 1941*(XIX of 1941); *The Motor Vehicles(Drivers)Ordinance, 1942 (*V of 1942); *the Maternity Benefit (Tea Estate) Act, 1950* (XX of 1950); *the Employment (Records of Service) Act, 1951*; *the Bangladesh Plantation Employees Provident Fund Ordinance, 1959* (XXXI of 1959); *the Coal Mines (Fixation of Rates of Wages) Ordinance, 1960* (XXXIX of 1960); *the Road Transport Workers Ordinance, 1961* (XXVII of 1961); *the Minimum Wages Ordinance 1961* (XXXIV of 1961); *The Plantation Labour Ordinance, 1962* (XXIX of 1962); *The Apprenticeship Ordinance, 1962* (LVI of 1962); *the Factories Act, 1965* (IV of 1956); *the Shops and Establishment Act, 1965* (VII of 1965); *the Employment of Labour (Standing Orders) Act, 1965* (VIII of 1965); *the Companies Profits (Workers Participation) Act, 1968* (XII of 1968); *the Industrial Relations Ordinance, 1969* (XXII of 1969); *The Newspaper Employees (Conditions of Service) Act 1974* (XXX of 1974); *and the Dock Worker (Regulation and Employment) Act,1980* (XVII of 1980).

[99] *The Bangladesh Labour Act 2006* (Bangladesh) s. 2(3).

[100] Ibid, s. 4(2) (Lxi).

[101] Ibid, s. 4(2) (Lli).

6.4.3.2 Bangladesh's obligation under ILO and human rights conventions

Bangladesh has ratified so far 33 ILO Conventions on labour and employment including seven of all eight fundamental conventions.[102] Among all of the ILO conventions eight are considered as fundamental as to rights at work. [103] The *ILO Declaration on Fundamental Principles and Rights at Work, 1998* unanimously adopted by all ILO members includes all of these core labour standards. With the adoption of the Declaration the principles and standards for right at work have become binding on all ILO members. As an ILO member, Bangladesh has shown its commitment to core labour standards. These standards include the freedom of association and effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labour; effective elimination of child labour; the elimination of discrimination in respect to employment and occupation and; the right to minimum wages and mandated benefits.

Apart from Bangladesh's support for labour standards of ILO Conventions and Declaration of 1998, it has also ratified some binding human rights conventions where labour related rights are in focus, and thus taken upon the obligation for the implementation of these rights through legislative efforts. These human rights conventions are the *International Covenant on Social and Political Rights (ICSPR), 1966* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966*. The ICSPR prohibits all forms of forced and compulsory labour[104] and recognises the right to form association[105] as an individual citizen of the state. 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 minimum, fair wages and equal remuneration; the right to safe and healthy working conditions; and the right to equal opportunity in employment.[106] According to these conventions, as a ratifying state Bangladesh is under a duty to integrate all these standards of rights into its existing legal framework immediately or progressively and undertake appropriate measures for their implementation.

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[102] The eight fundamental conventions are the *Freedom of Association and Protection of Right to Organize 1948*, *Right to Organize and Collective Bargaining 1949*, *Forced Labour 1930, Abolition of Forced Labour 1957, Equal Remuneration 1951, Discrimination (Employment and Occupation)1958, Minimum Age 1973,* and the *Worst Forms of Child Labour 1999.*

[103] See International Labour Office, *Decent Work Country Programme Bangladesh* (2006-2009) <http://www.ilo.org> 20 January 2013.

[104] See *International Covenant on Civil and Political Rights*, 1966 (United Nations) art. 8 <http//www.treaties.un.org/doc/Publication/UNTS/.../volume-999-I-14668-English.p...> at 27 August 2013.

[105] Ibid, art. 22.

[106] See *International Covenant on Economic, Social and Cultural Rights* (United Nations) 1966, arts. 6, 7, 8 and 12.

6.4.3.3 The national labour legislation and international labour standards

6.4.3.3.1 Need for integration of international standards into national legal framework

The integration of any international legal standards in the national legislation has an obvious functional value. It raises the recognition and weight of the legislation in terms of its application and paves the way for effective implementation and enforcement. The strength of implementation largely depends on the availability of adequate and efficient legal principles. This true in case of FDI operation as it is led by foreign economic powerhouses. The availability of core labour standards in the legal framework is a primary element for regulating their activities affecting labour rights.

It is contended that core labour standards affect labour costs and thus create a negative impact on the flow of foreign investment in a competitive situation.[107] But one needs to look at core labour standards from the broader context of development and not just in terms of their affecting labour costs. It is plausible that one should think about the role of labour costs in attracting FDI and similarly the role of FDI in overall development of the economy. It is sometimes seen that enforcing core labour standards does not cause the substantial rise of labour costs, and on the other hand they can still rise even if these standards are not imposed. Moreover, suppressing workers' rights is not the only way of remaining competitive; there are many other ways of remaining competitive, for example, by increasing productivity through improved technology. This is evident from the concept of Newly Industrialised Economies (NIE), that the rising of labour costs *per se* does not create a problem to competitiveness as long as countries are able to introduce superior technologies.[108] Indeed, enforcing labour standards is a means to the development of human capital is essential for the absorption of new technologies.

It may be conceded that lowering labour costs through the lax enforcement of labour standards might seem an attractive and easy option for influencing FDI flow in some industries with the possibility of making only some short-term benefits. However, in the long run, countries allowing this might have the comparative advantage only in low-tech, labour-

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[107] See Sornarajah, above n 50, 114.

[108] Ritash Sarna, *The Impact of Core Labour Standards on FDI in East Asia* (2005) The Japan Institute for Labour Policy and Training, Tokyo <www.jil.go.jp/profile/documents/sarna/pdf> 23 July 2013.

intensive industries and will never be able to progress without investing in technological efficiencies and human capital.

There are many other ways in which the enforcement of labour standards seems to be influencing FDI location. It is evidently shown in a survey study that higher standards and stronger rights may lead to more rapid economic growth. With regard to gender inequality, it is argued that gender inequality in employment translates into a lower average in human capital.[109] With respect to child labour, in a recent survey of its economic effects, Galli identifies several ways in which reductions of child labour might lead to more rapid economic growth by facilitating human capital development.[110] Stronger rights may also be associated with greater political and social stability, particularly freedom of association and collective bargaining, and greater political stability results in more rapid economic growth.[111]

One can conclude that the labour regulation of FDI in the application of core labour standards is essential in foreign investments in developing host countries for materialising their intended development objectives on a long-term basis. A host state such as Bangladesh, where there is the lack of an efficient labour force and social and political instability, should not try to attract FDI at the compromise of strong regulation of labour standards. Instead it should integrate core labour standards or adopt a human rights-mediated policy into its legal regime.

6.4.3.3.2 Integration of different core labour standards into the BLA

A. Right to freedom of association and collective bargaining

The newly adopted BLA recognises the freedom of association and the right to collective bargaining.[112] The international standard of this right purports that the workers' participation in forming unions and strikes and negotiating collectively with employers must be free. The

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[109] See *Gender Differences in Employment* (World Development Report, Chapter 5, 2012) <econ.worldbank.org> 18 October 2013.; OECD, *Report on the Gender- Initiative: Gender Equality in Education, Employment and Entrepreneurship* (2011); Pierre-Richard Agenor and Haviana Canuta, 'Gender Equality and Economic growth: A Framework for Analysis' (2013) VOX <http://www.voxeu.org/article/gender-equality-and-economic-growth-framework-policy analysis> 18 October 2013.

[110] Rossana Galli, 'The Economic Impact of Child Labour' (Discussion Paper DP/128/2001, International Institute for Labour Studies, Geneva Decent Research Programme) <http://www.ilo.org/inst> 18 October 2013.

[111] David Kucera, 'The Effects of Core Worker Rights on Labour Costs and Foreign Direct Investment: Evaluating the "Conventional Wisdom"' (Discussion Paper, No.130/2001, Decent Work Research Programme, International Institutes for Labour Studies) <http://www.ilo.org/inst> 18 October 2013.

[112] See *The Bangladesh Labour Act 2006* (Bangladesh) s.176.

relevant *ILO Convention of 1948* sets forth that workers and employers shall have the right to establish and to join the organisation of their own choice without previous authorisation.[113] In addition, the organisation shall have the right to draw up its constitutions and rules, to elect a representative in full freedom to organise its administration and activities and to formulate its program.[114] The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.[115] The review of the relevant principles in the legislation reveals that the BLA apparently pursues international standards in these respects.[116]

However, certain stringent legal requirements for running a trade union and membership thereto has curbed the right to trade unions to an extent, which can be argued as placing restrictions upon free unionisation. The majority of restrictions concern the procedural requirements for obtaining the registration for union, its membership for the workers and its operation by the worker leaders. No union can be established without the prior authorisation or approval by authorities. Authorities are entrusted with the power to unilaterally dissolve, suspend or de-register a trade union organisation.[117] Another basic requirement for registration is thirty per cent membership of the total number of workers in a particular firm. This requirement seems to discourage unionisation.[118]

With regard to thirty person membership requirement, the ILO Committee of Experts on Conventions and Recommendations raised the question of the Act's compliance with the *ILO Convention of 1948*. In a 2009 report, the Committee noted with deep regret that the Act does not contain any improvement in relation to trade unionisation from the previous legislations and in certain respects it contains even further restrictions which stand opposed to the Convention.[119] Therefore, the Committee recommended lowering the minimum union membership requirement of 30 per cent of the total number of the workers employment in an establishment.[120]

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[113] See *ILO Convention 87 on Freedom of Association and Protection of the Right to Organise*, 1948, art. 2.
[114] Ibid, art. 3.
[115] Ibid, art 4.
[116] See *The Bangladesh Labour Act 2006* (Bangladesh) sec.176 (a), (c), (d).
[117] Ibid, ss.179, 182.
[118] Ibid, s.179 (2).
[119] The previous legislations mean the Factory Act 1965 and Industrial Relations Ordinance 1969 dealing with issue of trade unionization which are repealed by the enactment of the BLA 2006. see Abdullah Al Faruque, *Current Status and Evolution of Industrial Relations System in Bangladesh* (International Labour Organization, 2009) 12.
[120] Ibid.

But this recommendation was not entertained by the national policy-makers.[121] Recently following the collapse of the *Rana* Plaza building in Saver of the Dhaka District in Bangladesh the question of trade unionism came to the forefront and a Cabinet meeting of the ministers decided to bring about changes in the existing *Labour Act*. They agreed upon the reduction of the membership requirement for registration. Accordingly an amendment was adopted on 15 July 2013 to the existing Act in relation to freedom of association. But unfortunately it didn’t address the reduction of the membership requirement and hence it again became the subject of huge criticism from civil society and workers’ organisations both home and abroad. Critics said the amendment was a whitewash, and indeed the government has allegedly tried to change the laws in favour of employers, particularly ready-made garment factory owners despite the *Rana* Plaza and *Tazrin*-like incidents.[122]

The said restriction is a major issue that in many cases discourages workers from establishing or participating in a trade union. Accordingly, while the number of trade unions is increasing over time, the unionised workers and other employees account for only three per cent of the total work force in one a statistic from 1971 to 2004.[123] The overall trend for unionisation in most growing garment sectors in Bangladesh is disappointing. The reluctance of employers either local or foreign to enforce this standard can also be instrumental to the worker’s low regard of unions.[124]

Another legal issue of labour law that indirectly contributes to the low unionisation trend is the provision for the formation of a participation committee in industrial establishments.[125] This committee is representative of both employees and employers. It can be formed or remain active during the existence or non-existence of a trade union in a certain firm. Employers are more interested in the formation of a representative committee rather than in a trade union which is solely worker-led. The representative committee is tasked with similar functions to trade unions.[126] Taking advantage of this legal provision both local and foreign employers tend to form a representative committee as an alternative to a trade union in order to maintain the employer-worker relationship and dialogue in their industrial units. In addition, because of public sector downsizing in Bangladesh, most workers in the private

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[121] Ibid.
[122] Hisham Bin Mustofa, ‘Amended *Bangladesh Labour Act 2013* under criticism’ *Priyo News* (online), 22 July 2013 <http://news.priyo.com/2013/07/22/amemded-bangladesh-labour-act-2013-under-critics....> 5 September 2013.
[123] ILO Labour Office, *Decent Work Country Programme Bangladesh* (2006-2009) <http://www.ilo.org> 30 January 2013.
[124] Ibid.
[125] The *Bangladesh Labour Act 2006* (Bangladesh) s. 205.
[126] Ibid, s. 206(1).

sectors, especially in garments and apparels, prefer a representative committee over a trade union.[127] As the committee is, according to legal provision, composed of the equal representation of employers and workers, the employers are always dominant in decision-making and with employers hand-picked worker representatives have no power to bargain over the terms and conditions of their employment.[128]

This opportunity is also available in the industries located in EPZs, which are usually the dominant base of foreign entrepreneurship. In Bangladesh until 2004 the government maintained a double standard policy in the enforcement of workers' rights to the freedom of association and collective bargaining. The exercise of right to freedom of association as incorporated under the *BLA* was solely confined to the workers engaging in firms or projects located in non-EPZ areas and was deliberately suppressed in EPZs. The legal safeguard was that the *Bangladesh Export Processing Zones Act 1980* as amended in 1984 empowers the government to exempt such zones from the operation of certain laws including *Employment of Labour (Standing Order) Act 1965* and the *Industrial Ordinance 1969* that dealt with the requirement of the formation of trade unions.[129] Accordingly in 1986 the government suspended the effectiveness of those labour laws in EPZs.[130] The main reason for the restriction on trade unions was to attract foreign investment.[131] As the major objective of establishing EPZs is to boost up foreign investment through ensuring the required infrastructural support and facilities for creating a favourable investment climate, the governmental policy-makers thought that permission of trade unionism would hinder this objective and ultimately affect FDI. They attempted to justify the EPZ exemption from the application of labour laws as an economic necessity for attracting foreign investment.[132] EPZs thus continued to advertise the absence of union activity as a way to attract foreign investment.[133]

This discriminatory labour practice was criticised by the American Labour Federation, AFL-CIO in 2003 and it petitioned the US trade representative to deny special trade benefits (GSP)

[127] Faruque, above n 119, 23.
[128] International Trade Union Confederation, *Bangladesh-Survey of Violations of Trade Union Rights* (2013) <survey.ituc-csi.org/Bangladesh.htm> 19 December 2013.
[129] *The Bangladesh Export Processing Zones Act 1980 as amended in 1984* (Bangladesh) s.11A.
[130] These two labour laws are presently repealed and amalgamated with the current *Bangladesh Labour Act* 2006.
[131] See Ramapriya Gopalakrishna, 'Freedom of Association and Collective Bargaining in Export Processing Zones: Role of the ILO Supervisory Mechanisms' (Working Paper No.1, International Labour Office, 2007) <www.ilo.org/wcmsp5/groups/public/---ed.../wcms_087917.pdf> 19 December 2013.
[132] Ibid.
[133] See Export Promotion Bureau, *Bangladesh EPZ* (2007) <http://www.epb.gov.bd/bangladesh_epz.htm> 17 April 2013.

unless Bangladesh revised this discriminatory policy.[134] On the other hand, foreign investors in EPZs especially from Japan, Korea, and Taiwan played a negative role. They threatened to close down industries and withdraw their investment if trade unions were permitted.[135] Nevertheless upon pressure from the AFL-CIO several meetings were held between international development organisations and embassy representatives from the said countries, finally the Parliament of Bangladesh passed *The EPZ Workers Association and Industrial Relations Act* in 2004 granting limited workers' association rights in EPZs from 1 November 2006.[136] The association is called the EPZ Workers Representative and Welfare Association. However, the permission for association was subject to certain such restrictions which are tantamount to the utter violation of international standards.

The major restrictions under this Act include *inter alia* (a) the prohibition of the formation of workers' associations in industrial units established after its commencement;[137] (b) the permission of only one association in a zone;[138] (c) allowing the government a ban on strikes until 31 October 2008;[139] and (d) the cancellation of registration without any severe ground.[140] Moreover, this Act does not afford guarantees against administrative interference with the right of workers to elect their representatives in full freedom as the procedure of election is determined by the BEPZA.[141] It therefore was criticised as incomplete but considered 'a step in the right direction' nevertheless.[142] The permission to form a workers' association with such restrictions nevertheless contradicts Bangladesh's commitment to observe the international standards by ratifying the respective *ILO Convention of 1948*. It is assumed that the nomenclature of committee and the laxity in the legal framework by imposing different restrictions on the right to the freedom of association in disregard of international standards and Bangladesh's own constitution was mainly to satisfy foreign investors.

According to ILO Tripartite Declaration 1976 it is not permitted to curtail fundamental labour right as an incentive to attract foreign investment. It states that where the governments

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[134] M Abu Eusuf, ABM Omor Faruque and Attiur Rahman, 'Institutions for Facilitating FDI: Issues for BEPZA, Bangladesh' (Briefing Paper No.10, IPPG and CUTS International) <www.ippg.org.uk> 18 April 2013.
[135] Ibid.
[136] See *The EPZ Workers Associations and Industrial Relations Act 2004* (Bangladesh) s.5
[137] Ibid, s. 24.
[138] Ibid, s. 25(1).
[139] Ibid, s. 88(1).
[140] Such as the contravention of any of the provisions of association's constitution, see Ibid, ss. 36(1) (c), (e)-(h), and 42(1) (a).
[141] Ibid, ss. 5 (6) and (7), 28 (1), 29 and 32 (4).
[142] International Labour Organization, *Report on the Committee on Freedom of Association* (Report no. 357, ILO, 2010) <http://www.ilo.org >19 December 2013.

of host countries offer special incentives to attract foreign investment, these incentives should not include any limitation on workers' freedom of association or right to organise or bargain collectively.[143]

The *EPZ Workers Association and Industrial Relations Act* became the subject of severe criticism by the ILO Committee of Experts on Freedom of Association. The committee stated in its 2009 report that the Act contained numerous and significant restrictions and delays with regard to the right to organise an association in EPZs and failed to comply with the *ILO Convention of 1948* and *ILO Right to Organize and Collective Bargaining Convention* 1949.[144] It identified the legal principles inconsistent with ILO standards and requested that the government take necessary measures to amend the relevant Act so as to bring it into conformity with ILO standards established by the relevant conventions. Later, another legal development took place through the enactment of The *EPZ Workers Welfare Association and Industrial Relation 2010* repealing the *Act of 2004*. This Act in fact made no change. It prescribes for the formation of a welfare organisation in EPZ industries in an almost similar fashion to its previous repealed *Act 2004,*[145] despite the commitment of the government for the phased introduction of trade unions with ensuring different organisational rights at each stage at the event of the adoption of the former Act. It even creates certain further risks or barriers to the rise of trade unionisation in the EPZs. It imposes the restriction that a member of this welfare organisation is not allowed to have any relation to or be a member of any other political party.[146] This kind of restriction is obviously opposed to the objective purpose and content of the right to freedom of association under ICSPR and ICESCR. It provides no protection for workers forming an association from the interference of their authorities. According to this law the executive chairman of BEPZA is entrusted with the power to verify the application for the formation of association, conduct the vote for fulfilling the requirement, and approve or reject the drafting of a charter for the committee.[147] The association does not have collective bargaining rights except for negotiation with the employer on working conditions, and remuneration or payment for the productivity enhancements.[148] In fact, the later Act does not contain any real improvement on the former legislation.

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[143] See *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* 1977 (third edition, 2001), para, 46.
[144] See ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendation* (Part IIIA, 2010) <http://www.ilo.org> 20 December 2013.
[145] See *The EPZ Workers' Welfare Organization and Industrial Relations Act, 2010* (Bangladesh) s.5.
[146] Ibid, s. 80.
[147] Ibid, s. 7.
[148] Ibid, s. 37 (2).

In view of the current legal framework of trade unionisation applicable for both non-EPZ and EPZ areas it can fairly be viewed that the international standards of trade union are not properly pursued in the BLA 2006 and they are virtually absent in EPZ workers' association law. The gaps or absence of trade unionisation in the legal framework creates a potentially negative impact on all employment rights, such as low wages and unequal treatment, arbitrary terminations, and unfair charging for misconduct etc.[149] Although it was created under the cover of attracting foreign investment, this kind of legal initiative is unacceptable as it creates scope for the MNCs to avoid compliance with international labour standards.

The multinational investor companies, although they are expected to influence the development of labour standards of the hosting country, in fact had no role in this respect in the EPZ's of Bangladesh. Rather, they have almost as much anti-trade union sentiment as do the local investors, as evidenced by one statement. A foreign investor said that foreign investors are like migratory birds, settling at places congenial to them only, and attracted to invest capital in Bangladesh EPZs as trade union activities are prohibited there by law.[150]This statement, although it does not represent all foreign investors, presumably reveals the reluctance of many of them to come under any legal obligation to enforce labour standards except through their self-regulatory measures. Moreover, there are evidences of anti-union practices by the foreign companies in EPZs.[151]

Therefore, Bangladesh should bring reforms into the legal framework of trade unions under the BLA 2006 in relation to the registration requirement, and unilateral power of authorities for the dissolution of registration or deregistration and so on. At the same time it should give up maintaining double standards in relation legal framework of freedom of association in EPZs by imposing the obligation of the formation of trade unions consistent with international standards. The principle of obligation and its proper implementation may be instrumental in ensuring workers' fundamental rights are upheld, and may eventually lead to

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[149] Gopalakrishna, above n 131.

[150] Tabibul Islam, 'Labour-Bangladesh: Trade Unions Enter EPZs Agitating Investors' *Inter Press Service News Agency* (Dhaka), 3 November 1999.

[151] For example, the EPZ Dhaka/Beijing Dyeing and Weaving Industries dismissed a union official for demanding that workers be paid according to the EPZs new regulation. The company complied with the new wages but only after firing 24 workers. A secretary of the workers welfare society was called on to resign and was subsequently dismissed after he refused to do so in front of BEPZA officials. See International Trade Union Confederation (IUTC), *Internationally Recognised Core Labour Standards in Bangladesh* (Report for the WTO General Council Review of the Trade Policies of Bangladesh, 2012) <www.ituc-csi.org/IMG/pdf/bangladesh-final.pdf> 20 December 2013.

the improvement of their economic and social standards along with a productive atmosphere at the industry level. The OECD argues that the observance of rights to the freedom of association and collective bargaining can offset the negative effects of higher wages if they create a stable social climate through a better-worker employer relationship, leading to increased motivation and productivity, and resulting in a positive effect on FDI.[152]

B. The elimination of child labour

Child labour has been declared illegal by the *ILO Convention No.182*;[153] and the ratifying states are expected to bring about its 'effective elimination'.[154] The term 'effective elimination' indicates taking immediate and comprehensive action by adopting legal instruments prohibiting the employment of children in any occupation or establishment as defined by the *Convention*. The elimination of child labour is directed to all of the worst forms of child labour which have been categorised under Article 3 of the Convention itself. These categories include all forms slavery, forced or compulsory labour, compulsory recruitment in armed conflict; use and procuring for prostitution and for the production of pornography and pornographic performance; use or procuring for illicit activities such as production and trafficking of drugs; and above all employment in a work which is by nature harmful to a child's health, safety, and morals. Out of all these categories, the last form may relate to investment and industrial activities.

Bangladesh has ratified the *ILO Convention 182 on Worst Forms of Child Labour* and in line with the direction of this Convention the BLA 2006 prohibits the employment of child labour in general. The section 34 of the BLA states that no child shall be employed or permitted to work in any occupation or establishment. The wording of the prohibition is not qualified by any form of labour as prescribed by the Convention.

Bangladesh has not yet ratified the *ILO Minimum Age Convention 1973*. Therefore, in contradiction with the international standard of age, the BLA sets the minimum age for admission to work at the age of 14. It however permits a child above 12 years to be employed in light work that does not pose a risk to his physical and mental development or

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[152] 'OECD Employment, Do Multinationals Promote Better Payment and Working Conditions?' (OECD, 2008) <www.oecd-library.org/employment/...emplyment.../do-multinationals> 18 October 2013.
[153] The convention is entitled '*ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of Worst Form of Child Labour' (No.182), 1999*. It came into force in 2000.
[154] See the Preamble of the *ILO Convention 182*.

interfere with his education.[155] It prohibits children from performing hazardous work, but the term 'hazardous work' is not defined in the law. The International Trade Union Confederation (ITUC) reports that the Bangladesh government is working on a list of hazardous occupations and tasks.[156] It also prohibits children's parents or legal guardians to enter into a service agreement on behalf of the child.[157] The principle of prohibition is a means of regulation of child labour on the part of the state and assigns responsibility for all kinds of industrial and non-industrial entrepreneurs not to employ child labour as part of the protection of human rights and dignity.

The child labour prohibition certainly has implications for human rights protection in investment activities. The employment of children in the workforce causes them to miss out on many rights essential for their growth and development, for example, their right to education. It may expose them to abuse, exploitation, and vulnerability in terms of wages, working hours, safety and security, because of their lack of skill and maturity. Child labour creates an adverse impact on the human capital development of an economy by depriving children of education. If children are well-educated, the future labour force will be better skilled, and a skilled labour force is an important determinant of FDI. In order to drive maximum benefits from foreign technologies, the importance of an educated labour force in the host economy is well established in the literature.[158] In this sense, foreign investors should extend their assistance to host states in abolishing child labour and also contribute to child labourers' rehabilitation programs, although the percentage of child labour in manufacturing sectors to FDI is relatively small. Foreign firms are not directly involved in the hiring of child labour, but their supply chains or associates are reportedly involved in it.[159]

C. Right to equal treatment in employment and occupation

Any kind of discrimination in employment and occupation has been declared illegal under *The ILO Discrimination (Employment and Occupation) Convention 1958*. Discrimination as

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[155] See *The Bangladesh Labour Act 2006* (Bangladesh) s. 44.

[156] ITUC, *Internationally Recognised Core Labour Standards in Bangladesh* (Report for the WTO General Council Review of the Trade Policies of Bangladesh, Geneva, 24 and 26 September, 2012) <www.ituc-csi.org/IMG/pdf/bangladesh-final.pdf> 23 December 2013. The ILO estimates that there are seven million child workers in Bangladesh, of whom 1.3 million are engaged in hazardous work. Children work mostly in agriculture, manufacturing, services including domestic service and street-based activities.

[157] *The Bangladesh Labour Act* 2006 (Bangladesh) s. 35. The term legal guardian includes any person having legal custody of or control over a child.

[158] See Sarna, above n 108; see also Kucera, above n 111, 59-60; see also OECD, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs* (2002) OECD <http://www.oecd.org> 20 July 2013.

[159] Ibid.

referred to in the *Convention* purports to be any distinction, exclusion, or preference based on the colour, race, gender, religion, and national or social origin which has the effect of nullifying or impairing equality of opportunity and one's treatment in employment or occupation.[160] The prohibition of discrimination involves equal treatment in regard to access or hiring, termination, the assignment of tasks, and the enjoyment of equal rights and opportunities at work such as pay, benefit, promotions etc. Distinction on the basis of an inherent requirement[161] is excluded from prohibition.[162] There is another ILO convention called the *Equal Remuneration Convention* 1951 that specifically requires equal remuneration irrespective of gender.[163] These two Conventions have created obligations upon the ratifying states for the elimination of discrimination in respect of employment and occupation through legal and policy initiatives.

Equality in treatment has been recognised as a fundamental labour right through the *ILO Declaration on Fundamental Principles and Rights at Work 1998*.[164] This Declaration affirms that all members of the ILO, even if they have not ratified the ILO Conventions in this respect, have the obligation to respect, promote, and realise this fundamental principle.[165] Bangladesh has ratified both of the Conventions and is accordingly obliged to promote equal opportunity and treatment in employment and remuneration.

The *Constitution of Bangladesh* responds to this international labour standard. It recognises the equal opportunity of all citizens in any employment or in public office and denounces any kind of discrimination in the employment on the grounds of religion, race, caste, sex, and nationality.[166] However the title of the respective article of the constitution 'equality of opportunity in the public employment' creates an ambiguity about whether the principle applies to the employment in private enterprises as well. According to the title of the article the service in private enterprises apparently remains outside the purview of the prohibition. There is no separate provision in the constitution guaranteeing the protection of discrimination in private sectors. It may be a constitutional lacuna or an error in the text.

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[160] *The ILO Discrimination (Employment and Occupation) Convention* (1958) art.1 (1).
[161] It means for example, any firm or industry may hire a skilled worker at a higher salary, or a distinction is allowed on the basis of the nature of the work.
[162] *The ILO Discrimination (Employment and Occupation) Convention (*1958) art.1 (2).
[163] The Equal Remuneration Convention (1951) art. 1 (b).
[164] See the *ILO Declaration on Fundamental Principles and Rights at Work* (1998), art. 2 (d).
[165] Ibid, art.2.
[166] See the *Constitution of the People's Republic of Bangladesh 1972*, art. 29 (1), (2).

The question of equal treatment in employment, either public or private, in the majority instances has been settled by the national legislations through the integration of standards into the respective legal framework. For instance, the *Labour Code of the Socialist Republic of Vietnam* has recognised the right of every person to work, and to choose freely any type of work without being discriminated against on the basis of his gender, race, social class, beliefs or religion.[167] *The Mozambican Labour Law of 2007* is very articulate in this context. The Article 237 of this legislation defines the norms of the right to work as it states that the right to work applies all citizens, with no discrimination of any nature and equality of opportunity in the choice of occupation or type of work is a fundamental principle.

There is no such general provision in the BLA 2006, or in any other laws in relation to employment and occupation in Bangladesh. Only section 345 of this Act reflects on equal treatment for male and female workers in terms of determining wages and fixing a minimum rate of pay.[168] Protection against discrimination under this law is focused on gender but not on other grounds of discrimination (e.g., race, religion, ethnicity, and nationality) as per the said conventions. It is however noteworthy that the relevant principles for appointment to employment do not indicate any discrimination in practice on the said grounds or any other rights relating to working conditions.[169] The absence of a general principle pertaining to the elimination of all kinds of discrimination is nevertheless a legal gap. This legal gap contrasts with international standards and the constitutional provision, and in practice opens the scope for the misuse of international standards. For example, hiring foreign nationals by the foreign investors for the same occupation as local workers but with a higher remuneration under the cover of procuring a skilled work force is shown as an inherent requirement and hence does not fall under the definition of discrimination.

In addition, the application of gender-based discrimination only to wages and remuneration may create scope for discriminating against women in other respects. They can be discriminated against when it comes to hiring or promotion because of their higher rate of illiteracy.

In view of the existing legal framework, both gender equality and equality on other grounds in employment need to be taken into consideration in a broader and more specific way. The

[167] See the *Labour Code of Socialist Republic of Vietnam*, 1994 (Vietnam) art.5.
[168] It is stated that in determining wages for any worker, the principle of equal wages for male or female workers for work of equal nature or value shall be followed and no discrimination shall be made in this respect on the ground of sex.
[169] See *Bangladesh Labour Act 2006* (Bangladesh) ss. 329.

equality issue is essential for development purposes. Gender equality has a positive correlation with the economic growth of a country. Gender inequality in employment lowers the average level of human capital in industry and thus in the long run creates a negative impact on investment and growth.[170] Braunste rightly points out that equality has its own merit in terms of development, whether or not it is directly linked to economic growth.[171] The World Bank considers gender equality a development objective in its own right and its absence can harm the level of human capital and well-being of future generations.[172] It is also observed that growth and social development which rests on the exploitation of women is a pattern that threatens human resource development in the broader sense.[173]

With the rapid growth of industrialisation and urbanisation, the women of developing countries are becoming educated and are seeking economic self-reliance, and are thus entering the labour force. MNCs take advantage of this increased supply of workers by employing women in low-skilled and labour-intensive manufacturing jobs such as in the making of garments, footwear, and consumer electronics. MNCs' preference for hiring women lies in the fact women have less bargaining power compared with males and accept lower wages. Although the creation of job opportunities by MNCs has empowered women and increased their autonomy, the tendency of employing them in low paid jobs has increased their chances of being discriminated against if they wish to attain better jobs.[174] This discriminatory practice can be curbed through adopting a strong legal framework of elimination of discrimination on the ground of gender.

Equality on other grounds also relates positively with development. It is agreed that the creation of employment opportunities by FDI is a positive aspect of development, but discriminatory practices are detrimental to the generation of a skilled labour force and therefore the expansion of employment opportunities on discriminatory grounds is unlikely to contribute to long-term and sustainable economic development. In order to eliminate discrimination for development purposes a comprehensive legal framework in line with international standards is essential for a least-developed country such as Bangladesh.

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170 Stephan Klasen, *Does Gender Inequality Reduce Growth and Development: Evidence from Cross-Country Regressions*? (Policy Research Report on Gender and Development, Working Paper Series No. 7, World Bank, November 1999) The World Bank Development Research Group < http://www.worldbank.org/gender/prr> 20 July 2013.

171 Sornarajah, above n 50, 114.

172 Ibid. The World Bank, *Engendering Development: Through Gender Equality in Rights, Resources and Voice* (A Policy Research Paper, World Bank, 2001) <http://documents.worldbank.org > 22 July 2013.

173 Ibid.

174 Sadrel Reza, M Ali Rashid and AHM Mabubul Alam, *Private Foreign Investment in Bangladesh* (University Press Limited, Bangladesh, 1987) 87.

D. Prohibition of forced or compulsory labour

Forced labour is widely accepted as a human rights violation and is prohibited in all international human rights documents including the respective ILO Conventions. According to the *Forced Labour Convention 1930*, forced labour is defined as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[175] The *Abolition of Forced Labour Convention, 1957* prohibits forced and compulsory labour to be used or mobilised for the purpose of development.[176] The Myanmar military has been accused by the ILO for using forced labour in a systematic manner for agriculture and infrastructural development projects where the US Company Unocal had been allegedly complicit as a joint-venture investor for the construction of the Yadana pipeline in Myanmar.[177] However, this form of forced labour at present is not directly linked to FDI in the host states.

Bangladesh has ratified the relevant both the Conventions and accordingly forced labour is declared illegal by the *Constitution of Bangladesh*. Article 34 of the Constitution states that all forms of forced labour are prohibited and any contravention of this provision shall be an offence and shall be punishable in accordance with the law. The BLA has no specific principle prohibiting forced labour. However, with regard to children in forced labour, the Act prohibits debt bondage, but only in respect of children under 14 years of age.[178] *The Penal Code* in Bangladesh prohibits forced labour and defines it as a punishable offence.[179]

E. Right to minimum wages

The right to minimum wages and other benefits such as leisure, maternity leave, and compensation for accident and injury etc. are mandated as fundamental labour rights by ILO Conventions and international human rights documents.[180] Every person at work has the

[175] See *The Forced Labour Convention* (1930) art. 2 (1).
[176] See *The Abolition of Forced Labour Convention* (1957) art. 1 (b).
[177] See Sornarajah, above n 47, 114 ; See also Megun Juan, Jesus Campo and Patricia Campo, 'The Accountability of Multinational Corporations for Human Rights Violations' (2010) 64/65 *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* 171,180; Lillian Manzella, Julieta Rossi, and Nichlas Lusiani, *Collective Report on Business and Human Rights* (June 2008) International Network for Economic, Social and Cultural Rights <http://www.escr-net.org/usr_doc/BHRCollectiveReport_ESCR-Net.pdf> 27 July 2007.
[178] *The Bangladesh Labour Act 2006* (Bangladesh) s. 37.
[179] *The Penal Code 1860* (Bangladesh) s. 374.
[180] See *Universal Declaration of Human Rights* (1948) art. 23(2), (3); *International Covenant on Economic, Social and Cultural Rights* (1966) art. 7(a),(b), (d).

right to claim a minimum wage appropriate for his living standard. In recognition of this, the ILO's *Minimum Wage Fixing Convention, 1970* imposes a legal obligation upon ratifying member states to establish a system of fixing minimum wages irrespective of their groups. It also prescribes the factors to be taken into consideration in setting the minimum wages for the workers. The factors include the needs of workers and their families, the cost of living, social security benefits, relative living standards of other social groups, and above all the requirements for their economic development.[181] The Convention also suggests for every member state to create a minimum wage fixing machinery adapted to national conditions and requirements comprising of the representatives of employers and workers to fix the wage and to make adjustments from time to time.[182]

With respect to fixing minimum wages, Bangladesh has responded well to international norms and standards. The BLA 2006 has addressed comprehensively the issue relating to the workers' right to a minimum wage and its enforcement and regulation.[183] The law provides for the constitution of the national machinery to recommend for fixing a minimum wage taking into consideration the factors proposed by the respective ILO Convention,[184] imposing obligation upon the employers to comply with the minimum wage rate,[185] and prohibiting strongly payment at a rate lower than the minimum.[186] Accordingly, a Minimum Wage Board has been established with the representation of employers and workers. The Board is empowered by the Government to recommend and reconsider a minimum rate of wages for all or any class of workers.[187] In recommending the minimum wage rate the Board is directed by the law to consider factors such as the cost and standards of living, the cost of production, productivity, the economic price of products, business capability, the economic and social conditions of the country and of the locality concerned, and other relevant factors.[188] The factors appear to be compliant with international standards as introduced in the *ILO Minimum Wage Fixing Convention*.[189] However, the international standards strike a reasonable balance between the interests of workers and employers, suggesting the

[181] See *ILO's Minimum Wage Fixing Convention* (1970) art. 3 (a), (b).
[182] Ibid, art. 4.
[183] It is noteworthy that the payment and protection of wages and other related matters were previously regulated by the *Payment of Wages Act 1936*. This Act had a wide coverage. The workers employed in factories, shops, industrial and commercial establishments such as road transport services, railways, dock, jetties, inland steam vessels, mine, oil fields, plantations or any other workshop have been brought within the purview of this legislation. This law has now been merged with the newly introduced *Bangladesh Labour Act* 2006.
[184] *The Bangladesh Labour Act 2006* (Bangladesh) ss.138, 141.
[185] Ibid, s.148.
[186] Ibid, s. 149 (1).
[187] Ibid, s.139.
[188] Ibid, s.141.
[189] See *Minimum Wage Fixing Convention*, No 131 (1970) s.3.

consideration of factors relating to the need of workers as well the economic factors relating to the levels of productivity and maintaining a high level of employment.[190] But a close look at the factors as mentioned in Bangladesh's labour legislation finds that more attention is paid towards the business interests of the employers. This paves the way for their avoiding appropriate consideration for the living standards of the workers on different business and economic grounds. However, under this law the employers and workers are given an equal right of objection to a proposed minimum rate if it is found inequitable.[191] In addition, the law introduces a periodic review system by the Board in the consideration of the changes in determining factors of a minimum wage.[192]

Despite these developments in the legal framework, the compliance status is unsatisfactory and does not seem to be consistent with the law. Taking an example from the largest sector, RMG, it is found that from 2006 to 2010 the minimum wage has been 1,662.50 Taka for the lowest grade worker in the calculation that the basic wage is 1125.00 Taka, house rent allowance is 337.00 Taka and medical allowance is 200.00 Taka, whereas commodity prices and house rents have increased several times during this period.[193] The wage structure reveals that no consideration of workers' family needs or living standards was taken in setting the rate. Neither did the Board make any recommendations for change during this period in view of the changes in the determining factors. The principle relating to periodic review by the Board prescribes that on the basis of any change in determining factors the Board shall recommend for a modification or revision of the minimum wage.[194] But in practice it depends upon the demand from the workers' representatives in the industries. Only the RMG sector workers' representatives and the international organisations are vocal about raising their monthly minimum salary. No other sectors have reportedly any strong workers' representation. Therefore the periodic recommendation for changes in minimum wages is only present in the RMG sector.[195]

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[190] Article 3 (a) (b) of the *Minimum Wage Fixing Convention* 1970 states that elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include: (a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups; (b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

[191] Ibid, s.140.

[192] Ibid, s.142.

[193] See *The Bangladesh Gazette (Extra Ordinary Issue),* S.R.O. No. 301 (2006) <http://www.Ain/2006/SROKOM/Sha-6/Ni.Mo.Board-1/2006> 23 December 2013.

[194] *The Bangladesh Labour Act 2006* (Bangladesh) s.142.

[195] Faruque, above n 119.

The legal framework of minimum wages under labour law does not apply to EPZ workers. EPZs are exempted from this law by the *BEPZA Act 1980*. The BEPZA has its own guideline for determining a minimum wage rate including other service benefits. The BEPZA Instruction No. 2 lays down directives on matters concerning the setting of minimum wages. According to this Instruction, the power to set the minimum wage is vested with the employers,[196] and the workers' association cannot interfere with the minimum wage in any unit of any EPZ area settled by the employers[197] except in the matters of increasing the wage, and other benefits. There is no recommendation under the said Instruction for compliance with ILO considerations for setting minimum wages. As a result, in 2010 when re-fixing the minimum wage in different sectors such as garments, leather products, and plastic products, it is revealed that from 1989 to 2010 the wage rate remained unchanged, which was extremely inadequate in terms of maintaining a decent standard of living. For example in the garment sector for a lowest grade worker the monthly minimum wage was $25-30 , that means less than US $1.00 per day and this is considered poor as per the international criteria.[198] No periodic revision was held during this span of time. This has been criticised as the violation of the fundamental human rights of the workers in EPZs.[199] The re-fixing of the minimum wage in 2010 for all grades from apprentice to high-skilled does not show any consideration for the cost of satisfying the basic needs of workers and their families. The increased salary rate is not consistent with current commodity price rises, house rents, and economic inflation.[200]

The laxity in the legal framework of minimum wages for EPZ workers in Bangladesh over two decades is responsible for the situation whereby foreign investors have generally paid lower wages within these enclaves than those paid in industries located outside but still within the same country.[201] However, is true that industries in the EPZs have contributed to the increase of employment opportunities,[202] but there is no overall improvement reflected in the living standards of the workers, who are the main stakeholders.

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196 *Instruction No.2 of Bangladesh Export Processing Zones Authority 1980*, part 1.
197 Ibid.
198 Ibid, part 5; See also Bangladesh Export Processing Zones Authority, *Re-fixing of Minimum Wages and Benefits for the Workers of the Enterprise of EPZs* (October 2010) <www.epzbangladesh.org.bd> 22 December 2013.
199 See Abdullah Siddiqui, *Bangladesh: Human Rights in Export Processing Zones* (2007) Asia Monitor Resource Centre <http://www.amrc.org.hk/alu_article/export_processing_zones/bangladesh_human_rights...> 22 December 2013.
200 See, Bangladesh Export Processing Zones Authority, *Re-fixing of Minimum Wages and Benefits for the Workers of the Enterprise of EPZs* (October 2010) <www.epzbangladesh.org.bd> 22 December 2013.
201 See Reza, Rashid and Alam, above n 174, 87.
202 See Debaprya Bhattacharya, *Export Processing Zones in Bangladesh: Economic Impact and Social Issues* (International Labour Organisation, 1998) 33.

Conversely, some recent studies claim that foreign investors rarely violate workers' right to a fair remuneration. They show that foreign investors pay higher wages, to equivalent workers, than their domestic-owned counterparts.[203] One prime example is a study based on ILO data carried out in five East Asian countries (Hong Kong, Korea, Singapore, Thailand and the Philippines) which found that FDI raised overall wages in all of the countries.[204] The reason behind this may be the stringent national law provisions of those host countries. Therefore in Bangladesh all industries, irrespective of their location within or outside the EPZ, should be brought under the same legal framework of minimum wages in full compliance with international standards so as to ensure the fundamental rights of the workers that eventually may lead to the economic and social development of the country on the whole.

6.4.3.3.2 Right to Occupational Safety and Health

A. The importance of the protection of OSH in MNCs

Occupational safety and health (OSH) is a cardinal labour right relating to the working conditions of a firm or development project. It has become a growing concern in local and foreign manufacturing, mining and other hazardous development projects in developing countries. This issue has come to the forefront in MNC-led operations as a result of some recent cases held in UK courts against MNCs' operating in Africa over their negligence in the maintenance of occupational safety and health standards. *Thor Chemical Holdings Limited* [205] is a UK-based multinational whose production of mercury-based chemicals in England was severely criticised by the Health and Safety Executive because blood and urine tests of the employees had revealed elevated mercury levels.[206] Later, the company relocated its mercury manufacturing plants from England to South Africa without addressing the health and safety issue and continued its production as before. In 1992 the scandalous

[203] See for example, B Aitken, A Harrison and R Lipsey, 'Wages and Foreign Ownership: A comparative study of Mexico, Venezuela, and the United States' (1996) 40 *Journal of International Economics*, 345, 371; D Velde and O Morrissey, 'Do Workers in Africa Get a Wage Premium if Employed in Firms Owned by Foreigners?' (2003)12 *Journal of African Economies*, 41-73; D Brown, A Deardoff, and R Stern, *The Effects of Multinational Production on Wages and Working Conditions in Developing Countries*, (Research Working Paper 9669, National Bureau of Economic Research, 2003) <www.nber.org/chapters/c9541.pdf> 30 July 2013.

[204] See Pedro S Martins, 'Do Foreign Firms Really Pay Higher Wages? Evidence from Different Estimators' (Discussion Paper Series, No.1388, Institute for the Study of Labour,November 2004) <http://ftp.iza.org/dp1388.pdf> 30 July 2013.

[205] *Thor Chemical Holdings v Cape Plc*. (*1995) TLR 579.*

[206] For a case summary see Richard Meeran, 'The Unveiling of Transnational Corporations: A Direct Approach' in Michael Addo (ed.) *Human Rights and the Responsibility of Transnational Corporations* (Kluwer Law International, Hague,1st ed.199)161-170; See Weschka, above n 33, 631.

mercury exposure of South African employees was discovered after three workers had died and others suffered from different levels of mercury poisoning.

Similarly, an incident occurred in Rio Tinto, the Namibian subsidiary of the English-based parent company RTZ. It was exploiting a uranium mine in Namibia, where the plaintiff, MR Connelly worked.[207] According to his statement, during the time of his employment, the dust levels at the mine were excessively high. Face masks were not provided, and as a result the plaintiff developed laryngeal cancer.

Another allegation of negligence was lodged against Cape PLC which mined asbestos in several locations of South Africa between 1890 and 1979. It was revealed that in the 1970s, in some of the mines, virtually no health and safety precautions existed and the asbestos dust levels exceeded the UK limits by many times. As a result, not only were workers exposed to high asbestos dust levels, but so were the villagers living nearby.

The reason drawn from the MNCs negligent behaviour in occupational health and safety issues was among others the laxity of the local regulatory framework.[208] Virtually no allegations of such incidents were brought against their parent companies located in England. The allegation was made against their wholly-owned subsidiaries operating in African countries. Therefore it is assumed that they breached their obligations for the protection of occupational safety and health by taking advantage of the absence of local regulatory measures in this respect. In view of this, the availability or arrangement of a legal framework for the promotion and protection of occupational safety and health can regulate foreign investment in this regard and thereby reduce the opportunities of violation.

B. The Integration of OSH standards in the BLA

Workers' rights to health, safety, and security in the workplace are termed in the legal texts as their right to OSH. It is recognised as a fundamental labour and employment right by the human rights documents and ILO Conventions. A plethora of ILO Conventions and Recommendations[209] set forth the international standards of this right by defining principles

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[207] Ibid.

[208] See the fact of the cases of *Thor Chemical Holding Ltd., RTZ Corp. Plc* ([1995] TLR 579), and *Cape Plc.* ([1996] Q.B 361).

[209] For example, major ILO Instruments concerning safety and health are the *Protection of Workers' Health Recommendation, 1953 (No.97), Occupational Safety and Health Convention (No.155), and Recommendation (No.164),1981, Occupational Health Services Convention (No.161), and Recommendation (No.171), 1993, Prevention of Major Industrial Accident Convention (N0.174), and Recommendation (No.181), 1993, List of*

in this field as well as allocating duties and responsibilities to the competent authorities, to employers and to workers. The international standards of occupational safety and health concern general protection measures (for example, guarding of machinery, medical examination of young workers or limiting the weight of loads to be transported by a single worker); protection in specific branches of economic activity (such as mining and building industry, commerce and dock work); protection of specific professions (for example, nurses and seafarers) and categories of workers having particular occupational health needs (such as women and young workers); and protection against specific risks (ionising radiation, benzene, asbestos); prevention of occupational cancer; control of air pollution, noise and vibration in working environments; and measures to ensure safety in the use of chemicals including the prevention of major industrial accidents. As part of governmental and employers' duties the *ILO Occupational Safety and Health Convention 1981* provides for the adoption of a national occupational safety and health policy, as well as describing the actions to be taken by governments and within enterprises to promote occupational safety and health to improve the working environment. *The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* 1977 suggest MNCs to maintain the highest standards of safety and health in conformity with national requirements.[210]

Bangladesh has not yet ratified two key conventions on occupational safety and health (OSH), namely the *ILO Convention on Occupational Safety and Health, 1981*(n.187) and *Promotional Framework for Occupational Safety and Health, 2006* (n.157). However the *BLA 2006* focuses on many standards for OSH as recognised by the ILO *Convention*.

The legal framework of OSH in the BLA 2006 is quite extensive. The framework consists in three chapters. Chapter 5 addresses health and hygiene issues intended for ensuring and improving a pollution-free working environment in the industries. The relevant principles deal with issues such as cleanliness, ventilation and temperature, removing dust and fumes, the disposal of waste and effluents, avoiding over-crowding, providing good lighting and drinking water, the establishment of latrines and urinals and so on.[211] Chapter 6 provides guidelines for safety measures relating to building and machinery, the preparation of required precautionary measures and arrangements in the case of fire (such as escape exits,

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Occupational Diseases Recommendation, 2002 (No.174), Protocol of 2002 to the Occupational Safety and Health Convention, 1981(No.155), and *the Promotional Framework for Occupational Safety and Health Convention (No.187), 2006 and Recommendation (No.197), 2006.*

[210] *The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977, t hird edition 2001) paragraph 37.

[211] See *The Bangladesh Labour Act 2006* (Bangladesh) ss. 5 - 60.

connecting stairways in each floor, and active firefighting apparatus etc.), safety from dangerous fumes, protection of eyes, availability of lifts, stairs, and alternative exits and approaches, precautions against the use of chemicals, explosive or inflammable dust or gas and so on.[212] Chapter 7 mainly deals with implementation and enforcement mechanisms for occupational safety and security provisions in the workplace that cover the respective responsibilities of employers, the government, and workers.[213] Under the BLA main tools for the enforcement of occupational safety and health provisions are inspection and enquiry, reporting, banning or prohibiting operations upon the report of any accident, occupational disease, or the dangerous operation of machinery. The Act also empowers the concerned authority to make rules for the enforcement of health and safety in the workplace.[214] In addition, the *Mines Act 1923* also sets a legal framework of OSH for mine workers in Bangladesh.[215]

Although in view of the legal provisions incorporated in the BLA the labour law seems to be encompassing of the OSH standards, due to some reason huge gaps are noticeable in the law and practice. One intrinsically important thing is that in the Act, the terminology of OSH has not been used, and therefore OSH as a fundamental right of the workers is not translated properly through the legal provisions. Because of the absence of the term OSH the fundamental protective spirit and requirements are missing in the Act. Neighbouring state's labour laws, such as the *Nepalese Labour Act*, covers OSH issues with the application of the terminology itself in a comprehensive way. Thailand has a separate law titled the *Safety, Health and Work Place Act* (revised in 2011).

In addition to the state of the legal framework, the enforcement mechanism is not satisfactorily designed in the law. The OSH inspection system under the Act is poor, reportedly understaffed, and corrupt that cuts corner of legal requirements. There is no specialised governmental department to deal specifically with OSH. Penal sanctions for the violation of OSH requirements are negligible for mega-corporations, who manage to ignore requirements with impunity often under political patronage and cover-up. This is evident from some recent disasters, namely the collapse of the *Rana* Plaza building[216] and the fire in

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[212] Ibid, ss. 61- 78.
[213] Ibid, ss.79 - 88.
[214] Ibid, ss.88.
[215] See *The Mines Act, 1923* (Bangladesh) ss.17 to 22.
[216] See Willium Gomes, 'Reason and Responsibility: the Rana Plaza Collapse' *Open Democracy* (online), 9 May 2013 <http://www.opendemocracy.net/opensecurity/william-gomes/reason-and-responsibility-rana-plaza-collapse> 2 August 2013.

the *Tazrin* Fashion building[217] (a renowned garment factory), which reflect on vulnerable OSH situations and non-compliance with OSH standards. In these two cases, the governmental initiatives to apply justice to those responsible and pay compensations to the victims have not been satisfactory. However, it is commendable that an amendment has been made on 15 July, 2013 to improve OSH situations at Bangladesh workplaces in the face of a volley of criticism from the international community which termed the working situation there as slavery.

Along with legal development, it is important to strengthen the implementation mechanisms. Therefore Bangladesh should ratify the ILO conventions on OSH, most importantly the one relating to a promotional framework, so as to be under international obligation to implement the standards consistent with its suggestions. It should also establish and activate the proposed National Council for Industrial OSH with broader responsibility.

6.5 Mechanisms for Enforcing Labour Rights

The BLA 2006 introduces both administrative and judicial mechanisms to ensure compliance with law and enforcing labour rights. The administrative system includes the Department of Labour, Department of Inspection, and Department of Industrial Relation for EPZ. The judicial system includes the Labour Court, Labour Appellate Tribunal and the High Court Division of the Supreme Court.

6.5.1 The administrative mechanisms

A. The Department of Labour

The BLA 2006 provides for the establishment of the Department of Labour headed by the Director of Labour with required number of other directors appointed by the government to enforce the compliance with the provisions of this Act.[218] According to the Act their powers, among others, concern the enforcement of workers' right to a trade union. The prescribed functions include the registration of a trade union, lodgment of complaints with Labour Courts for action against any offence or any unfair labour practice or violation of any

[217] For details, see Syed Jamal Uddin, 'The Fallout from the *Tazrin* fire' *The Financial Express*, November 29, 2012; Asia Monitor Resource Centre, *Tazrin Fire-The Ground Realities* (Tazrin Incident Investigation Report, 2012) <http://www.amrc.org.hk/system/files/Tazreen%20Report.pdf> 28 August 2013.
[218] See *The Bangladesh Labour Act 2006* (Bangladesh) s.317 (1).

provisions of laws relating to trade unionisation, and acting as conciliator in any industrial dispute arising out workers and their employment.[219] The duty for registration also extends to cancellation and rejection of the trade union registration, disqualification of membership etc.

The power to lodge any offence concerning unfair labour practice is an effective tool enabling the protection of workers' right to a trade union and its exercise. Unfair labour practice as defined by the Act may be held by the employers or the workers and contains a long list of activities militating against the free exercise of the right to freedom of association. The constituent elements of unfair labour practice on the part of the employers involve the activities leading to the violation of workers' right to a trade union.[220] On the other hand, unfair labour practice by the workers includes the intimidation, inducement, and compelling or attempt to compel any worker to be or not to be in a trade union. The Director by the exercise of its administrative power in the lodgment of complaints in trade union related-issues can contribute to facilitating the protection of the workers' right.

B. The Department of Inspection

The Department of Inspection headed by a chief inspector with the requisite number of deputy chief and assistant chief inspectors is established under this Act for carrying out the inspection of the compliance with the rights and obligations provided by it.[221] Inspection as a compliance mechanism includes the following types of responsibility regime:[222]

(a) the inspection or examination of the place and premises of the establishment at any reasonable time;
(b) the examination of papers of the business establishment or industry as to how far it is prepared or has progressed in accordance with the provisions of this Act; and
(c) making the necessary examinations and enquiries to ascertain compliance with the provisions of the Act, its rules and regulations in respect of industry building or the establishment and the workers.

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[219] Ibid, s.317 (4).
[220] For instance, imposition of any condition in a contract of employment restraining the right to joining or continuing in a trade union; refusal to employ on the ground of trade; discriminating against any person in the employment, promotion, condition of employment on the ground of trade union membership; dismissal, discharge, removal from employment on the ground of trade union and so on.
[221] *The Bangladesh Labour Act 2006* (Bangladesh),s.318.
[222] Ibid, s.319.

The first category includes the inspection of matters relating to occupational safety and health arrangements available in the premises and industry buildings. The second category concerns the company's policy for compliance, code of conduct, reports etc. The third category includes matters relating to employment rights, the payment of wages, hours of work and rest, and prosecution against the violation of labour laws. It also includes the approval of building plans and construction, and liaison with different governmental departments, employers, and trade unions on the enforcement of labour laws.

As per the existing law, the Department of Inspection under the Ministry of Labour has been established to ensure the smooth and effective functioning of the inspection. To facilitate the functioning it works under three wings, namely, an engineering section, general section and medical section. The engineering section is responsible for occupational safety, accident investigation, and compensation etc. The general section deals with general welfare measures, the payment of wages, working hours, and conditions of employment. The medical section is responsible for occupational health and hygiene and the maternity benefit. Upon the inspection, the inspector from each section advises the management concerned on the spot on the rectifying of defects or infringements observed. He or she subsequently issues a notice and during the follow-up inspection if the required actions for defects and/or infringements are not taken, he or she files a lawsuit for violation in the labour court.

Although the inspection department is empowered with the approval of building construction upon inspection and the inspection of other health and safety measures in the firm or project, as per the schedule or on emergency basis, the Act lacks rules regarding inspection of these works vis-a vis safety and other aspects of importance to workers. It also lacks principles relating to holding the inspectors accountable for their work. In addition, as this inspection system in the current labour law is a replacement of inspection system of the previous *Factory Act 1965* which has been merged with this law, the system is only designed for factories, not for any other development project. However, the *Mine Act 1923* provides for the obligation of a chief inspector office to supervise working conditions in the mine and to ensure safety conditions. So to remove the legal gaps firstly, in the interest of the safety of factory workers, the law must require submitting a certificate to the concerned authorities following the approval of building work. Secondly the jurisdiction of the inspector's office under the current labour law should be extended to development projects.

It is noteworthy that the current labour Act suggests that the government establish the National Council for Industrial Health and Safety to work for ensuring compliance with industrial health and safety issues.[223] The proposed council is to be based on a multi-stakeholder framework with the participation both employers and employees of different manufacturing sectors.[224] Its responsibility includes: (1) to prepare a national policy for ensuring safety in industrial establishments and maintaining the health and conditions of work and atmosphere therein; and (2) to frame guidelines for the implementation of its policy. The proposal for constituting such an institutional framework at the auspices of the government is a good endeavour to promote the conditions of occupational health and safety in Bangladesh as we witness in the activities of National Council for Occupational Health and Safety in Malaysia established under the *Occupational Health and Safety Act, 1994.* The government of Bangladesh has not yet constituted the Council.

C. Department of Industrial Relation for EPZ

The Department of Industrial Relation in EPZs operates as substitute organisation of the Department of Labour and Chief Inspector of factories under the BLA 2006. There are also 60 councilors appointed to provide technical assistance to this department to implement BEPZA instructions 1 and 2, the newly repealed *EPZ Workers Society and Industrial Relations Act 2004,* and the *EPZ Workers Welfare Society and Industrial Relation Act 2010*. This department is assigned to perform a plethora of duties as per the direction and guidelines of BEPZA where there is no specific mention of workers fundamental rights and working conditions. However, it is responsible for dispute settlement on the basis of workers' complaints as per BEPZA rules and regulations. BEPZA instructions 1 and 2 have dealt with the payment of wages and other welfare facilities and have no focus on the working conditions. So the inspection and dispute settlement issues in the EPZs by the said department are not concerned with anything related to the recognised fundamental labour rights and right to OSH.

[223] Ibid, s. 323(2).
[224] Ibid, s. 323 (5).

6.5.2 The judicial mechanism

A. The Labour Court

The Labour Court (LC) as a judicial mechanism established under this Act is aimed at enforcing rights guaranteed or secured to any collective bargaining agent, employer or the workers. The court shall be composed of a chairman from the level of District Judge and two other members to assist the chairman. One of the members will be representative of the workers and another of the employers.

The jurisdiction of the Court encompasses four main tasks, namely: (a) to adjudicate and determine an industrial dispute or any other dispute arising out of the violation of any provision of this Act and brought before the Court; (b) enquire into and adjudicate any matter relating to the implementation or violation of settlement which is referred to it by the Government; (c) try offences under this Act; and (d) exercise and perform such other powers and functions as are or may be conferred upon or assigned to it by or under this Act or any other law.[225]

The core objective of the LC is to settle industrial disputes. An industrial dispute involves disputes relating to labour rights and disputes relating to service interest. No differentiation is made between a right's dispute and interest dispute under this law; both can be taken to the LC as a dispute. Any collective bargaining agent (CBA), employer or any worker can raise a dispute before the LC on the grounds of a violation of any right conferred by the Act or any award by peaceful settlement through conciliation or arbitration.[226] Individual workers in the case of dismissal, retrenchment, or otherwise removal from employment, can bring a complaint to the court.[227] There is no alternative mechanism for the settlement of individual disputes other than by the intervention of the LC. Individual disputes cannot be taken to court by the CBA as an industrial dispute. Considering this as a legal deficit in the jurisdiction of the court, this issue has been brought to the attention of the Supreme Court of Bangladesh, but the Court has made it clear that individual disputes cannot be entertained by the LC as an industrial dispute.[228]

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[225] Ibid, s. 214(10).
[226] Ibid, s. 213.
[227] Ibid, s. 33(1), 33(2).
[228] See Faruque, above n 119.

It is commendable that the *Act* provides scope for individual's direct access to justice under this court to uphold employment rights when they are violated. But the limitation that an individual's dispute cannot be treated as an industrial dispute and therefore is not capable of being raised by the CBA to the court may create potential risks to ensuring an individual's right to seek remedies in a country such as Bangladesh where most workers are poor and unwilling to resort to litigation against their employers. So disputes relating to the violation of individual rights can be introduced as industrial disputes on a case basis in the legal framework of dispute resolution under the law.

B. The Labour Appellate Tribunal

The BLA 2006 establishes the Labour Appellate Tribunal to hear the appeals from the LC. It consists of a chairman, or if the government deems fit, a chairman and such number of members as the government deems fit. The Labour Appellate Tribunal may set aside, vary, or modify any award or decision in judgment or sentence given by the LC or send the case back to it. The creation of the Appellate Tribunal is a major contribution of the current Act as the predecessor labour laws lacked this provision and the judgment of the LC was final. Now by introducing such provision the right to appeal of aggrieved party has been ensured.

C. High Court Division of the Supreme Court

Even though the labour court has been entrusted with the exclusive jurisdiction in respect of deciding labour issues, the aggrieved person can invoke the jurisdiction of the High Court Division (HCD) on the ground that the matter in issue leads to the violation of fundamental rights and there is no other efficacious remedy in this matter.[229] Before the constitution of the Appellate Tribunal under the BLA 2006, it was the only way to invoke the writ jurisdiction of the HD for challenging a decision passed by the LC. Now in spite of the recourse to the Labour Appellate Tribunal, the jurisdiction of the HD can be invoked on the grounds of the violation of fundamental rights or any procedural error committed by the LC.

[229] See *The Constitution of the Peoples' Republic of Bangladesh* 1972, art.102.

D. The EPZ Labour Tribunal and Appellate Tribunal

The adjudication system under the Labour Court and the Labour Appellate Tribunals are not applicable to the cases of EPZs workers. The *EPZ Workers' Association and Industrial Relations Act 2004* for the first time provided for the establishment of the EPZ Labour Tribunal and EPZ Labour Appellate Tribunal to settle the disputes or try the offences under this Act. Before the enactment of this law, the conciliation or arbitration method used to be in application for settling labour disputes. This was controversial for being primarily investor-biased.[230] This Act provides for governmental obligation to establish an EPZ Labour Tribunal in every EPZ.[231] But since the enactment until it was repealed by the *EPZ Workers Welfare Association and Industrial Relations* 2010 no tribunal was established. The new *Act of 2010* stipulates similar provisions for the establishment of the Labour Tribunal and Appellate Tribunal in each EPZ.[232] The establishment of the Labour Tribunal is still under process and until now no EPZ tribunal has been established.[233] As a result the same conciliation and arbitration procedure is being applied for the settlement of disputes and workers still suffer from the same investor-bias problem. There is no legal scope for appeal against the decision of the arbitrators and conciliators. Due the absence of labour tribunal and scope of appeal against arbitral award, they workers are being deprived of their right of access to justice, which leads to the deprivation of other rights such as minimum wages, appropriate working hours, leave, compensation and health care as guaranteed by the statutory laws.

In view of this situation the Bangladesh Legal Aid Service Trust (BLAST) lodged a writ petition with HD on public interest grounds. On the basis of this, the HCD issued a rule on 25 August, 2008 requiring the government to explain why it should not be directed to form the labour tribunal and appellate tribunals in EPZs.[234] The government has not yet replied to the rule and the tribunals are yet to be established.[235] Moreover, the government's position in this respect is made clear by the comment of the current labor minister in Bangladesh that he is not aware of the legal obligation of the formation of labour tribunals in the EPZs.[236] So the implementation of the legal principles regarding the establishment of a labour tribunal is a

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[230] See Bangladesh Export Processing Zones Authority, *Instruction No.1 of* 1989, s.29.
[231] *The EPZs Workers' Association and Industrial Relations Act,* 2004 (Bangladesh) s.56.
[232] *The EPZ Workers Welfare Association and Industrial Relations Act* 2010 (Bangladesh) s. 48, 52.
[233] Faruque, above n 116.
[234] *BLAST and Another vs Bangladesh and Others [Labour Tribunal Case] (2008) Writ Petition No.6448.*
[235] Special Reporter, 'Two Vital Tribunals Yet to be Set up in the Country's EPZs' *The Financial Express* (Dhaka, Bangladesh), 14 November 2013 <http://www.thefinancialexpress-bd.com/2013/11/14/3881> at 20 December 2013.
[236] Ibid.

compelling need to protect fundamental labour rights, including other service interests in all EPZs in Bangladesh.

6.5.3 Existing enforcement mechanisms of labour rights and the real life situations

It can be fairly asserted that the existing mechanisms are enough to ensure the protection and promotion of labour rights across the industrial and commercial establishments including EPZs in Bangladesh. But the real life situation of labour and employment rights shows a very different and weak picture of enforcement and it evidences huge gaps between legal arrangements and practice. The reasons for such a situation are different in non-EPZ and EPZ sectors. In EPZ sectors the main reason is the absence of the required law and enforcement mechanisms. In non-EPZ commercial, industrial and other development sectors the reasons are attributed to the defect of the administrative and judicial system. The administrative system is infected with negligence, a lack of responsibility, a lack of effective implementing measures, and above all, legal restrictions. The judicial system mainly faces institutional incapacity, cumbersome procedures and unnecessary delays, and a lack of logistic support. Some evidences of weak enforcement of the rights are exemplified in the following.

A. Weak trade unionisation in the non-EPZ sector and administrative negligence

In Bangladesh the state of enforcement of the right to trade union is very disappointing. It has been said that Bangladesh had the weakest union rights in Asia in the mid-1990s.[237] Across all the industries a very small percentage of workers (mostly male) belong to unions and these are affiliated with different political parties and thus function as extensions of political parties, not as representatives of workers. This is a recurring theme in the firms of Bangladesh as seen in the World Bank Investment Climate survey.[238]

The role of the Director of Labour is responsible for unsatisfactory for promoting trade unionization to an extent. His role is always accused of being biased towards employers. It is reported that a number of applications for registration remain undecided for days after

[237] Yana Rodgers and Gunseli Berik, 'Asia Race to Capture Post-MFA Market: A Snapshot of Labour Standards Compliance, and Impacts on Competitiveness', (2006) 23(1) *Asian Development Review* 55, 86.
[238] Gunseli Berik and Yana Rodgers, 'The Debate on Labour Standards and International Trade: Lessons from Cambodia and Bangladesh' (Gem-IWG Working Paper Series 07-5, International Working Group on Gender, Macroeconomics, and International Economics, June 2007) <www.genderandmacro.org> 18 October 2013.

days by the Director without any stated reason.[239] In cases where there are deficiencies in an application, applicants do not receive any reply that could enable them to amend their application and retry. On the other hand the Director of Labour is seen to actively use the given power for the cancellation of registrations. For instance, in 2010 the registration of the Bangladesh Garments and Industrial Sramik Federation (BGIWF) was cancelled for the alleged violation of its constitution and unfair labour practice. There are many other instances like this. This legal power, in effects, paves the way for its arbitrary use, and works in the favour of employers. It is further reported the new registration of trade unions has been stopped for last couple of years in the garment sector that includes a number of foreign factories.[240]

B. *Non-compliance with labour laws, a fragile health and safety situation and the lack of a compliance monitoring system*

The internal inspection and monitoring system under the Department of Inspection as provided by the Act lacks proper coordination, adequate staffing, and periodic monitoring which results in persistent non-compliance with labour laws. Poor employer compliance with labour laws and with international conventions is confirmed by compliance evidence collected by the Fair Labour Association (FLA) in 2004. According to the FLA report of 2004 the major labour standard violations were non-compliance with wages, hours of work, and overtime compensation codes.[241] FLA inspectors also found the violations of health and safety regulations and a lack of code awareness as the second most frequent set of problems in Bangladesh.[242]

The fragility of health and safety conditions has become phenomenal in the industries of Bangladesh. The recent fire incidents in garment factories near the capital city Dhaka have drawn global attention towards the fragile state of health and safety measures in garment industries, the major earners of foreign currency. Foreign consumers and buyers have protested at this and attributed the responsibility to non-compliance with health and safety regulations and their weak enforcement due to the absence of proper inspection and monitoring systems. Along with a weak monitoring system, the inspectors' indulgence in

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[239] ITUC, *Internationally Recognized Core Labour Standards in Bangladesh* (Report for the WTO General Council Review of the Trade Policies of Bangladesh, Geneva, 24 and 26 September, 2012) <http://www.ituc-csi.org/IMG/pdf/bangladesh-final.pdf> 2 October 2013.
[240] Faruque, above n 119.
[241] See FLA, *Global Compliance Report 2004* (published in 2005) <http://www.vfc.com/VF/corporation/...Pages/.../VFC_Glo_Compli_Report.pdf> 2 October 2013.
[242] Ibid.

corruption or bribery in issuing approvals for building construction or overlooking other safety issues is claimed to be responsible for persistent non-compliance with occupational safety and health regulations. In addition, employers often indulge in fraudulence without the knowledge of the inspectors. For example, employers obtain approval for construction of an industry building based on a design and layout in the prescribed manner, then subsequently violate the approved building plan.

Poor staffing as mentioned is also a major factor for weak monitoring. According to a recent study in 2008 there were less than 80 labour inspectors to inspect thousands of registered enterprises across the country which is reasonably unmanageable. [243] The other factor is the lack of legal requirement of periodic monitoring and inspection. The inspection schedule is designed by the chief inspector independently and this is carried out very negligently and nominal. In a study it is reported that most workers said that they never met any government officials coming and inspecting their workplaces. [244] The inspection if it occurs mostly involves inspectors' meeting with the employers, and inspection is most common after a harmful incident has already occurred.

It is noteworthy that the *Mines Act 1923* as indicated earlier creates obligation for the government to establish a separate department of inspection for working conditions. Such an obligation is frequently avoided by the government. A study on decent working conditions in *Barapukuria* coal mine project in Bangladesh reveals that the project came into operation in 1996 with the partnership contract Chinese National Machinery Import and Export Corporation, but no chief mine inspector and office was established over a decade as per the legal obligation under the *Mine Act* 1923.[245]

C. Procedural cumbersomeness and disposal of cases by the LCs

It is true that the arrangement of judicial mechanism for the enforcement of labour rights is adequate under the BLA 2006. But the role of the LC does not appear to be satisfactory although it enjoys a wider scale of jurisdiction for the protection of worker's right. The point of dissatisfaction mainly lies with the rate of disposal of the cases. In a report of a daily

[243] See Jakir Hossain, Mostafiz Ahmed, and Afroza Akhtar, 'Bangladesh Labour Law: Reforms Directions' (November 2010) BILS <www.ituc-ap.org/wps/.../report-of-the-baseline-study-on-bangladesh.pdf...> 2 October 2013.

[244] Ibid.

[245] Shahadat Hossain Khan, *Status of Coal Mine Workers in Bangladesh: Decent Work Challenges in Barapukuria (* Study Report,2011) Bangladesh Occupational Safety, Health and Environment Foundation

newspaper it is stated that 11,900 cases are pending as of late April, 2013 in the seven LCs and Labour Appellate Tribunals of Bangladesh, with one of the courts operating without a judge and four operating without registrars.[246] Most of the pending cases involve employment rights, decent works and violation of trade union rights. The report identifies that the reasons for the huge backlog of cases in labour courts are not only the poor number of courts and inadequate staffing but also the irregularity of holding courts, lengthy legal procedures, and the delayed disposal of cases. Although the law has fixed a maximum of 60 days for the disposal of cases, there is a lack of clear guideline about what happens to those cases that fail to be resolved within that time. And there is no alternative dispute settlement method on labour issues.

D. Protection of labour rights in EPZs and the absence of legal mechanisms

The violation of labour and employment rights including freedom of trade association and minimum wages is frequent in the EPZs of Bangladesh. EPZs are the main base of foreign manufacturing and operate under a shield of exemption from the application of labour laws dealing with rights related to employment security, trade unions, and minimum wages. The enforcement mechanisms for limited rights as introduced by the current applicable laws are not adequate. Moreover, the judicial mechanism is not yet set up as discussed earlier. The governmental laxity in regulating labour issues in EPZs is responsible for such a situation.

Given the discussion, it can be remarked that the existing mechanisms for the enforcement of labour standards do not work properly. They encounter many technical and non-technical legal barriers and inefficiency in their functions, including indulgence in corruption. As such, due coordination from the government in association with different stakeholders for the improvement of labour standards is lacking. Despite huge resentment and dissatisfaction from the national and international community the prolonging of such a situation testifies to the government's inertia in improving the regulatory framework both in EPZs and non-EPZ investment locations in line with international standards. In addition, employers are still far from creating a compliance culture. Their compliance attempts in many cases are cosmetic, foreign-buyer driven, and not in the spirit of development through the promotion of labour rights. Foreign entrepreneurs take advantage of the weak labour regulation. The prevalent

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<http://www.amrc.org.hk/system/files/Coal%20Mine%20Study%20-%20OSHE%20%5BBangladesh%5D.pdf> 30 December 2013.

[246] M Mohiddin Alamgir, 'About 12000 Cases Pending in Labour Courts' *New Age* (Dhaka, Bangladesh), 1 May 2012 <http://www.newagebd.com/detail.php?date=2012-05-01&nid=8929#.UkwK_mx--70> 2 October 2013.

situation therefore requires bringing changes and improvement in the activities of existing enforcing authorities, such as restructuring the department of labour, introducing a periodic monitoring system, establishing a full time labour court with adequate staff, and undertaking to establish the National Council for Occupation Health and Safety, bringing the EPZs workers under the application of enforcement mechanisms provided by the general labour laws.

6.6 Forced Eviction and Protection of the Right to Resettlement: Laws and Regulations

6.6.1 FDI operation, forced eviction and human rights implications

It is beyond doubt that the FDI led development projects or mining operation have a positive impact on social and economic prosperity by increasing employment prospects, the exploration of economic resources, and access to new infrastructure such as electricity, roads, and communication. These can aid in the realisation of the human rights of the people of a country through increasing the standard of living and facilitating their access to health, housing and education, food, clothing etc. But at the same time it is common that certain communities or individuals suffer the profound violation of their human rights in consequence of the implementation of the development projects, mining operations, or other commercial plants of foreign companies or development agencies. The most common is the forced eviction or displacement of the people currently living at the location of the investment projects. The human rights affected in forced eviction extend beyond the loss of the right to housing, food, and land, to the loss of other economic securities such as the ability to earn a living and sustain a household, the prevailing economic model (especially the involuntary transition from a land-based to cash–based economy), the loss of access to resources on which they have depended (water, agricultural land, common resources such as pastures and forests), and the ability to re-establish homes and lives if the compensation for relocation is insufficient or non-existent.[247] Forced eviction exposes people to cultural security risks through the disintegration of previously cohesive communities and significant changes in lifestyle brought about by subsequent relocation. This mostly happens in the case of the eviction of indigenous people.

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[247] McBeth, above 5, 229; See also MQ Zaman, 'Land Acquisition and Compensation Involuntary Resettlement' (1990) 14(4) *Cultural Survival Quarterly* <http://www.culturalsurvival.org/ourpublications/csq/article/land-acquisition-and-compensation-involuntary-resettlement> 29 December 2013.

It is true that FDI operation for infrastructural development and other extractive industries can contribute to the national development, but this development cannot be realised at the compromise of the human rights of a certain community or individuals. The violation of human rights through forced eviction creates the economic marginalisation and social disintegration of certain groups, but development should be for the entire population as all have the right to enjoy the benefits of development.[248] The *UN Declaration on the Right to Development* points out that the aim of economic development is the maximisation of the wellbeing of the entire population, and therefore cannot be realised by the economic marginalisation or social disintegration of groups such as indigenous groups.[249] Hence, there needs to be some obligations for either the host state or the investing companies to minimise the negative consequences of investment projects and ensure the right of resettlement of the victims in an effective manner.

6.6.2 Right to resettlement and international human rights obligation

There is no clear reflection on the prohibition of forced eviction caused by development-induced projects in previously adopted general international human rights documents such as the *Universal Declaration of Human Rights (UDHR)* and *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. But in the texts of these instruments vital importance in placed on the situations of human rights that can be applied to evicted or displaced persons. In UDHR there are provisions in relation to the right to property and adequate housing and prohibitions on their arbitrary deprivation.[250] Similar provisions are available in Articles 6 and 11 of the ICESCR regarding the state responsibility to ensure progressively the right of every individual to an adequate standard of living for himself and his family including adequate food, clothing, housing, and the continuous improvement of living conditions.

Although there is no clear focus on the obligation for resettlement in case of forced eviction in the text of ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) elaborates the contents of international human rights law obligation in connection with forced eviction. It recognises the justification of the evictions in some cases, but stresses the

[248] See *The African Charter on Human and Peoples Rights* (1981) art. 22(1). It states that all people shall have the right to their economic, social and cultural development with due regard to their freedom and identity in the equal enjoyment of the common heritage of mankind.
[249] *The UN Declaration on the Right to Development* (1986) art.1.
[250] See *The Universal Declaration of Human Rights* (1948) arts.17 and 25.

state's obligation to carry out proper consultation with the people to be resettled, to provide legal recourse mechanisms for grievances connected with the resettlement, and to provide a number of other safeguards to ensure compliance with human rights standards during eviction.[251] The CESCR also emphasises the importance of ensuring that people are suitably resettled so that they continue to have a sustainable livelihood.[252]With elaborating the state responsibility the Committee also cautions the international agencies funding development projects in any country that involve large scale eviction or displacement of persons, that every effort should be made at each phase of the development project to ensure that the rights contained in the Covenant are duly taken into account.[253]

The views of the CESCR require a high threshold of justification of eviction if necessary for the implementation of development or any other commercial FDI projects. The *Guiding Principles on Internal Displacement*, a soft law instrument developed under a UN mandate,[254] provides similar provisions for the justification of eviction for the purpose of development projects. The Guiding principles provide that every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence,[255] and proceed to stipulate that arbitrary displacement includes 'cases of large scale development projects, which are not justified by compelling or overriding public interest'.[256]

This position indicates that, if possible, eviction should be avoided. If eviction is necessary the project can be altered or discontinued, or the state government must provide all adequate arrangements for the resettlement of evicted persons under a concrete legal and policy framework safeguarding the relevant human rights of the evicted persons. The Article 16 of the *ILO Convention No.169*[257] is notable in this context that where the relocation of these people is considered necessary as an exceptional measure, such relocation shall take place

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[251] See Committee on Economic, Social and Cultural Rights, *The Right to Adequate Housing: Forced Eviction* (UN Doc. E/1998/22, annex IV) General Comment-7, 15 <http//www.unhabitat.org/downloads/docs/IntlInstrumentsonHousingRights.pdf> at 23 December 2013.

[252] For example, the committee states that where those affected are unable to provide for themselves, the state party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available. See Ibid, 16.

[253] See Committee on Economic, Social and Cultural Rights, *General Comment 2: International Technical Assistant Measures* (UN Doc.E/1990/23) reiterated in CESCR General Comment -7, 17.

[254] The Guiding Principles on Internal Displacement were produced under the mandate of the Special Representative of Secretary General on Internally Displaced Persons and presented to the Commission on Human Rights in 1998.

[255] Office for the Coordination of Humanitarian Affaires, *Guiding Principles on Internal Displacement* (2001) principle 6 (1) <http://www.unhcr.org/43ce1cff2.html> 23 December 2013.

[256] Ibid, principle 6 [2(a)].

[257] This *Convention* is called the *Indigenous and Tribal people Convention* 1989.

with their free and informed consent. Where their consent cannot be obtained, such relocation take place only following appropriate procedures established by national laws and regulations including public inquiries where appropriate, which provide opportunity for the effective representation of the people concerned.

6.6.3 The locus of obligation under international human rights law

The international human rights law establishes the state's obligation for the protection of human rights if it is violated or infringed in any way. Therefore, the primary responsibility for the protection of human rights in the course of their violation due to the implementation of development projects or any commercial investment rests with the host state where the projects occur. The responsibility of the financing agencies or the investor MNCs to ensure the protection of human rights remains unsettled in international law on the basis of their status as an international legal personality. If the project is a joint venture with the government agency of a foreign country, then responsibility can lie with the home state.

As the host state is the primary responsible entity, its obligation covers the adoption of all legal and policy measures to ensure the protection of human rights connected with involuntary resettlement, as well as obliging investors to respect human right standards in that connection through foreign investment legislation.

Although there is no direct obligation directed to the development agencies, most of them recognise the potential for their development projects to infringe human rights.[258] Therefore, each of the major institutions has adopted its own set of safeguarding policies. The World Bank Group, Asian Development Bank, African Development Bank, Inter-American Development Bank, and the OECD have formulated their own policies for the resettlement of the affected people or individuals.[259] These policies cover a range of areas on the basis of previous experiences of detrimental consequences of projects to communities. The policies

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[258] McBeth, above n 5, 231.

[259] For example, *World Bank Operational Policy on Involuntary Resettlement* (revised 2001), *The Asian Development Bank (ADB) Policy on Involuntary Resettlemen*t (1994), *ADB Safeguard Policy Statement* (2009), *Agencies on Involuntary Displacement and Resettlement in Development Projects* (1991, 2003). See for details Bogumil Terminsky, *Development-Induced Displacement And Resettlement: Theoretical Framework and Current Challenges* (Geneva, 2013) 89-92 <http://www.dlc.dlib.indiana.edu/.../Bogumil%20Terminski,%20development-Induce> 28 December 2013.

have an almost in equal focus on issues relating to the customary land rights of the people, their consent for resettlement, adequate compensation for losses, and full resettlement.[260]

The idea behind the safeguard approach is to require the party receiving the funds to take certain risk mitigation measures to protect the various interests identified in the policies. The development agencies use this tool as a condition for granting loans or funding, meaning that failure to take the required measures renders the breach of agreement. Thus through the function of the contract, the protection of the communities' right may be elevated to the status of law or entrenched in law.

6.6.4 Legal framework of protection of human rights in involuntary resettlement

6.6.4.1 Constitutional guarantees for protection

It is already noted that most human right issues affected by forced eviction is the loss of the right to ownership and property. The *Constitution of Bangladesh* acknowledges and guarantees the protection of people's ownership and right to property. It recognises under Part 2 of its state policy three kinds of ownership including public, cooperative, and private.[261] It also recognises the right to property as the citizens' fundamental right. As for protection of right to property, Article 42 of the *Constitution* provides that every citizen shall have the right to acquire, hold, transfer, or otherwise dispose of property, and no property shall be compulsorily acquired, nationalised or requisitioned save by the authority of law.

This article also provides that any law made for this purpose shall: (1) prescribe for the process of acquisition, holding, and transfer of the property with compensation; and (2) shall fix the compensation or specify the principles under which the compensation can be assessed or fixed, but no such law shall be called in question in any court on the ground that any provision in respect of such compensation is not adequate. The provision regarding the restriction to judicial recourse on the ground of the inadequacy of compensation is opposed to the people's economic right of compensation in the case of involuntary resettlement. It nevertheless suggests for the formulation of national legislation to establish a legal framework for the regulation and protection of peoples' right to property that can be applicable in involuntary resettlement.

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[260] See *World Bank Operational Policy* (OP 4.12) art.6; *Inter-American Development Bank Operational Policy on Involuntary Resettlement* (OP-710) Principle 2; *African Development Bank Involuntary Resettlement Policy* 2003, ch.4.

[261] The *Constitution of Peoples' Republic of Bangladesh* 1972 , art.13.

6.6.4.2 National legislation

In Bangladesh the principal legislation applicable for involuntary resettlement issues, particularly in the case of the loss of the right to land by the governmental acquisition or requisition for development purposes, is the *Acquisition and Requisition of Immovable Property Ordinance (ARIPO)*, 1982 (including all amendments up to 1994). Some other laws regulating the acquisition of immovable property include *The Land Acquisition Act of 1894, The Land Acquisition Act I of 1894, The Acquisition of Waste Land Act of 1950,* and *The Chittagong Hill Tracts (Land Acquisition) Regulation*. The ARIPO has consolidated all previous legislations relating to matters of the acquisition of immovable property. Hence it becomes the sole legislation for the said purpose. It is notable that under the ARIPO the acquisition or requisition right is vested only with the government for public purpose and the word public purpose, although is not defined by the *Act* itself, covers in practice all kinds of development projects, extractive operations, and manufacturing plants of MNCs on agreement with the government. It means, for example, if the development or extractive project is a joint-venture then the government acquires the property on its own for the implementation of the project on the ground of public purpose. If the project is funded for example with 100 per cent equity of foreign or local company or by foreign or local individuals for any extractive or any development projects, the government acquires the property on behalf of the investing company or individual and transfers it to them on the basis of agreement between the government and the company or individual investors in an equal procedural manner applicable for public purpose. The associated issues of acquisition such as taking possession and compensation of the displaced individuals are determined on the basis of agreement in compliance with this law. The acquisition of land for an EPZ is done by the BEPZA under the ARIPO 1982 under the cover of public purpose.[262]

The question is how far this law considers the protection of people's right to their lands in the case of acquisition and requisition by the government for public purpose. It is understood by the discussion on state obligation under international human rights law as well as the policy directives of development agencies that in order for the effective protection of the rights of persons facing potential involuntary resettlement, the main focus of national legislation will be on some major essential requirements such as local consultation and consent requirements, an appropriate timeline for displacement, full

[262] See *The Bangladesh Private Export Processing Zones Authority Act 1996* (Bangladesh), s.12.

information on resettlement measures and transitional support, compensation measures for resettlement, and the right to access to legal protection against arbitrary displacement etc. This calls for evaluating the legal framework under ARIPO and other applicable special laws in Bangladesh to explore how far they maintain harmony with international standards in order to ensure the protection of the relevant human rights of the people potentially affected by acquisition or requisition.

A. *People's consultation and consent requirements*

Once a given investment project is under consideration which requires acquisition of lands and displacing the owners and others living at the site, it is widely recognised that the effective engagement of the local people through consultation and their consent is essential in the early stages of project design, not only to respect local rights but also to establish a company's social license to operate.[263] The international guidelines call for local consultation before investment approval including, *inter alia*, the *OECD Guidelines*, the *World Bank Guidelines*, and the *UN Declaration on the Rights of Indigenous Peoples*.[264]

There is no provision requiring local people's consultation procedure before the acquisition of land under ARIPO 1982. However, the consent of owners is taken in a different way. According to this, the Deputy Commissioner (DC), who is the executive authority for acquisition at local level, serves a preliminary notice of acquisition at a convenient place or near the property stating that the property is proposed to be acquired.[265] Upon the objection from the people interested in the property, the DC organises a hearing and then he submits a report to the Government on the basis of objection if any for a final decision.[266] Then the Government considers the report and makes a final decision.[267] This is the procedure for gaining the owners' 'consent'.

This procedure seems to be weak as it does not reflect on the representation of the community but only the owners or settlers who have a record of ownership.[268] It does not cover other potentially affected persons without a title or ownership record, such as informal

[263] Lorenzo Cotula, *Foreign Investment, Law and Sustainable Development: A Handbook on Agriculture and Extractive Industries* (International Institute for Environment and Development, 2014) 97.
[264] See OECD Guidelines require community participation and integration with host population; Article 10 of the *UN Declaration on the Rights of Indigenous Peoples (2007)* requires free and prior consent of indigenous people for relocation.
[265] *The Acquisition and Requisition of Immovable Property Ordinance* 1982 (Bangladesh) s.3.
[266] Ibid, s. 4(1) (2) (3).
[267] Ibid, s.5.
[268] Ibid, s. 4(3).

settlers or squatters, occupiers, and informal tenants or lease holders. Although the objection right is conferred upon the person interested, the condition of ownership record refers only to owners and settlers with a record. In addition, this procedure does not follow the spirit and objective of recommendations under different international guidelines for consultation for free consent. The objective of consultation is to share and communicate with the people about the purpose of acquisition and how and to what extent it serves the public interest. The procedure notification is not apparently intended for the greater engagement of the interested people in the property. Therefore, notification of acquisition must be after consultation with the interested persons, otherwise their consent will never be free in a real sense.

Apart from ARIPO, for acquiring indigenous land in the Hill Tracts of Bangladesh accord to *District Council Act 1989* the prior consent of the District Council is essential. There is no mention of direct participation of any indigenous land owner and also how the District Council will gain the land from the original or customary owner. This legal provision contravenes the relocation directives by the *UN Declaration on the Rights of Indigenous Peoples*. Although the document lacks a binding status in application, the prior or free and informed consent has been progressively interpreted in international human rights jurisprudence relating to the collective right to the property of indigenous or tribal peoples. An example is expedient in this context that an indigenous land-grabbing case occurred in the 1980s for the purpose of mining for gas and oil. The seismic survey was launched by Shell, a multinational oil company, but was discontinued in the face of insurgency in the region. The survey was resumed in the 1990s by the US-registered company, UNOCOL. An Arabian businessman later bought the interests of UNOCOL and began drilling for gas without reaching any understanding with the local indigenous community leaders with regard to the likely impact on inhabitants of the drilling sites and gas-line areas, or the questions of dislocation, rehabilitation, or compensation and so on.

B. Appropriate schedule for displacement

The general practice of setting an appropriate schedule for displacement is through consultation between the parties. According to the APRIO the government begins action on acquisition after it decides for the acquisition of certain lands for public purpose or public interest. The process starts with a notification and follow-up reply from the owners. Then it proceeds step by step as per a prescribed time for the hearing of objections, if any, the government's final decision, and settling matters relating to the award of compensation. The acquisition is held after the payment of compensation and thereafter possession of the property will be taken officially through a declaration in the official gazette.[269] But the law and practice in many cases are inconsistent. In the Jamuna Multipurpose Bridge Project displacement occurred before compensation was completed.[270]There was no mention in the text of exactly when the displacement would commence.

C. Compensation measure for resettlement

Adequate compensation is a fundamental right in the case of deprivation of ownership caused by the acquisition or requisition of property. There is no specific provision in the *Hill Tracts Council Act 1989* about compensation in the case of acquisition of property by the government. However ARIPO 1982 sets out procedural and substantive principles relating to compensation for those who deprived of their property as per the law. According to this Ordinance, upon the final decision of the government for acquisition, and taking immediate possession of the property the government DC will serve the notice to all interested in the property to claim compensation.[271] After some necessary enquiries the compensation will be awarded on a fixed date. The compensation will be determined as per the market value of the property at the date of publication of notice for acquisition.[272] In determining the amount of compensation all incidental loss of the property owner or interested caused through the acquisition will be taken into account and added to the value of the property.[273] The important point of determining the amount is that if the acquisition is likely to compel the relocation of residence or business place, then the reasonable expenses incidental to such a change will be paid.[274]

The decision of compensation under the said legislation is entirely *exparte*. It is not decided upon by prior agreement between the government and affected persons and thus in many cases it creates chaotic situations and the deprivation of the affected persons' dues. There are instances in displacement cases in the development projects in Bangladesh in which the allotted compensation was inadequate. A survey study on the amount of compensation for

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[269] Ibid, s. 11(1).
[270] Syed Al Atahar, 'Development Project, Land Acquisition and Resettlement in Bangladesh: A Quest for Well Formulated National Resettlement and Rehabilitation Policy' (2013) 3(7) *International Journal of Humanities and Social Science* 306, 313.
[271] Ibid,s.6.
[272] Ibid, s.8.
[273] Ibid, s.8 (b),(c),(d).
[274] Ibíd , s.8.(e).

displaced persons in land acquisition for the implementation of the Jamuna Multipurpose Bridge (JMB) project in Bangladesh reveals that 77 per cent of affected respondents said that the amount of compensation was not sufficient at all against their losses.[275]

One of reason for the inadequacy of compensation is the Ordinance provides for compensation in cash according to market-value. Cash compensation cannot substitute for the loss of land, particularly in the case of indigenous people. There is a popular saying among the Havasupai Apache Indians in the US, a people displaced repeatedly by development projects: "Land is like diamond but money is like ice".[276]

Under this Ordinance, there is prominent legal gap with respect to the eligibility for compensation. It considers for compensation a person who appears in the land administration records as an owner or person who has legal title. Therefore temporary settlers or occupiers with no title or record are deprived of compensation. The ADB policy on involuntary resettlement suggests that the absence of formal legal title should not bar the giving of compensation.[277] The Ordinance determines compensation for lands and fixed assets,[278] but it lacks provision requiring the assessment of the loss of income and livelihood.

D. Resettlement measures, transitional support and compensation options

Proper resettlement measures for displaced persons is a vital issue for ensuring the protection of fundamental rights to life, and the government as the state authority is primarily responsible as inferred from human rights documents. The government should design the plan of resettlement with appropriate transitional support and budget allocation.[279] When involuntary resettlement becomes unavoidable, then the government should inform the

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[275] Al Atahar, above n 270, 312.

[276] Scott Guggenheim, 'Development and the Dynamics of Displacement' (A paper presented for Workshop on Rehabilitation of Displaced Persons, Institute for Social and Economic Change and MYRADA, Bangalore, India, 1990) 20. <http://scholar.google.com.au/scholar?hl=en&q=development+and+the+dynamics+of+displacement&btnG=&as_sdt=1%2C5&as_sdtp=2> 25 December 2013; MQ Zaman, *Land Acquisition and Compensation in Involuntary Resettlement*, Cultural Survival <http://www.culturalsurvival.org/.../land-acquisition-and-compensation-involunt> 23 December 2013

[277] See *ADB Safe Policy on Involuntary Resettlement* (2009) para 34.

[278] *The Acquisition and Reacquisition of Immovable Property Ordinance 1982* (Bangladesh) 8 (b). Clause b includes the loss of trees and crops in the amount of compensation.

[279] See Committee on Economic Social and Cultural Rights, *The Right to Adequate Housing: Forced Evictions*, UN Doc. E/1998/22 (20 May 1997) annex IV (General Comment 7) 15.

affected persons of its plan for relocation and seek their options for compensation.[280] Under ARIPO, there is no provision creating obligation for the government to take responsibility for the proper arrangement of relocation, especially for those who lose homesteads which are their source or means of earning income. The law provides for incidental costs for relocation as mentioned earlier. But it does not establish any provision to alleviate the long term impact of forced displacement on the people's livelihood from the perspective of socio-economic rehabilitation.

In addition, legal consideration for the determination of compensation does not include options other than monetary compensation. Such a compensation method may create obstacles for economic and social rehabilitation. Option for compensation mean the compensation should be determined as per the choice of the affected persons as they all are not similar in terms of nature of the losses they sustain out of eviction. A survey study on the JMB project reveals that before resettlement more than 72 per cent people were engaged in agriculture, but the number of agricultural households decreased sharply and now only 21 per cent are engaged in agriculture. Thus the overall income status of these people has decreased who have not got any other alternative.[281]

Given the above it is right to remark that the legal framework does not match the internationally recommended human rights standards. Moreover it lacks provisions requiring the participation of local or affected people in decision-making for relocation and compensation options.

6.7 The Enforcement of Legal Remedies

The ARPIO provides for an arbitral system for the settlement of the disputes in relation to the acquisition of property by the government. The settlement of a dispute mainly involves the case of an objection to the award of compensation and objection to the acquisition of the property. Under this law the DC is empowered on behalf of the government to acquire or requisite any private immovable property for public purposes or in the public interest subject to maintaining certain procedural formalities and awarding compensation for the owners or persons interested in the property. When the person interested in the property raises an

[280] See *Fact Sheet No. 25, Forced Evictions and Human Rights* (part 1) World Conference on Human Rights Vienna, 1993 <http://www.ohchr.org/Documents/Publications/FactSheet25en.pdf> 28 December 2013.
[281] Al Atahar, above n 270, 312.

objection to or does not accept the award of compensation calculated by the DC against the given property, the matter in dispute will be taken to arbitral arrangement for settlement.[282] Upon the application of the interested person the government will appoint a judicial officer, not below the rank of Sub-Judge as an arbitrator to settle the matter in issue.[283] The arbitrator proceeds on the basis of the objection to award and will be guided by the principles relating to the determination of compensation as mentioned in sections 8, 9 or 20 of this *Ordinance*.

The Ordinance also provides for the constitution of the Arbitration Appellate Tribunal for appeal against the award of the arbitrator.[284] This tribunal is composed of a person or persons who are or have been a district judge.[285] The decision of the Arbitration Appellate Tribunal is final. No further proceeding is allowed in this connection to a higher judiciary. The legal remedy for compensation is restricted to the arbitration system constituted by the government under this ordinance. The restriction for legal remedy for compensation to the arbitration system curtails the right of a person aggrieved to seek legal recourse to the highest judicial body where similar pecuniary award for other grounds is entertained.

This Ordinance also guarantees the right of the objection to the acquisition of the property at the moment the formal notice is published for acquisition, and the objection is entertained and decided by the Divisional Commissioner on behalf of the government. The decision of the Divisional Commissioner is final. No further scope for judicial remedy is available for the person aggrieved by the decision of Divisional Commissioner under this Ordinance as it creates a bar to the jurisdiction of court. Section 44 of the ARIPO articulates that no court shall entertain any suit or application against any order passed or any action taken under this Ordinance, and no injunction shall be granted by any court of any action in respect of any action or to be taken in pursuance of any power conferred upon or under this Ordinance.

This judicial bar curtails the right to recourse judicial protection and thus appears to be clearly at odds with the right conferred upon every citizen of Bangladesh under Article 44 of the *Constitution of Bangladesh*. This Article states that every person has the right to move to the HCD of the Supreme Court in the form of writ jurisdiction under Article 102 for the enforcement of fundamental rights recognised under part III of the Constitution. The right to protection of property is guaranteed fundamental under this as mentioned earlier. In that sense, the underlying principle appears to be invalid in accordance with the Article 26 (2) of

[282] *The Acquisition and Reacquisition of Immovable Property Ordinance 1982* (Bangladesh), s. 28 (1).
[283] Ibid, s. 27.
[284] Ibid, s. 34.
[285] Ibid, s. 27.

the Constitution as it articulates that the State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void.

In addition to a judicial bar the principle of indemnification under this Ordinance restricts the scope of legal challenge by the aggrieved person in the case of the acquisition or requisition of his or her property. According to section 43 any act done in good faith under the cover of the power conferred by this law will not be liable to any suit, prosecution, or legal proceeding. The point of justification seems to be that the act is done in good faith for the public purpose or public interest. But the problem is the term 'public purpose or interest' is not defined by the law and therefore there is potential for the misinterpretation of this term as well as arbitrary practice by the administration at the advantage of such a principle. The absence of legal provision requiring public participation in decision-making for acquisition broadens this scope.

It is evident from the discussion that the existing legal remedy under the Ordinance is in no way enough to protect the right of property of an individual affected by acquisition for public or private purpose. Therefore, the existing legal restrictions to recourse to judicial should be amended.

6.8 Concluding Remarks and Recommendations

The objective of this chapter was to examine FDI legislation, BITs, and all the national laws and policies of Bangladesh applicable to FDI operations with a view to assessing their strength, adequacy, gaps, and weaknesses for the protection of human rights potentially affected by FDI operation in manufacturing, development projects, and mining. Labour rights and rights relating to involuntary resettlement were central to this examination. The ultimate goal was to strengthen the protection regime of human rights by introducing a responsibility regime in the legal framework of FDI legislation and BITs if necessary, as well as bringing improvement and changes in the other applicable laws and enforcement mechanisms available thereunder. The examination of the said legal instruments reveals huge gaps, loopholes, and inadequacies in legal provisions as well as weaknesses and shortcomings in the enforcement mechanisms. These are the main challenges to counter in regulating the FDI operation of MNCs and other development agencies in connection with the protection of human rights.

The study finds firstly that there is no provision in the core FDI legislation creating responsibility for FDI operators for the protection of human rights. Secondly, its finds that the trend of addressing human rights issues began only after 2009 and the relevant provision is not comprehensive or focused on all human rights issues which are potentially affected by FDI operations.

Thirdly, it finds Bangladesh maintains a double standard in relation to protecting labour rights, although it has ratified all of the binding human rights instruments and most of the fundamental ILO conventions. The applicable laws are separate for non-EPZ and EPZ workers. The applicable law in EPZs does not recognise in a true sense the workers' right to freedom of association and collective bargaining, the international standards of setting a minimum wage, or equality in employment. In addition, it lacks the proper administrative and judicial enforcement mechanisms.

The national legislation BLA 2006 falls short of international standards in relation to the freedom of association and collective bargaining, abolition of forced labour, and equality in employment. The legal framework of OSH appears to be comprehensive, but is not focused in line with international standards. In addition, there are inconsistencies between laws and compliance and enforcement measures. The administrative and judicial enforcement mechanisms suffer a variety of institutional incapacities, procedural shortcomings, and technical infirmities.

Fourthly, it finds that there is no specific legal or policy regime for the protection of rights related to forced eviction or involuntary resettlement caused by the implementation of development projects and extractive operations for the main. The legal framework as established by the ARIPO 1982 does not mesh with the recommended international standards and directives developed by the UN Human Rights Committee or ILO convention or the World Bank, ADB and OECD guidelines. In addition, remedial measures under this law prove to be insufficient for providing due protection of citizens' fundamental right to property.

Hence it can be concluded that human rights issues are still not given enough weight in the foreign investment legal regime or in relevant laws applied to FDI operation in Bangladesh. Therefore, this study recommends some major reforms and changes for the legal and institutional improvement of the existing legal framework or the adoption of new law or policy so as to protect human rights relating to labour and employment and involuntary resettlement. The recommendations are as follows:

1. Introducing a specific principle in FDI legislation for creating responsibility for the protection of human rights;
2. Revising the current human rights principles in the model BIT text in order to make it comprehensive, and re-negotiating with all existing parties to BITs to introduce human rights principles;
3. Banning or re-designing the existing applicable labour legislation in EPZs to recognise all fundamental rights for workers in line with international human rights standards;
4. Improving the national labour legislation provisions in accordance with international standards in the fullest way and strengthening compliance measures and enforcement mechanisms thereunder;
5. Adopting a separate legislation or national policy on the issues relating to the acquisition of immovable property for public or commercial purposes, and involuntary resettlement in line with internationally recommend guidelines, including people's participation in decision-making, prior consent, compensation options, and adequate rehabilitative and resettlement measures; and
6. To assess the gravity of loss caused by forced eviction a human rights impact assessment system and reporting such as EIA in environmental matters can be introduced as an obligation for the approval of the development project.

CHAPTER 7

PROTECTING FDI AND NATIONAL INTEREST: THE LAWS AND PRACTICE OF BANGLADESH

7.1 Introduction

Investment protection is the central concern of foreign investors in host states. The legal security afforded by the host state's national legislations or their bilateral agreement allows them to exercise the economic freedom they desire while investing in a foreign country. The legal protection of investment property is instrumental for motivating foreign firms to pursue new investments and ensures a profitable outcome from their endeavors. Investors are less likely to invest in countries that do not provide legal safeguards of their investment properties or where chances are meagre for the maximisation of business profits. Given this tendency, the host state's national laws and bilateral treaties are substantially influenced by and geared towards guaranteeing investment protection. Therefore it is often seen that FDI laws, and in particular bilateral treaties, are qualified with the words 'Promotion and Protection'.[1]

There may be several issues that require legal protection in investment, but two issues such as protection against expropriation and protection through dispute settlement are prominently guaranteed through FDI legislations and bilateral treaties. Expropriation of property was once a major concern of foreign investors, especially while the communist regimes were active and countries were more or less influenced by the concept of absolute sovereignty. The rapid acceptance of the concept of economic globalisation and the demise of communism contributed to the alarming rise in the rate of unilateral declarations of protection against expropriation through national legislations. The expropriation issue was also prominently placed in the BITs. In addition, in choosing a means of dispute settlement,

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[1] See *Agreement Between the Government of Philippines and the Government of People's Republic of Bangladesh for the Promotion and Reciprocal Protection of Investments (1998), Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investments (2004), Agreement Between the Republic of Austria and the People's Republic of Bangladesh for the Promotion and Protection of Investments (2001), Agreement Between the Government of Canada and the Government of the Kingdom of Thailand (1998), Agreement Between the People's Republic of Bangladesh and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (2001)* (UNCTAD, *Investment Instruments Online* <http://www.unctadix.org/templates/page_1007.aspx> 30 December 2013).

although different options are made through BIT negotiations, international arbitral settlement has become the most preferred means of settlement.

Legislative or agreement-based guarantees for lawful treatment with regard to expropriation removes what foreign investors fear to be the greatest threat to their investments, as expropriation is the severest form of a host state's interference with the property involved in an investment. Investors are hesitant to invest where there is a danger of expropriation of physical assets. Similarly, legal guarantees for dispute settlement in the host state provide hope for a remedy in the event of government intervention and for the enforcement of an investment contract in a neutral way. As the rise of FDI inflow is deemed to be dependent upon the availability of a strong protection against expropriation and dispute settlement on the part of host countries, protection regime usually develops to the gratification of foreign investors or capital exporting countries at the compromise of the host state's national interest. As a result, some important economic and social development issues remain inarticulate or unaddressed in the legal regimes of host states, such as determining compensation for expropriation, expropriation for the national development interest, exhausting of local remedies in dispute settlements, and the inclusion of non-economic development issues.

Given the significance of legal protection of FDI, this chapter explores how far the protection against expropriation and protection through judicial or arbitral settlement is established in the legal framework and BITs of Bangladesh, with simultaneous attention to and consideration for associated national economic and social interests.

7.2 The Protection against Expropriation of Investment

7.2.1 Definition of expropriation

Expropriation is understood in foreign investment law as a governmental interference with foreign investment or investment property that leads to the substantial deprivation of the investor's enjoyment of legal title to the investment. The exponents of foreign investment law in the present time define expropriation as the 'taking of property by the host state'.[2] The general consensus is that:

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[2] For example, Rosalyn Higgins has used the term taking in her book on Taking of Property by the State: Recent Development in International Law. See Rosalyn Higgins, *Taking of Property by the State: Recent Development in International Law* (MartinusNijhoff, 1983)10; Sornarajah has termed the notion of

> The term "expropriation" carries with it the connotation of a "taking 'by a governmental- type authority of a person's "property" with a view to transferring ownership of that to another person, usually the authority that exercise its de jure or de facto power to do the "taking".[3]

The taking of property by the host state government may result from legislative or administrative acts that transfer the title and physical possession of the investment property. Taking can also result from official acts that effectuate the loss of management, use or control, or a significant depreciation in the value of the assets relating to investment such as the revocation of license or the denial of permit or the levying of taxation, freezing of the bank accounts, exchange controls, and takings by agents or mobs. It can also take place through nationalization[4], confiscation[5] or requisition[6] by the host government. The taking of the foreign investor will amount to a taking if the purpose of the expulsion is the taking of his property[7] except on the national security ground or any other rational ground for expulsion. The minimum qualifying standard of taking is any kind of interference by the host state authority directly or indirectly that affects property interests or rights of the foreign individuals or corporations.

The nature of taking is classified into direct or indirect taking, which will be defined in detail in the following section 7.2.3.2 below. Direct expropriation takes place through the physical seizer or transfer of the property of a foreign investor by the government,[8] while indirect expropriation is a measure short of physical taking that may be termed as 'creeping expropriation' or 'constructive expropriation'.[9] However, both types of expiration have similar legal consequence in international law

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'expropriation' as 'the taking of foreign property'. See M Sornarajah, *The International Law on Foreign Investment* (Cambridge, 3rd ed., 2010) 365.

[3] *S.D. Myers,Inc.v.Government of Canada* (2000, partial award), International Legal Materials, para 280.

[4] Nationalisation refers to a wide scale and impersonal takeover of individual property. Before world war 1, expropriation was normally directed to individual property but after world war second, this practice became wide-spread, impersonal and generalised and came to be known as 'nationalisation'. For a historical review of 'nationalisation'during world wars, see Freidman, *Expropriation in International Law* (Stevens, 1953).

[5] Confiscation can either be understood as the taking of property by the state without compensation or with punitive motive on political grounds.

[6] Requisition is when the state for the time being and for its own use takes the possession of private property without compensation.

[7] See *Biloune v Ghana Investment Board* (1993) 95 ILM 184,43.

[8] Jeff Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in Pirre-Marie Dupay, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 290.

[9] See *Tipples v TAMS-ATTA* (1985) 6 Iran-US CTR 219,225.

7.2.2 The standard of protection in international law

Guarantees against expropriation are a core element of investment protection. The word 'expropriation' is used interchangeably with 'nationalisation' in national legislations and bilateral treaty texts. The availability of protection against expropriation in a foreign territory determines the investors' decision-making. Their concern mainly involves issues relating to the definition of expropriation, its legal preconditions, and the standard or amount of compensation to be paid in the event of expropriation. Although on the basis of the notion of territorial sovereignty, the national and classical international laws accepted the right to expropriate an alien's property, modern international law based on treaties has developed three principles of law to regulate matters relating to expropriation that addresses the definition, scope, and conditions of the exercise of the power and the consequent compensation. As a result, the legality of a measure to expropriate is restricted and becomes the subject of certain requirements. Without the satisfaction of those requirements, it is generally prohibited. This has been entrenched in most treaties and international documents, judicial decisions and also recognised by customary international law. The requirements for the permissible or lawful expropriation include that:

(1) the measure must serve a public purpose (as provided by law)[10] ;
(2) it must not be arbitrary and discriminatory;
(3) it must follow the principles of due process (i.e. the minimum standard of customary international law and the requirement of fair and equitable treatment; and

These four requirements have become the international standard of protection against a state's sovereign right to expropriation which has been pursued in many international treaty and non-treaty texts. For instance, the *1967 OECD Convention on the Protection of Foreign Property* states that no party shall take any measures depriving directly or indirectly, of his property a national of another party… unless four conditions are met according to the recognised rules of international law.[11] The *1998 Draft Multilateral Agreement on Investment* (MAI) also required the satisfaction of these four elements for the legality of expropriation.[12] In a 2000 UNCTAD study it was confirmed that most agreements include

[10] The word 'public purpose' is substituted for 'public interest' in Article 3 of the 1967 *OECD Draft Convention on the Protection of Foreign Property*.
[11] The measure in question must be taken: (i) in the public interest, (ii) under due process of law, (iii) not be discriminatory; and further, (iv) just effective and effective compensation must be paid. See *OECD Convention on the Protection of Foreign Property* (1967) art.3.
[12] See Multilateral Agreement on Investment (1998), s. IV (2).

the same four requirements for a lawful expropriation, namely public purpose, non-discrimination, due process and the payment of compensation.[13] For examples, the UK Model BIT (1991), the Chinese Model BIT (1994), the Argentina-United States BIT (1991) *North American Free Trade Agreement* (NAFTA) 1994, *the Energy Charter* (1998) introduce the principles of the legal of expropriation subject to the said conditions.[14] The World Bank Guideline also describes that the expropriation or any other taking of a foreign investment by the host state in whole or in part is permissible if it is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, and without discrimination on the basis of nationality and against the payment of compensation.[15]

All these four requirements have been given much emphasis in executing any act relating to expropriation as evident from the decisions of the cases. With regard to public purpose, in the 1921 *Norwegian Shipowners' Claims* case[16] the arbitral tribunal examined whether the taking of foreign property was 'justified by public need'. The tribunal referred to the power of a 'sovereign state to expropriate, take or authorise the taking of any property within its jurisdiction which may be required for the public good or for the general welfare. Similarly in the *German Interest in Polish Upper Silesia* case[17] before the Permanent Court of International Justice (PCIJ) public purpose was referred to as an expropriation requirement.

With regard to non-discrimination as a requirement for the legality of expropriation, there are many expert opinions and judicial clarifications, such as in the recent ICSID case of *ADC v Hungary*. The tribunal in this case observed that in order for discrimination to exist, particularly in an expropriation scenario, there must be different treatment given to different parties. [18]

[13] UNCTAD, *Taking of Property* (UNCTAD series on Issues in international investment agreements ,2000) 41 <unctad.org/en/docs/psileiitd.15.en.pdf7> 14 May 2014.
[14] See The United Kingdom Model BIT (1991) art.5; the Chinese Model BIT (1994) art.4; the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and the Protection of Investment (1991) art. IV (1); NAFTA (1994) art.1110 ; the Energy Charter (1998) art.13.
[15] *The World Bank Guidelines on the Treatment of Foreign Direct Investment* (1982) art.IV.
[16] (1922) UN Reports on Arbitral Awards vol.1, 307-345.
[17] (1925) P.C.I.J. (ser.A) No. 6 (Aug. 25).
[18] (2006) ICSID Case No. ARB/03/16,para 442.One pertinent instance is available in *British Petroleum v Libya* the sole arbitrator considered the expropriation as unlawful because it was politically motivated. He found that[…]the taking of the property by the Respondent of the property […] clearly violates the public international as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character (1973, 1974) 53 I.L.R. 297, 375).

Similarly, the 'due process of law' as a legal requirement is strongly pursued in settling the expropriation matter, which is evident from *Goetz v Burundi*.[19]The tribunal characterised this requirement as follows:

> […] to be internationally lawful, the measure must not only be supported by valid reasons, it must have also have been taken in accordance with a lawful procedure'. The 'due process' is an expression of minimum standard under customary international law and of the requirement of fair and equitable treatment. Therefore, it is not clear whether it is used as independent requirement in the legality of expropriation.[20]

With regard to the 'due process' requirement, in the case of *ADC v Hungary* the tribunal's observation includes reasonable advance notice, a fair hearing, and an unbiased and impartial adjudicator to assess the actions in dispute.[21]

The importance of compensation is extensively recognised issue in IIAs and other international documents both as a contractual and fundamental right of investors which will be detailed in a subsequent section 7.2.3.2.[22] The test of whether an expropriation is lawful or illegal depends upon the fulfillment of the requirements by the host states. In this respect the host states are under the obligation of compliance with the requirements as established by the customary international law. The customary principle of international law as regards the legality of expropriation has evidently influenced the formulation of the national law principle of expropriation on a large scale. Sometimes it has even been recognised and guaranteed by the host states.

7.2.3 The legal protection against expropriation in Bangladesh

7.2.3.1. Constitutional guarantee

In Bangladesh the constitutional guarantee for protection against expropriation is recognised only as a citizen's fundamental rights; it does not extend to foreign investment and thus there is no explicit guarantee for protection of a foreign investment. Article 42 of the *Constitution of Bangladesh* states that subject to any restrictions imposed by law, every citizen shall have

[19] (1999) ICSID Case No. ARB/95/3, 470.
[20] Ibid.
[21] (2006) ICSID Case No. ARB/03/16, para 445.
[22] It will be discussed in a following section in the context of Bangladesh.

the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalised or requisitioned save by the authority of law. The constitutional words reflect on the prohibition of arbitrary and forced expropriation applicable to the citizens only.

The constitutional guarantee for foreign investors' property is evident in some other developing and least-developed host countries, for example Vietnam and Sri Lanka, which are both close neighbours of Bangladesh. Article 25 of the Vietnam's 1992 *Constitution* states that:

> The state encourages foreign organizers and individuals to invest capital and technologies in Vietnam in conformity with the Vietnamese law and international law and practice; it guarantees the right to lawful ownership of capital, property and other interests by foreign organizations and individuals. Enterprises with foreign investment shall not be nationalized.

In Sri Lanka, this commitment is reflected in the constitution through the recognition of bilateral agreements for the protection and promotion of investment as part of its national law.[23] Thus, Sri Lanka has manifested its legal obligation for protection through a constitutional guarantee.

In Bangladesh the qualification of citizenship restricts its application in general. Foreign investors cannot obtain citizenship automatically in Bangladesh unless the threshold investment amount is equivalent to US$500,000 or by transferring US$1,000,000 to any recognised financial institutions (non-repatriable).[24] Some constitutional provisions relating to expropriation remain general and non-qualified. The *Constitution of the Republic of Croatia* is one such provision, which states that the property may, in the interest of the Republic of Croatia, be restricted and expropriated by law.[25] So in order for establishing a constitutional guarantee explicitly for the right of protection against expropriation applicable to all, the word 'every citizen' should be replaced by 'every person' or 'every individual'.

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[23] See *the Constitution of the Socialist Republic of Sri Lanka*, Article 157. It is stated "Where Parliament by resolution passed by not less than two-thirds of the whole number of Members of Parliament (including those not present) voting in its favour, approves as being essential for the development of the national economy, any Treaty or Agreement between the Government of Sri Lanka and the Government of any foreign State for the promotion and protection of the investments in Sri Lanka of such foreign State, its nationals, or of corporations, companies and other associations incorporated or constituted under its laws, such Treaty or Agreement shall have the force of law in Sri Lanka and otherwise than in the interests of national security no written law shall be enacted or made, and no executive or administrative action shall be taken, in contravention of the provisions of such Treaty or Agreement".

[24] *The National Industrial Policy (Bangladesh)* 2010, Ch. 13.

[25] *The Constitution of the Republic of Croatia* (2010) art.5, para 1.

7.2.3.2 Statutory guarantee

Although the *Constitution of Bangladesh* lacks any specific guarantee for the protection of foreign investment against expropriation, this is recognised by the FPIA 1980. It is also recognised in BITs between Bangladesh and others supplementing the existing law as well. Section 7 of the FPIA establishes the substantive principle in regard to expropriation by stating that 'foreign private investment shall not be expropriated or nationalised or be subject to any measures having the effect of expropriation or nationalisation except for public purpose against adequate compensation which shall be paid expeditiously and freely transferable'. The wording of the section reflects on the ambit of prohibition and the conditions under which the expropriation is permitted, that mean the legality and illegality of expropriation. The ambit of the prohibition covers both direct and indirect expropriation without public purpose and compensation. On the other expropriation is legal if it is done for the public purpose and with compensation. This wording of the principles simultaneously expresses the right of investors to be protected against expropriation and the right of the host to expropriate under prescribed circumstances. The legality or illegality test under this section contains four basic legal elements direct, indirect expropriation, public purpose and adequate compensation as conditions that require some clarification. There is no mention of non-discrimination and the due process as conditions. However internationally-recognised requirements are often seen to be negotiated through BITs in Bangladesh.[26]The existing legal elements in the section 7 require some clarification.

A. Direct expropriation

While there is no definition of expropriation in the text of the *FPIA 1980*, the formal phrase 'expropriation or nationalisation' in the context of prohibition reflects on the meaning of direct expropriation. These two terms are often used interchangeably in the FDI legislation and BITs. Confiscation has also the similar meaning, but not used in the modern text. In practice, it refers to the direct transfer of private-owned property partly or in full to the state ownership or ownership of the third party with the interference of the government. It may also refer to the formal transfer of title or outright physical seizure, or obligatory transfer of

[26] See for example, in the BIT between Bangladesh and Thailand, art.5(b) ; it is stated that the legality of any expropriation and the amount and method of payment of compensation shall be subject to review by due process of law; the BIT between Bangladesh and the United Arab Emirates, art.5(1); Investment shall not be nationalized… except for expropriation made in the public interest, on a basis of non-discrimination, carried out under due process of, and against prompt, adequate and effective compensation.

title in favour of the host state and capricious confiscation.[27] It means the deprivation of ownership takes place overtly and permanently. Determining any act as direct expropriation is very simple as it takes place by government notification and declaration. Any forceful acquisition, requisition or forced sale of the property is direct expropriation. In Argentine law, direct expropriation is resorted to when the government as guarantor of the public interest needs certain property in order to satisfy a general and collective community interest and is therefore forced to take or use property owned by a person.[28]

B. Indirect Expropriation

As regards indirect expropriation, most of the legal texts include a clause such as 'measures having similar effect for expropriation or nationalisation'. A similar clause has been used in section 7 of the FPIA 1980 as mentioned earlier which refers to indirect expropriation. Exactly which acts or measures constitute indirect expropriation, and the point where different acts or measures reach the stage of being considered an expropriation, are not often clearly indicated. Nevertheless, the indirect expropriation is explained as an unreasonable interference of the government with property rights, taking administrative measures, or enacting laws the practical effect of which would be equivalent to the expropriation, even though the real owner retains the title.[29] In the *Metalclad* award the tribunal defined it as a 'covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host state'.[30]

In *Middle East Cement Shipping and Handling Co. v Egypt* indirect expropriation was described as 'measures taken by a state the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights'.[31] This type of expropriation is identified as 'disguised expropriation'[32] or 'creeping expropriation'.[33]

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[27] Sornarajah, above n 2, 364.
[28] Wenhua Shah (ed.), *The Legal Protection of Foreign Investment: A Comparative Study* (Hart Publishing, 2012) 111.
[29] See Starret Housing Corp. et al and the Government of Islamic Republic of Iran et al (United States Claims Tribunals) Rep.122,154 (1983). This case dealt with the appointment of Iranian Managers to an American housing project. The Tribunal concluded that an expropriation had taken place.
[30] *Metalclad v. Mexico* (2000) 5 ICSID Reports, 209, para 103.
[31] (2002) ICSID Case No. ARB/99/6, para 107.
[32] *Bercelona Traction* Case *(Belgium v Spain)* (1971) ICJ Reports 3, 274.
[33] R Dozlar, 'Indirect Expropriation of Alien Property' (1986) 1 *ICSID Rev* 41; B. Weston, 'Constructive Takings under International Law: A Modest Foray into the Problem of Creeping Expropriation' (1975) 16

The *Harvard Convention of 1961* points out some instances of indirect expropriation that includes state interference through legal and non-legal, economic and political measures, that affect or make impossible the free exercise and enjoyment of ownership to the property by a foreign investor.[34]

Indirect expropriation can also be effected by means of a decree or judicial decision, a biased interpretation of a contract clause, a particular administrative process, and regulatory decision-making.

An example of a judicial decision creating an expropriation is evident in the ICSID tribunal's award in *Saipem v Bangladesh.*[35] The *Saipem* ICSID award is probably the first ICSID award to find that the actions of a state's court of Bangladesh can have an expropriatory effect. The *Saipem* ICSID tribunal clarified that the actions of Bangladeshi courts in revoking the ICC tribunal's authority and declaring the ICC award a nullity did not constitute a direct expropriation. Instead, such actions constituted "measures have similar effects" within the meaning of article 5 (2) of the BIT between home state of *Saipem* Italy and Bangladesh.[36] These actions deprived *Saipem* of the benefit of the ICC award.[37]

The ICSID decision in *Sipem v Bangladesh* declared judicial interference as an indirect expropriation as it caused *Sipem* to lose financial benefits but not its control and management over the operation of company. This decision is contradicted by another ICSID decision in the *CMS Gas Transmission Company v Argentina*[38] case. The Tribunal in setting the criteria for indirect expropriation in this case denied the existence of an expropriation because the

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Virginia Journal of International Law 103. It is noted that creeping expropriation may be more appropriate to denote the slow and progressive measures adopted to initiate attrition of ownership and control rights.

[34] For example, blocking the entrance of the investing party in the their factory on the professed ground of maintaining order, setting the wages of local employees at a prohibitively high level on through labour legislation, obstruction of technical personnel from outside the country by the denial of entry visa, forbidding an alien to sell his property or appointing conservators, managers, or inspectors for enterprises the alien has taken from the government and who might interfere with the free use of the alien of its premises and its facilities.

[35] See *Saipem S.p.A. v. The People's Republic of Bangladesh* (2009) ICSID Case No. ARB/05/7, unreported, para 124.

[36] Article 5(2) states that investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting party, except for public purposes, or national interest, against immediate, full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis or in conformity with all legal provisions and procedures. (*Agreement of 20 March 1990 between Government of Republic of Italy and Government of the People's Republic of Bangladesh on the Promotion and Protection of Investment*. The treaty entered into force on 20 September 1994).

[37] *Saipem v. Bangladesh*, above n 35, 129.

[38](2003) ICSID Case No.ARB/01/8, paras 263-64.

investor had full ownership and control of the investment. The Tribunal considered that expropriation occurs when the investor loses control over the whole investment, thus rejecting the concept of partial expropriation.[39] The decision of the case indicates that partial expropriation by whatever means is not enough to constitute 'indirect expropriation'.[40]

In the *Saipem v Bangladesh* case the decision of the ICSID was not based on the substantial loss of Saipem as it acknowledged that 'the substantial deprivation of Saipem's ability to enjoy the benefits of the ICC award for compensation from Bangladesh is not sufficient to conclude that Bangladesh courts' intervention is tantamount to an expropriation'.[41] This is because the analysis of whether the acts of the judiciary constituted an indirect expropriation was not based on the so-called 'sole effects' doctrine. According to this doctrine, the most important aspect to determine indirect investment is the impact of the measure; the deprivation has to be substantial in order to lead to expropriation.[42] Rather, it based its decision on the legality test of the acts of Bangladeshi courts to determine whether the actions of Bangladeshi courts amounted to an expropriation. It pointed out that due to the particular circumstances of this dispute and the manner in which the parties pleaded their cases, the unlawful character of the actions was a necessary condition.[43]

The point of contention here is that prior awards of ICSID have used only the 'sole effect' doctrine, but in the Saipem award ICSID applied the legality test to determine indirect expropriation. This appears to be a departure from the use of the 'sole effect doctrine' which is recognised as an important criterion for determining expropriation as established by some other international tribunals where the severity of economic impact is paramount. For example, the European Court of Human Rights has found an expropriation where the investor suffered the substantial deprivation of the enjoyment of ownership and benefit of the property. If the investor's rights have not disappeared, but only been substantially reduced, and the situation is not irreversible, there will be no deprivation under Article 1 of the *European Convention of Human Rights*.[44]

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[39] U Kriebaum, 'Partial Expropriation' (2007) 8 (1) *The Journal of World Investment and Trade* 69, 74.
[40] In the matter concerning Tipples v TAMS –ATTA, it was observed that 'constructive expropriation' occurs when events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. See *Tipples v TAMS-ATTA* (1985) 6 Iran-US CTR 219,225.
[41] *Saipem v Bangladesh*, above n 35, 133.
[42] Ibid.
[43] Ibid, 134.
[44] See cases *Handyside* v *United Kingdom (*1976) 24 Eur.Ct.H.R. (ser.A) 29; *Poiss v Austria* (1987) 117 Eur.Ct.H.R.(ser.A) 84,108. See discussion H. Ruiz Fabri, 'The Approach Taken by the Europeran Court of Human Rights to the Assessment of Compensation for 'Regulatory Appropriations of the Property of Foreign Investors' (2002) 2(1) *N.Y.U Environmental Law Journal* 148, 152.

It is indeed difficult to determine indirect expropriation through a single principle as it takes place within a wide variety of circumstances. There is no distinction is drawn between direct and indirect expropriation in its legal effect.[45] The minimum test that can be used for determination is that there is diminution in the value of the interest of the foreign investors in the assets, ownership, control and management of the property and the time period over which it occurs is often longer than necessary. However, with the increase of governmental intervention for development this test may be debatable.

C. Meaning of public purpose as a condition

Regardless of the form, expropriation is legally justified only when two prescribed conditions, public purpose and adequate compensation, are available simultaneously. The national legal texts and BITs uniformly impose a public purpose requirement for expropriation. The word 'public purpose' is not defined in the relevant legal text; its extent is not even demarcated by any of periodic NIPs in Bangladesh. It generally refers to or is substituted for the word 'public interest'[46] which should be determined by the laws and policy of the host state itself. In the *James* case, the Court said that the taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being 'in the public interest'.[47] The word 'public purpose' may also be explained as taking property for a 'social purpose or legal purpose and general welfare that may extend to the consideration of public health, safety, morals or welfare'.[48] The public purpose also covers the national economic interest. The noteworthy statement is made by *The General Assembly Resolution No.1803 on Permanent Sovereignty over Natural Resources* under its Article 4 that reaffirms the requirement of public purpose, referring to 'grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interest'.

[45] See *Biloune v Ghana Investment Board* (1993) 95 ILR 184, para 75. The tribunal held that no distinction should be drawn between direct and creeping expropriation.
[46] Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties*: *Standards of Treatment* (Kluwer Law International, 2009) 370.
[47] This case concerns a reform undertaken by the United Kingdom regarding the right of individuals with long leases to acquire the freehold of their leasehold property. This reform, according to James, the Claimant, "deprived' the freeholders of their property since they could neither refuse to sell nor set the price for it. See *James v United Kingdom* (1986) 98 Eur. Ct. H.R. (ser.A) 9, 32.
[48] G Christie, 'What Constitutes a Taking of Property under International Law?' (1962) 38 *British Yearbook of International Law* 307, 338.

Indeed determining the matter of public interests depends upon the host states' internal socio-economic circumstances. Therefore, in any undertaking the consideration must be paid to whether this is arbitrary and discriminatory in character or politically motivated.[49]

D. Adequate compensation as a condition and relevant complicacies

Adequate compensation is another condition for the legal justification of expropriation whether direct or indirect, legal or illegal. The compensation involved in expropriation is meant to ensure the security of foreign investors' assets and protect their fundamental right to property. It is given in reparation of the loss the investors may have sustained for being deprived of property by expropriation. The economic value of the payment of compensation for host countries is that it safeguards host countries from the negative impact of expropriation and helps them to retain the flow of foreign investments.

The determination or calculation of the amount of adequate compensation is a major question that is often addressed by the laws of host countries in pursuance of standards set by international law and practices. In Bangladesh the law refers to the adequate compensation approach in the case of expropriation and it also explains the standard of adequate compensation as "an amount equivalent to the market value of the investment expropriated or nationalized immediately before the expropriation or nationalization".[50] In addition, as regards the method of payment, the law says that the compensation "shall be paid expeditiously and be freely transferable".[51] It means the payment must be made without delay and in easily convertible currency.

The qualification of compensation in these terms in the legal text of Bangladesh reveals the fact that the concept of compensation has been borrowed from the traditional Hull formula. Bangladesh has pursued the Hull formula of compensation which has recently become the subject of much criticism from the host states' economic perspective. The Hull formula holds that the compensation must be adequate, effective, and prompt. It was dominant during the period of laissez-faire economies and colonisation in the 19th century.[52] The term

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[49] *Lybian American Oil Company Limco v. Lybia* (1981) 20 ILM 1 288,408,430-1.
[50] *Foreign Private (Promotion and Protection) Investment Act* (Bangladesh) 1980 s. 7(2) (1).
[51] Ibid.
[52] In 1938, the United States Secretary of State Hull, in response to the Mexican agrarian nationalization measures, declared in correspondence to the Ambassador of Mexico that under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment thereof". Since that time, this phrase (prompt, adequate and effective) has

'adequate' has quite often been used in practice interchangeably with 'full or fair' compensation.[53]This formula represents the concept of full compensation which, although adopted in different BITs and states' legal texts, has largely failed to provide an agreed-upon normative standard for compensation. It is, therefore, often said to be a long-buried principle.[54]

There are some reasons behind this. The main reason lies in the fact that the Hull formula was based on Euro-centric values and the notion of the sanctity of private property.[55] It assumed that the character of customary international law was formed with the practice of a few developed capital-exporting states during the era of colonisation, and that the vast majority of developing countries had virtually no participation in its formation due to their colonised status. Moreover, today the traditional consensus as found in *Hull formula* is no longer generally accepted as an expression of customary international law. The consensus has been eroded throughout the 20th century by communist expropriation and nationalisation in many developing countries with the attempt to establish a New International Economic Order through series of resolutions of UNGA. The justification is that the formula is not responsive to the needs and goals of developing countries in their work of nation-building; rather it is intended for the exclusive profit-maximising objectives of the foreign investors of northern countries. Developing countries, therefore have long been arguing the urgency of the modification of the traditional formula of adequate compensation in the light of their financial situation and difficulties; difficulties which they consider were not of their own making.[56] Developing countries termed this formula an 'orthodox standard of compensation' which thwarts their efforts to carry out necessary social and economic reforms,[57] and sought to formulate new law to govern compensation upon expropriation in consideration of the ability of the expropriating states to pay the amount of compensation. The author views that the legal obligation for adequate compensation meaning full compensation in pursuance of the Hall formula is irrational, for it necessitates the compromise of financial obligations, if any, pertaining to the expropriated property. In view of this a governing principle that protects the interests of both investors and host countries is needed urgently today.

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sometimes been referred to as the "Hull Formula". See Louis Henkin, et al, *International Law: Cases and Materials* (West Publication Co., 1980) 688.

[53] According to Schwarzenberger the difference between 'full' and 'adequate' compensation is merely one between synonyms; see, G Schwarzenberger, *Foreign Investment and International Law* (Pragear, London, 1969) 10.

[54] M Rafiqul Islam, *International Trade Law* (Law Book Company, Australia, 1999) 246.

[55] Ibid.

[56] Sherif H.Seid, *Global Regulation of Foreign Direct Investment* (Ashgate Publishing Company, 2002) 47.

[57] S Jain, *Nationalization of Property: A Study in North-South Dialogue* (Deep and Deep, 1983) 124.

The expectation of such a governing principle is reflected in Article 2 of the *Charter of Economic Rights and Duties1974* that requires appropriate compensation should be paid in the case of nationalisation, expropriation, and transfer of property. The article suggests that the 'appropriate compensation has to be determined by the laws, regulations and other pertinent circumstances of the expropriating states'. Furthermore it allows the settlement of controversy arising over compensation through the mutual agreement of the states on the basis of sovereign equality and the principle of the free choice of means. The developed countries perceive that Article 2 confers upon the host states *carte blanche* powers allowing them to play the role of judge and jury to their own cause in determining compensation.

The term of 'appropriate compensation' is also affirmed by the World Bank Guidelines. [58] However, this term is clarified differently, as the document establishes a nexus between appropriateness and adequacy of the amount of compensation by saying that 'compensation is deemed to be appropriate if it is adequate, effective and prompt'. In fact, the Guideline attempts to strike a balance between the Hull formula and rules of the Charter as there is no reference to the fact that under the cover of 'adequate, effective, and prompt', any investor has received full compensation upon the nationalisation or expropriation of their investment.[59] In addition, reviewing some traditional decisions of international tribunals, professor Schachter remarks that there is no such a reference that the decisions of international tribunals have recognised the obligation of adequate, effective, and prompt compensation.[60] In view of this the application of the Hull formula as an imperative guide for the payment of compensation in the event of nationalisation has become obsolete.

Nevertheless, the Hull formula has still been placed in the national legal texts of foreign investment in many countries, including Bangladesh. It is mostly pursued in the laws and policies of countries which maintain more open and less protective policies in order to attract foreign investments. Changes and modifications are noticed in the investment legislations of the late 1990s and onwards in respect to the standard of the amount of compensation, in the face of the impracticality of the Hull formula on one hand and the economic and other

[58] See *World Bank Guidelines on the Treatment of Foreign Direct Investment* (1992), art. IV.

[59] For examples, major twentieth-century deprivation settlements, notably Mexican agrarian policies, Eastern European nationalisation programs, the taking of the oil industry in the wake of a change of government in Libya and the Iranian concessionary contracts, show that the claimant states have never received 'adequate, effective and prompt' compensation. In all cases, less than full compensation has been paid to the owners of alien property and in installments. See M Bulajic, *Principles of International Development Law* (MarinusNijhoff, 1993) 264; Dawson and B Weston, 'Prompt, Adequate and Effective: A Universal Standard of Compensation' (1961-62) 30 (4) *Fordham Law Review* 727, 728; Islam, above n 54, 251.

[60] O Schachter, 'Compensation for Expropriation' (1984) 78(1) *American Journal of International Law* 122, 123.

considerations of the host country on the other hand.[61] The modifications and changes concern the replacement of the word ‘adequate’ by ‘appropriate’. The word ‘appropriate’ appears to be more logical in the sense that it may provide scope for taking into account the circumstances that the state considers noteworthy in valuating the expropriated property to protect the interests of the claimant as well as its own. An instance is available in the *Aminoil* award where the tribunal considered ‘appropriate compensation’ for a lawful expropriation, although it acknowledged the difficulty in finding the precise meaning of this very imprecise term.[62] It observed that,

> […] the determination of the amount of an ‘appropriate’ compensation is better carried by means of an enquiry into all circumstances relevant to the particular concrete case, than through abstract theoretical discussion.[63]

Whatever the standard of compensation, the calculation of the value of a nationalised property on the basis of its real or fair market value as established by the majority of national legislations and treaty provisions is a difficult task. This market-based approach to valuation is, however, useful when a large number of comparable assets are being traded on financial markets. However it tends to be more difficult to apply when there are no obvious comparable entities, where there is little or no revenue being generated, or where there is loss-making.[64] In addition, there may be many considerations and matters to account for in calculating compensation, such as the value of the nationalized assets, the interest gained on the value of the nationalised assets until the awarding of compensation, the issue of the loss of future profits and ongoing concern value.[65] Furthermore, for the protection of the interests of the host state, the exchange rate and currency valuation at the time of the first investment, the amount of the original investment with the adjustments of re-invested property, and the amount of expropriated property should be taken into account.[66]

Various methods are or can be employed to determine the market value of the property, such as by discounted cash flow, book value, net and current market value, and so on. The foreign investment legislation simply states the ‘market value of investment expropriated or

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[61] Ibid.
[62] *Kuwait v American Independent Oil Company* (1982) 21 ILM, 976, 1032.
[63] Ibid, para. 144.
[64] A Damodran, *Investment Valuation* (John Wiley and Sons, London, 2002) 1.4. Damodran notes that often that uncertainty comes from the asset being valued, though the valuation model may add to that uncertainty. See also, Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law (*British Institute of International and Comparative Law, 2008) 214.
[65] See Islam, above n 54, 251.
[66] Ibid.

nationalized immediate before the expropriation or nationalization'. There is no statutory explanation as to how the 'immediate past market value' will be calculated, either by deducting the resulting increase in value or adding the resulting decrease.

A departure has been created by the BIT provision in a complex situation of calculation. Article 5 (4) of the BIT of Bangladesh with the United Arab Emirates states that 'where the fair market value cannot be readily ascertained, the compensation shall be determined on equitable principles taking into account all relevant factors and circumstances, such as the capital invested, the nature and duration of the investment, replacement value, book value and good will'. The issue of market value can be addressed through bilateral negotiations, but it is preferable to have legal development through statutory provision on the valuation criteria of the compensation of expropriated property. 'Market value' can be justified as the valuation is an economic matter, but some other associated considerations should be included to balance the interests of the parties concerned. These considerations may include establishment costs, the reinvested amount, the repatriated amount, tax deduction of the income during the process of expropriation, and other deductions as a result of legal or social obligation if any of the expropriated company. If these are not taken into consideration, the amount of compensation awarded would be more likely higher than the losses being compensated for.

7.3 Indirect Expropriation and Right to Regulate: A Missing Point in the Law

The review of the expropriation principle in the legal framework reveals that there is a lack of statutory clarification of the phrase 'any measures having the effect of expropriation or nationalization'. Although it is well known that this phrase is indicative of indirect expropriation, as similar phrasing or wording is frequently used in the legal texts and BITs with the same meaning and judicial clarification is also evident, statutory clarification is essential for determining the inductive and deductive elements of indirect expropriation. Without statutory clarification there remains potential scope for the misinterpretation of the term 'indirect expropriation' which is ambiguous.

As the indirect expropriation or measures equivalent to expropriation have not yet been unequivocally defined, foreign investors may be inclined to take recourse to the plea of indirect expropriation in many issues simply relating to the enforcement of the investment contract. In addition, the absence of clarification may affect the host state's right to regulate the investment for the purpose of development. With the growth of development-oriented regulatory issues, the control and management actions or intervention of the host state government may appear similar to expropriation in some cases, but not illegal taking in the sense of 'indirect expropriation'. Host states' control in respect to taxation, the cancellation of licenses on environmental grounds,[67] interference in human rights and labour rights, and interference supported by *jus cogence* norms, for example, should be removed from the purview of expropriation either through legal provision or treaty provision. Therefore, the categorical clarification of indirect expropriation for public purpose is essential in the interests of the host state.

7.4 The Arrangement of Dispute Settlement in Bangladesh

7.4.1 Determination of a dispute settlement method

A host state, in the course of accepting foreign investment usually enters into different types of contractual relationships with foreign private parties that may include full or joint-venture entrepreneurship, the use of natural resources, production-sharing contracts, contracts of works, technical assistant contracts, agriculture and manufacturing concessions, transfer of technology, and licensing contracts. Investment-related disputes may arise out of the breach of such contractual obligations, the nationalisation or expropriation of property, interference with intangible rights, administrative interference, the requirement of national treatment, disputes involving the violation of human rights, interference on environmental grounds, allegations of contract formation through bribery, the violation of terms and conditions of bilateral agreements, and the interpretation of treaty provisions.

There are different means of settling disputes and these are most prominently conciliation, judicial settlement, and national and international arbitration. Although disputes are primarily subject to the national courts, in general practice the host state unilaterally selects the method of dispute settlement and sometimes it is decided through BIT negotiations or an individual investment contract. Under both circumstances the prime consideration is guarantee for the protection of the foreign investment.

[67] See the decision of *Murphyores Ltd. v The Commonwealth* (1976)136 CLR 1.

7.4.2 The unilateral selection and FDI law in Bangladesh

Unilateral guarantees come through introducing specific provisions in the acts of parliament of the host states. Dispute settlement issues have long been significantly pursued in BITs, since their inception in the 1950s. In recent years with the emergence of individual legal regimes for FDI, host countries in their investment laws and regulations have paid special attention to dispute resolution matters.

The national investment laws mostly prescribe the ways in which disputes in relation to foreign investment can be resolved through the existing national judicial mechanism or local or international commercial arbitration. For this purpose some states have developed procedural guidelines for dispute settlement with a view to maximising the protection of interests of investors. For example, the foreign investment law in Turkey states that for the settlement of disputes arising from investment agreements foreign investors can resort either to the authorised local courts, or to national or international arbitration or other means of dispute settlement.[68] Similarly in China, the law permits foreign businesses in matters of dispute resolution to recourse either to local courts or national and international arbitration.[69] Indeed, the Intermediate People's Courts, the courts at the second-last level in the Chinese judicial hierarchy, have economic tribunals for the hearing of cases involving foreigners.[70] In Vietnam, the law provides for conciliation, local arbitration, or court as imperative methods for dispute settlement for all categories of investment.[71]

Some countries such as Indonesia under their laws have chosen only international arbitration for the settlement of disputes. Article 32 of the new *Indonesian Investment Law*[72] sets forth the settlement of disputes potentially arising between the Indonesian government and investors as well as between foreign investors and local partners. It states that the capital investment disputes between the government and foreign investors are to be resolved through international arbitration as agreed by the parties concerned.

In Bangladesh the foreign investment law does not contain any such provision that reflects on the method of dispute settlement. The NIPs have no concrete focus on this, however the NIPs 1999, 2005 and 2010 suggest for maintaining 'international norms and system in

[68] *Foreign Investment Law 2003* (Turkey) s. 3 (e).
[69] *Foreign Economic Contract Law1985* (China) s.37.
[70] Ibid.
[71] *Law on Foreign Investment in Vietnam 1996 (* Vietnam) art. 24.
[72] This law is entitled *Law of the Republic of Indonesia Concerning Investment 2007*.

conflict resolution'.[73] This at least can act as policy guideline, but is not clearly indicative as to the applicable methods and seems to be generally vague. There are no set international norms and systems in respect of dispute resolution concluded by any binding multilateral law-making treaty. In the absence of clear legal provision, the dispute settlement issue relating to FDI depends upon the relevant provisions in BITs. It is nevertheless essential to close this legal gap by amending the FDI legislation.

7.4.3 Bilateral selection and BITs of Bangladesh

The bilateral selection of the method of dispute settlement takes place through negotiations under the BITs between state parties. At present, this is the common practice in settling investment-related disputes. Investment treaties have devised their own methods of dispute settlement in an attempt to create a regime of investment protection. The underlying provisions often included in BIT texts relate to two types of dispute settlement; (1) disputes related to the investment, and (2) disputes arising out of the interpretation or application of the agreement. BITs usually enable the foreign investors to invoke remedies through arbitration at their own insistence, where the host state is taken to have expressed its consent through treaty provision. They mainly provide an international arbitration system of investment protection through a specialised body dedicated to arbitration such as ICSID, although most times the option is open for amicable settlement or recourse to the local courts. But there is no consistency.

The individual contracts between investors and host states also provide a specific dispute settlement mechanism, most often through an arbitration clause. The dispute settlement issue may be dealt with separately or may fall within the scope of the BIT between a host state and the investor's home state in order to ensure full protection of the contractual contents.[74] In the *Saipem v Bangladesh* case[75] ICSID has decided on indirect expropriation in the light of an expropriation provision of a BIT between Bangladesh and *Saipem* in the home country Italy.[76]

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[73] See *National Industrial Policies 1999, 2005* (Bangladesh) Ch.14.

[74] See for details, Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Martinus Nijhoff Publishers, 2011) 120.

[75] (2007) ICSID Case No. ARB/05/07, *Decisions on Jurisdiction and Recommendations on Provisional Measures,* para 122.

[76] See *Saipem v Bangladesh* above n 35 ; see also for example, *Bayindir InsaatTurizm TicaretVeSanayi S.A. v Islamic Republic of Pakistan*, (2005) ICSID Case No.ARB/03/29, Decision on Jurisdiction, para 121.

The BITs of Bangladesh reflect similar wording on specific methods for dispute settlement to that in other BITs between capital-exporting home and capital-importing host states. The BITs in Bangladesh since the mid-1980s focus on dispute settlement relating to breach of investment obligation detailing the choice or option for selecting the method. The methods as reflected in different BITs cover usually three successive options with few differences. The three successive options are: peaceful settlement through negotiations and consultations; in default, recourse to a local court; and in default, recourse to international arbitration. But wording of the BITs are not similar and consistent. For example, sometimes the option for a means of dispute settlement is given between the national court and international arbitration, and sometimes the option for international arbitration comes at third stage. 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 in international arbitration.

The model BIT text of Bangladesh as adopted in 2009 suggests for three major alternatives and successive options; amicable settlement through consultation or negotiation; or in default either submission to the domestic court or to international arbitration.[77] Only one BIT between Bangladesh and Denmark, which was concluded after the adoption of the model BIT text, pursues the said provision. In the newly adopted model text, the exhaustion of local remedies is a prescribed condition. In terms of the choice of arbitration there is a specific reference in majority treaties to ICSID as an arbitral tribunal.[78]

In Bangladesh the above said three methods of settlement of dispute are in practice. But in fact there is no precedent of amicable settlement of investment disputes. The cases are most often referred either to domestic courts or international arbitration. In some recent cases such as the *Chevron and Niko* case the parties endeavored to settle the dispute through conciliation, but failed to reach any settlement.[79]

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[77] See *The Model Agreement on the Promotion and Reciprocal Protection of Investment between Bangladesh and Others* (2009) arts.9, 10.

[78] See the BIT between Bangladesh and Uzbekistan, BIT between Bangladesh and Canada, BIT between Bangladesh and Austria, BIT between Bangladesh and Thailand, BIT between Bangladesh and United Arab Emirates, BIT between Bangladesh and Swiss Confederation, BIT between Bangladesh and Federal Republic of Germany etc.

[79] See *Chveron Bangladesh Block Tweleve, Ltd and Chevron Bangladesh Blocks Thirteen and Fourteen Ltd v People's Republic of Bangladesh (*2011) ICSID Case No.ARB/06/10 .

Sometimes the provision for recourse to domestic courts is curtailed by a contract-based arbitration clause. The Joint Venture Agreement between Bangladesh Petroleum Exploration & Production Company (BAPEX) Limited and Niko Resource (Bangladesh) Limited only provides for mutual consultation and arbitration as a method of dispute settlement.[80] There is no mention of resort to local courts. However, recourse to a local court by any party would not be a violation of a treaty.

7.5 Judicial Arrangement

In Bangladesh investment-related disputes can be litigated either in the High Court Division (HD) of the Supreme Court or in any of three District Judges Courts. The litigation may be lodged with any bench of HD as it has original, appellate, revision and reference jurisdiction.[81] The original jurisdiction of the HD mainly concerns company-related civil matters conferred by *the Company Act 1994*, the *Admiralty Act 1861*, and the *Banking Company Ordinance Act 1962* of Bangladesh.

There is a single company bench formed at the disposal of the Chief Justice which deals with cases related to the management and winding up of the company, the violation of the provision of the *Company Act* or *Bank-Company Act* including investment, trade, and other commercial issues. The decision of this court is appealable in the Appellate Division (AD) of the Supreme Court.[82] In the case of writ jurisdiction and the violation of fundamental human rights, the complaint may be lodged with any Bench of the HD of the Supreme Court. The HD is also vested with hearing appeals from District Judge Courts. Any decision of the HD is appealable to the Appellate Division of the Supreme Court.

Apart from the HD, three Judges Courts among the subordinate courts of civil nature are able to try investment and trade-related cases. They are the Court of District Judge, the Court of Additional District Judge, and the Court of Joint District Judge. These three civil courts have original jurisdictions without any pecuniary limit in addition to appellate jurisdictions. For institution of the proceedings relating to disputes of a civil nature arising out of a breach of

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[80] See *Joint Venture Agreement for the Development and Production of Petroleum from the Marginal /Abandoned Chattak and Feni Gas Field between Niko Resource (Bangladesh) Limited and Bangladesh Petroleum Exploration and Production Company Limited* (2003) art.18.
[81] See *The Constitution of People's Republic of Bangladesh* (1972) arts.103, 101 and 102 (2). Article 101 states that the High Court Division shall have such original, appellate and other jurisdictions, powers and functions as are or may be conferred on it by this Constitution on any other.
[82] The Appellate Division of Supreme Court is the court of hierarchy which has appeal jurisdiction for the main, in addition to the issuance and execution of process, jurisdiction as to review; and an advisory jurisdiction.

contract, breach of trust, land acquisition, breach of property rights, non-payment of compensation for loss or expropriation, repatriation, compensation claims for incidental damages and other business transactions and investments, any party to an investment is entitled to lodge a complaint against another with any of the District Magistrate Courts.

It is noteworthy that until now two cases regarding foreign investment dispute were lodged with the Court of District Judge by Bangladesh. First case was lodged against Saipem S.p.A, an Italian company which was in contract with Bangladesh in 1990 for the installation of pipeline. This case was an anti-suit injunction to restrain the ICC tribunal's proceeding. The second case was against Niko Resources Ltd seeking compensation for environmental damages in *Magur Chara* and *Tengratila.* The proceedings of trail are still pending.

In addition to such regular courts, there are certain special courts in Bangladesh having specific jurisdiction to decide on commercial and labour disputes constituted under respective laws which have implications for foreign investment. They are: (1) Labour Courts; (2) Income Tax Appellate Tribunals; (3) *Artha Rin Adalats* (Money Loan Court); and (4) Insolvency Courts. The Labour Courts as established under the *BLA 2006* deal with labour disputes as defined by the *Act*.[83] The Income Tax Appellate Tribunals decide income tax disputes, and customs and excise matters.[84] *Artha Rin Adalats* decide money claims of banks and other financial institutions.[85] The Insolvency Courts declare defaulting borrowers as insolvent.[86]

The judicial arrangements for the settlement of investment disputes appear reasonably adequate in Bangladesh, although there is no special economic court for dealing with foreign investment related disputes as in China. In particular, the designated Bench in the apex constitutional court testifies that company and investment issues are highly regarded. However because there is a single Bench it is often overburdened with cases.

7.6 Internal Arbitral Arrangement

Alongside the judicial arrangement, arbitration is increasingly being employed as a method of investment-related dispute settlement in Bangladesh, and it has proved to be a successful

[83] See *The Bangladesh Labour Act 2006* (Bangladesh) ss.214 -218.
[84] See *The Income Tax Ordinance 1984* (Bangladesh) ss.11-15.
[85] See *The Artho Rin Adalat Act 2003*(Bangladesh) s.5.
[86] See *The Bankruptcy Act 1997* (Bangladesh) s.5.

and efficient means of conflict resolution of commercial matters. Although the foreign investors are not in general so far interested in invoking internal arbitration arrangement for settling disputes with host state parties, some joint-venture investment agreements, for example agreement between Niko Resources and Bangladesh,[87] have opted for internal arbitration as an alternative to courts, particularly after the development of an internal arbitration system through the enactment of the *Arbitration Act 2001* (Hereinafter referred to as the *Act of 2001*).[88] In addition, some arbitral institutions are developed at the local level for settling the disputes.

The *Act of 2001* is the fundamental instrument for the regulation of all commercial arbitrations in Bangladesh. It establishes in Bangladesh the current legal framework for international commercial arbitration, and the recognition and enforcement of foreign arbitral awards as well as domestic arbitration in Bangladesh.[89] The term 'international commercial arbitration' as defined in section 2(c) of this Act covers commercial disputes arising out of legal relationship by foreign investment agreement.[90] This new law was amended in 2004 in certain respects and some supplementary legislative provisions were introduced in the face of increasing foreign investment in Bangladesh in various sectors, prominently in natural gas and power and the emerging international export trade.

One of the fundamental features of the *Act of 2001* is that it is principally based on the *UNCITRAL Model Law on International Commercial Arbitration*[91]. However, it does not contain exactly the same law as used in the model law as it has borrowed some provisions from the *Indian Arbitration and Conciliation Act 1996*.[92] The Act follows exactly the same provisions of the model law in the definition and formation of arbitration agreement, the composition of an arbitral tribunal, insertion of an arbitration clause in the contract, setting

[87] *Joint Venture Agreement for The Development and Production of Petroleum from the Marginal /Abandoned Chattok and Feni Gas Field Niko Resource (Bangladesh) Limited and Bangladesh Petroleum Exploration and Production Company Limited* (2003) art.18.3, 18.4.

[88] This Act came into force on 10 April, 2001 by repealing the previous Arbitration (Protocol and Convention) Act 1937, and the Arbitration 1940.

[89] See the preamble of the *Arbitration Act 2001* as worded, "An Act to enact the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral awards and other arbitrations".

[90] Section 2 (c) states that international commercial arbitration means an arbitration relating to disputes arising out of legal 'relationships, whether contractual or not, considered as commercial under the law in force in Bangladesh and where at least one of the parties is- (i) ' an individual who is a national of or habitually resident in , any country other than Bangladesh; (ii) a body corporate which is incorporate in any country other Bangladesh ; (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh.

[91] *UNCITRAL Model Law on International Commercial Arbitration* (U.N. GAOR, 40th Sess., Annex I, U.N. Doc. A /40/17, Annex 1, 1985) <http://www.uncitral.org/ en-index.htm>29 December 2013.

[92] See AFM Maniruzzaman, 'The New Law of International Commercial Arbitration in Bangladesh: A Comparative Perspective' (2003) 14 *American Review of International* Arbitration 139, 142.171

aside of an arbitral award and so on.[93] Thus it creates a distinctive and unified legal regime for arbitration as an alternative to judicial settlement. The uniqueness of this Act also lies in its comprehensive feature that covers parties' all procedural rights to justice in pre-award and post-award stages of arbitration including enforcement mechanism of the award decided under this law in addition to the enforcement of foreign arbitral awards at local level.

In order to offer or ensure a fair and just arbitral system for international commercial dispute resolution the *Act of 2001* pursues international standards in procedural issues such as the composition of arbitral tribunals, the appointment of an arbitrator,[94] the jurisdiction of the tribunals,[95] the conduct of proceedings,[96] the making of arbitral awards,[97] the right of recourse against arbitral awards,[98] and the fundamental tenets of modernisation of international arbitration, mainly focused on (i) party autonomy; (ii) minimal judicial intervention in arbitration; (iii) independence of the arbitral tribunal; (iv) fair, expeditious, and economic resolution of disputes, and the effective enforcement of arbitral awards.[99] Apart from this, the *Act of 2001* for the first time in the arbitral history of Bangladesh has set out a comprehensive enforcement mechanism for domestic or foreign arbitral awards involving the existing judiciary.

To appreciate the features, firstly with regard to party autonomy, the contracting parties enjoy enormous autonomy mainly on two grounds; participation in the arbitration process and the application of governing laws to be used for the settlement of disputes, if they wish to seek arbitration under this Act as a means of conflict resolution. According to this Act, the parties can invoke the arbitration under the Act only when they have mutually inserted 'arbitration clause' in their business agreements for settling any dispute arising out of the breach of the agreement.[100] The Act has pursued corresponding international development and introduced the clause 'autonomy of arbitration' in the context of jurisdiction of arbitral awards.

Secondly, as regards the independence of the arbitral tribunal according to this Act the arbitral tribunal is formed independently of judicial intervention. The judiciary has in fact no

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[93] See *UNICITRAL Model Law*, Articles 8, 10, 16, 34.
[94] See *The Arbitration Act 2001* (Bangladesh) s 12.
[95] See Ibid, s 17.
[96] See Ibid, ss. 23-35.
[97] See Ibid, ss. 36-41.
[98]See Ibid, ss.42-44.
[99] Maniruzzaman, above n 92, 171.
[100] *The Arbitration Act 2001* (Bangladesh), s 4(2).

power to deal with the appointment of arbitration except in the case of urgency. The composition of the arbitral tribunal and the number of the arbitrators indeed depend upon the rules chosen by the parties.[101] Subject to some restrictions, the parties can enjoy freedom under the new Act to agree on a procedure for appointing an arbitrator or arbitrators.[102] In response to the recent trend towards internationalisation of arbitration, the new law does not impose any restriction on the nationality of arbitrators and leaves the matter to the choice of the parties.[103]

As regards the tribunal's independence, it is noteworthy that it is only bound by the laws the parties are agreed upon to apply for conducting arbitration as mentioned earlier. It therefore is not bound to comply with the provisions of *Code of Civil Procedures 1908* and the *Evidence Act 1872* in disposing of a dispute under the Act. Even, an arbitral award need not state any reason if parties are not to be given.

Thirdly, as far as judicial intervention is concerned, the new law strives to contribute to the creation of an impartial arbitration climate in Bangladesh where the judicial intervention is meagre and negligent. There are certain, rare, situations when the judiciary can participate in arbitration activities to a limited extent.[104]

Fourthly, the prime objective of the Act is to ensure fair, expeditious, and economic resolution of the disputes. To attain this objective, the Act introduces a competitive procedural framework of arbitration that ensures access to justice for an aggrieved party. In order to ensure procedural fairness and impartiality for arbitral decision-making the *Act* endorses certain principles of natural justice as imperatives for arbitral tribunals in conducting their proceedings. These include: (i) giving each party a reasonable opportunity to present its case orally, in writing, or both; and (ii) giving each party a reasonable opportunity to examine all the documents and other relevant materials furnished by the other

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[101] Ibid, s 11 (1).
[102] Ibid, s 12(1).
[103] Ibid, s 12(2).
[104] Firstly, under default procedure of this law as mentioned earlier, the Chief Justice of the Supreme Court is allowed to deal with the appointment of arbitrators. Secondly, the Chief Justice is vested with the power to supervise international commercial arbitration within the scope allowed by the Act.[104] Thirdly, the High Court Division has the power of deciding on the matter of jurisdiction if it is satisfied that the determination of question is likely to produce substantial savings in cost, the application is submitted without any delay and there is a good reason as to why the matter should be decided by the court. It is thus clear that the High Court Division cannot decide such jurisdictional questions of its own volition. Fourthly, pursuant to Section 10 (2), the Court, if it is satisfied that an arbitration agreement exists, refers the parties to the arbitration and stays the proceedings (if the action brought before it) unless it finds that the arbitration agreement is void, inoperative or incapable of determination by arbitration. Fifthly, the judicial authority can interfere with arbitration only on public policy ground.

party or any other person concerned before the tribunal.[105] In addition to procedural fairness, the *Act* provides a swift procedural arrangement for seeking remedy by arbitration and therefore prescribes the place and location of arbitration in Bangladesh so that all of the activities of resolution can be accomplished within a reasonably short time and with less expense.

With respect to the effective enforcement of domestic or foreign arbitral awards, the Act adopts some ways the most important of which is that it has accorded every arbitral award the status of a decree of a civil court and thus making the institutional participation of judicial administration essential for the enforcement of a decree of its own. It therefore says that the award shall be enforced under the *Code of Civil Procedure* (CPC) of Bangladesh, in the same manner as if it were a decree of the Court.[106] It means, on the application being made to it by any party the Court under the CPC will execute the award in the prescribed way as required for its own decree. Another important feature is that the Act, for the first time, has incorporated the mechanism of the *New York Convention* for the recognition and enforcement of foreign arbitral awards in Chapter X.[107] This chapter exclusively deals with foreign awards under the title "Recognition and Enforcement of Certain Foreign Arbitral Awards". It focuses on a general principle that 'any foreign award which will be enforceable shall be treated as binding for all purposes on the persons as between whom it was made, any award may accordingly be relied upon by any of those persons by way of defense, set off or otherwise in any legal proceedings in Bangladesh'.[108] The HD is empowered to oversee the enforcement of foreign arbitral awards. However the Act also provides the grounds for the refusal of the award, including *inter alia* legal incapacities and the question of the validity of an arbitration agreement between the parties, the absence of proper notification for presentation of a case, the lack of arbitral scope for the case, and the violation of an agreement in the appointment of arbitrators.[109]

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[105] *The Arbitration Act 2001* (Bangladesh) s. 23(1) (a), (b).
[106] Ibid, ss.44 and 45 (1) (b).
[107] It is noted that before enactment of present legislation on arbitration in 2001, there existed no legal mechanism for enforcement of a foreign arbitral award in Bangladesh. Although Bangladesh acceded to the *New York Convention* on July 6, 1992, it has not yet enacted any enabling statute to give effect to the Convention itself. Hence, the Bangladesh Courts are very reluctant to apply the New York Convention to the issue of recognition and enforcement of foreign arbitral awards.
[108] *The Arbitration Act 2001* (Bangladesh) s. 45 (a).
[109] See Ibid, s 46. It notes that the award may be refused on the grounds that (1) a party to the arbitration agreement had some legal incapacities; or (2) that the arbitration agreement was not valid under the law to which the parties are subjected to; or (3) that the party against whom the award is given, was not given proper notice appointment of the arbitrator or of the arbitral proceedings and accordingly was unable to present his case; or (4) that the decisions of the arbitral awards are beyond the scope of arbitral reference; or (5) that the composition of arbitration tribunal was in violation the arbitration agreement or the state law of the place of the arbitration ; or (6) that the award was set aside or suspended by the competent authority of the country , or

In view of the aforesaid discussion, the relevant provisions under the *Act of 2001* as to the arbitration of a commercial dispute arising out of local and international business or investment seem to be comprehensive as well as neutral, modern, and internationalised, and seem to be capable of protecting the interests of the parties by ensuring justice. The environment for arbitration in Bangladesh, as argued, has changed substantially following the introduction of the Act and it appears now to be more 'arbitration-friendly'.[110] Accordingly, there is a general rise in the use of arbitration as an alternate dispute resolution. Disputes arising out of construction, engineering, and infrastructure contracts are often referred to arbitration.[111]

7.7 Application of International Arbitration

The above discussion reveals that the arbitration arrangement at the national level for local and international commercial arbitration is a recent development and its neutrality and working ability still needs to be proven for achieving the confidence of foreign investors. In fact Bangladesh, since first accepting foreign investments, has accepted the jurisdiction of international arbitration in matters of foreign investment dispute resolution on the basis of bilateral agreements with its counterparts.

Bangladesh recognises the jurisdictions of internationally-recognised arbitral bodies such as the ICC court of arbitration and the ICSID through mutual negotiations under BITs. Apart from BITs Bangladesh also accepts their jurisdiction under specific contracts such as Joint Venture Contracts (JVAs), Product Sharing Contracts (PSCs), Gas Purchase and Sale Agreements (GPSAs), and International Purchase Agreements.

As regards reference to the ICC, some recent BITs including Bangladesh's Model BIT provides for resorting to ICC jurisdiction in disputes relating to the interpretation and the application provisions of the agreements. However, in the past, the ICC court was referred to in settling disputes between foreign investors and Bangladesh. For example, Bangladesh signed a BIT with Italy in 1992 and according to this, Saipem, an Italian entity, and Bangladesh Oil Gas and Mineral Corporation (Petrobangla), entered into a pipeline

under the law of which, that award was made; or (6) that the dispute was not fit for settlement by arbitration under the law or was to opposed to public policy.

[110] See Mr Ajmalul Hossain QC, 'Bangladesh' in Dr Andreas Respondek (ed), *Asia Arbitration Guide* (Respondek and Fan Pte Ltd: 2011) 23 <http://www.cbbl-lawyers.de/gfx_content/PDFs/AsiaArbitrationGuide2013> 29 December 2013.

[111] Ibid.

construction contract to be governed by the laws of Bangladesh and it provided for disputes to be resolved by arbitration under the ICC Rules to be held in Dhaka. The following is the arbitration clause:

> If any dispute, question or difference should arise between the parties to this contract with regard to rights and obligations hereunder which cannot be settled amicably, such dispute, question or difference shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators…. The venue of the arbitration shall be Dhaka. The Procedure in arbitration shall be in English.[112]

Although the ICC arbitration is seen to have been chosen under a specific investment contract, the present trend is that the arbitration is mostly sought by the International Centre for Settlement of Disputes (ICSID).

ICSID is another institution of international arbitration with jurisdiction Bangladesh accepts by its accession into the establishing Convention, as indicated earlier. It was established at the auspices of the World Bank. ICSID came into being by the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*[113], which came into force on 14 October 1976. Bangladesh became a party to it in 1980 and since then the ICSID arbitration jurisdiction has been consistently and prominently pursued in BITs along with others as one method of settlement in cases of disputes concerns investments between Bangladesh and investors of other contracting countries.

Bangladesh has so far concluded BITs with 36 countries and except for a few such as the BIT between Bangladesh and Germany they all have a reference to ICSID arbitration for dispute settlements as an alternative to a domestic court. In particular, the *Model Agreement 2009*, for the promotion and protection of foreign investment provides a guideline for settling investment-related disputes where international arbitration through ICSID is emphasised as an option. Article 13 of the *Model Agreement* suggests as follows:

> The international arbitration may be held by the International Centre for Settlement of Investment Disputes for settlement by arbitration under Washington Convention, 1965 provided that both the

[112] See, *Saipem S p A v Bangladesh*, Decision on Jurisdiction and recommendation on provisional measures (2009), above n 35; IIC 280 (2007).

[113] It is popularly called the *Washington Convention*. Here in the *Convention* 'Nationals of other States' mean the nationals of another Contracting State including both natural and juridical persons (see Article 25 of the *Convention*). ICSID gives private investors direct access to an international forum. The jurisdiction of ICSID is limited in that one of the parties must be contracting state and other must be a national of another contracting state. However, ICSID will administer proceedings which fall outside the scope of the convention.

parties are parties to the Convention. The arbitration award under ICSID shall be binding on both the parties and shall not be subject to any appeal or remedy other than those provided in the said convention.

In addition, the ICSID provision for the enforcement of an arbitral award by the domestic court in accordance with domestic law has also been confirmed by the provision of the Model Agreement. The *Arbitration Act of 2001* also articulates a procedure for the enforcement of a foreign arbitral award.[114]

In view of the above discussion it is clear that in absence of any explicit reference in national FDI legislation or policies, in Bangladesh the guidance for dispute settlement mechanisms has been settled through bilateral treaty negotiations and in that respect international arbitration as a neutral platform between investors and the host state has been well recognised. Moreover, being party to the ICSID and ICC, Bangladesh shows its commitment to permitting investors to exercise their right to access to justice and thus their legal protection is guaranteed. It is noteworthy that Bangladesh has so far participated in three ICSID arbitral cases known as Niko, Saipem, Chevron cases.[115]

7.8 The Conflicting Situations between Foreign Investors and Bangladesh

7.8.1 Foreign investors' negative attitude towards national courts

Despite mutual consensus through BITs to regard local courts as an option in the default of an amicable settlement, foreign investors are often reluctant to seek recourse to domestic courts of Bangladesh in relation to dispute settlement; rather they prefer international arbitration, although in many cases the exhaustion of local remedies is a condition.[116] This is not the case only with Bangladesh, but also with most developing and least-developed countries. The main point of their argument in general rests on a lack of confidence with the

[114] *The Arbitration Act 2001* (Bangladesh), ss. 45 (a), 46.

[115] Saipem v Bangladesh dealt with the pecuniary jurisdiction of USD 12.6 million (see *Saipem S.P.A v the People's Republic of Bangladesh* (2009) ICSID Case No.ARB/05/07), Chevron v Bangladesh dealt with the pecuniary jurisdiction of USD 127 million (see *Chevron Bangladesh Block Twelve Ltd and Chevron Bangladesh Blocks Thirteen and Fourteen Ltd v People's Republic of Bangladesh* (2010) ICSID Case No. ARB/06/10), Niko v Bangladesh dealt with the pecuniary jurisdiction of USD 35.71 million (see *Niko Resources Bangladesh Ltd v Bangladesh Petroleum Exploration and Production Company Ltd and Bangladeshi Oil, Gas and Mineral Corporation* (2013) ICSID Case No.ARB/08/10) .

[116] M. I. Faruque, Sajed A Sami and Taslima Yasmin, 'Impact of International Arbitration Proceeding: Governmental Approach and Investment Climate in Bangladesh ' (Working Paper No.1, Economic Research Group, Bangladesh , June 2010) <http://www.ergonline.org/ifc/index_of_SGAPP.html> 10 January 2012.

neutrality and capability of the local courts of developing host countries. They also point to legal infrastructural inefficiency in addition to a weak enforcement mechanism.[117]

In recent times, some studies and reports on the existing investment climate in Bangladesh reveal investors' negative attitudes towards the judicial protection available in Bangladesh in respect of dispute resolution.[118] They point out some operational weaknesses and inabilities of the enforcement mechanism of the existing judiciary, including the disqualification of judges to deal with international commercial issues. They also argue the existence of weak and cumbersome judicial procedures, wide corruption in judiciary (particularly in the lower courts), delays in tort judgments due to the absence of a prescribed penalty provision, judges' ignorance of international accounting practices, procedural weaknesses and delays in the enforcement of awards, and a scarcity of competent judges both in lower and upper courts.[119]

In consideration of the criticism from the part of investors, it is essential for the government of Bangladesh to strengthen the judicial system with improvement of the required legal infrastructure as well as the provision of an easier and prompt enforcement mechanism to attain the confidence of foreign investors. It is nevertheless right to say that it has almost become a tradition of investors of developed countries to avoid the option for resorting to domestic courts, which, in a sense, conflicts with the host states' principles of sovereignty. The *Calvo doctrine*, which is popularly accepted among developing countries, states that investment within host countries' territory are internal affairs and to be governed solely by national laws, and under the sole jurisdiction of domestic courts.[120]

The tendency of avoidance in some cases is promoted either by the scope of simultaneous use of a domestic court and international arbitration, or the scope of direct resort to international arbitration under investment agreement between Bangladesh and foreign company. It is evidenced by the recent *Niko* case. In this case, when Bangladesh part filed a lawsuit against *Niko* for damages out of the *Tengratila* blowout in 2008, *Niko* took preparation to defend the lawsuit. During the continuation of the proceedings of the suit, *Niko* proceeded to ICSID with an arbitration suit for the settlement of the case over the

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[117] See Sornarajah, above n 2, 286.
[118] See US Department of Justice, *Investment Climate in Bangladesh* ((2010) <http://www.state.gov/e/eb/rls/othr/ics/2012/191106.htmBangladesh> 18 October 2013; see also the World Bank and Bangladesh Enterprise Institute, *Improving the Investment Climate in* (June 2003) <www.bdresearch.org.bd/home/ attachments/ article/486/Bdesh_ICA-Proof_2pdf> 9 March 2012.
[119] Ibid.
[120] See for discussion Newcombe and Paradell, above n 46 <http://book.google.com.au/book/id> 10 February 2012.

compensation issue and also for realising their own outstanding gas bill for the gas field project.[121] *Niko* did this in the application of the 'arbitration clause' for dispute settlement under the joint venture agreement between Niko and Bangladesh Petroleum and Production Company.[122]

The tendency to avoid the option of domestic courts or of preferring international arbitration to domestic courts on the ground of some common complaints can be tantamount to disregard of the national laws. On the other hand, if investment disputes are often referred to international arbitration, bypassing or pending internal judicial settlement, the question arises whether the condition of exhaustion of local remedies can be escaped by mutual agreement. The answer will be given in a separate section.[123] But the downside of this practice is that it will diminish the possibility of legal development or development of the rule of law in the area of foreign investment in Bangladesh. The persistent avoidance of foreign investors from resorting to national courts or reluctance to participate on the plea of genuine grounds of infrastructural inefficiency or quality shortcomings will hamper the future development of judiciary in this area.

Against this backdrop, Bangladesh can insert binding principles in its national foreign investment law, in a similar way to Vietnam as mentioned earlier, for dispute settlement under domestic courts on the basis of the nature of the contract except otherwise agreed. At the same time the government of Bangladesh should undertake all necessary measures to restore investors' confidence with its national courts.

7.8.2 Foreign investors' negative attitude towards the internal arbitral system

Foreign investors hold a similar attitude towards internal arbitration to that held towards the local courts; they are not interested in internal arbitration for dispute settlement. The state parties under BITs or individual investors' contracts with Bangladesh are seldom seen to invoke internal arbitration for the settlement of disputes. Despite the newly introduced arbitration system being modern and internationalised, the reason for their reservations, as revealed particularly by the experiences of Saipem and Cheveron cases[124] includes two

[121] See *Niko Resources Bangladesh Ltd v Bangladesh Petrolium Exploration and Production Company Limited and Bangladesh Oil, Gas and Mineral Corporation* (2013) ICSID Cases No. ARB/10/11 and ARB8/10.
[122] See *Joint Venture Agreement for The Development and Production of Petroleum from the Marginal /Abandoned Chattok and FenI Gas Field* between Niko Resources (Bangladesh) Limited and Bangladesh (2003) art.18.
[123] See the following section 7.8.
[124] Faruque, Sami and Yasmin, above n 116.

aspects of the *Act of 2001*; firstly, that Dhaka as the prescribed location of arbitration under this *Act* is opposed to the customary practice of arbitration being held in a neutral country, and secondly, that the Act is more specific to Bangladesh.[125]

The first point, that Dhaka is a not a neutral place of arbitration, may be acceptable from the standpoint that its location goes against customary practice, but location is not the only factor in creating a neutral approach. For example, the regional arbitration centres, such as those under the ICC Court of Arbitration, have an important role, and Dhaka has one of these. In addition, the ICSID arbitration centre is located in Washington where the arbitration matters placed by US companies are entertained.

The second ground of reluctance to utilise Bangladesh's arbitration system is baseless as the arbitration jurisdiction under the Act extends to the settlement of disputes relating to international commercial transactions between Bangladesh and others. This is the common phenomenon of all national arbitration legislations dealing with foreign cases. Hence it is not rational to protest that the Act is specific to Bangladesh. It is also noteworthy that in order to maintain adequate impartiality in arbitral proceedings the law allows the other party to select arbitrators, including from foreign nationals. The local court has no scope of interference in this process unless a conflict arises in the selection of arbitrators or parties fail to select an arbitrator.[126]

Apart from above two points of reservation the enforcement of arbitral awards is also a grave concern of foreign investors as it suffers numerous institutional, legal infrastructural, cultural and educational problems. Their grounds of reservation are also corroborated by a study that has identified the following factors barring the arbitral awards,[127] such as:

1. the local courts as an enforcing machinery have some anti-arbitration bias and a tendency towards non-cooperation;
2. the local courts lack the aptitude to appreciate the mores and ethos of international private dispute settlement;
3. there is a serious lack of understanding of international rules and conventions including the *New York Convention*;
4. the courts have local protectionism;

[125] Ibid.
[126] *The Arbitration Act 2001* (Bangladesh) s.23 (1)(a)(b).
[127] Noor Mohammad and Rakiba Nabi, *Enforcement of foreign arbitral awards concerning commercial disputes in Bangladesh: A brief overview* <http://www.emeraldinsight.com/0828-8666.html> 6 February 2012.

5. there is wide spread corruption among various levels of administration and the judiciary; and
6. the system is sometimes manipulated by local disputing parties.

The above factors are not only the case with the courts of Bangladesh, but are a common phenomenon of third world countries where the courts suffer multiple types of legal infrastructural inefficiency and corruption is paramount. However, local protectionism is not unjustified if it becomes an essential consideration under special circumstances. According to the Act the court can avoid the enforcement if the matter proves to be incapable of arbitration or the enforcement of the award is opposed to the public policy of Bangladesh.[128] This protective provision appears to be very logical in terms of the interest of the host country. It cannot be denied that the judiciary in Bangladesh has multiple logistical incapacities and is also infected with corruption and potential manipulation, but in the case of the enforcement of foreign arbitral awards (which involve the country's economic interests) the author believes that the government will try its utmost to retain a positive image of the country. Moreover, the *Act of 2001* has empowered the HD to oversee the ensuring of enforcement, and it is less corrupt compared with the lower courts. Nevertheless, the government should address each of these issues in order to earn the confidence of the international business community and simultaneously establish a strong internal arbitral system.

7.8.3 The negative attitudes of the government of Bangladesh to international arbitration

Bangladesh has so far participated in several international arbitral proceedings with foreign investors under the arbitral regime of the ICC and ICSID. In different arbitral proceedings the counterpart foreign investors are Chevron, Sipem S.P.A, Niko, and Lahmeyer International Polly Power Services.[129] The experiences of all these international arbitration proceedings have showed a different picture and raised considerable doubts about the government of Bangladesh's inclination in voluntary compliance with arbitration proceedings. However, the government also has some grounds for allegations against the neutrality of international arbitration.

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[128] *Arbitration Act* 2001 (Bangladesh),s. 46 (b) (ii).
[129] Faruque, Sami and Yasmin, above n 116.

In this respect, an empirical study argues that whenever a dispute is brought to international arbitration, despite a seemingly strong commitment on paper, the government is found to be reluctant as if the original agreement has been forgotten.[130] It is quite often that faced with claims of a breach of its contractual or investment obligation in international arbitrations, the government either vehemently denies participating in the original dispute settlement proceedings, or applies some tactics to frustrate the arbitration proceedings through raising issues that appear to be unjustifiable and unsound in law. Sometimes, in the course of arbitral proceedings for dispute resolution, the government manifestly exploits its own judicial system and local laws to gain the advantage of anti-suit injunctions or to evade international awards rendered against it. This is evident in *Saipem S.P.A v Bangladesh* where the government of Bangladesh (Petrobangla), after a ruling by ICC in favour of Saipem for damages, moved first to local District Judge Court seeking an anti-suit injunction and then to the HD . The HD issued an injunction declaring that the ICC arbitral proceeding was *illegal and without jurisdiction*.

The study also finds that the government's reluctance to participate in international arbitrations is mainly manifest in its effort to avoid the jurisdiction of international arbitration. In order to avoid jurisdiction the government pleads on some common grounds such as that the dispute falls outside the scope of the arbitration agreement; or the government is not a party to the contract and the arbitration obligation under a BIT does not apply.[131] In an ongoing arbitration case under ICSID between Chevron and Bangladesh, the government of Bangladesh raised an objection to the jurisdiction of ICSID. The dispute was related to non-payment of four percent of sale proceeds by Petrobangla (a public entity in Bangladesh) which was firstly endeavored to be resolved amicably. Failing this, Chevron lodged the case with ICSID for arbitration, making Bangladesh a defendant with Petrobangla. Bangladesh contested ICSID's jurisdiction on two grounds. Firstly 'the dispute in question "is not even [an] investment dispute" according to its ordinary meaning as the meaning of investing refers, according to the government, to the 'investing of money' to earn interest and bring profit.[132] Therefore, neither the "exploration, development and other operations" nor "the sale of gas" constitute investments under Article 25 (1) of the *ICSID Convention*. Secondly, it was argued that the dispute is not between a Contracting state and a national of

[130] *Saipem v Bangladesh*, above n 35, para 3-37.
[131] In *Saipem v Bangladesh*, Bangladesh as the respondent had argued that the rights resulting from an ICC award concerned with a contractual dispute would not fall within the investment notion of pertinent investment treaty between Bangladesh and Italy, the home state of Saipem. (See *Saipem v Bangladesh*, para 127).
[132] See Lindsay Marchassault, '*Chevron Bangladesh Block Twelve, Limited and Chevron Bangladesh Block Thirteen and Fourteen, Ltd. v The People's Republic of Bangladesh* (2010) ICSID Case No. ARB/06/10: Introductory Note (2011) 26(1) *ICSID Review* 256, 260- 61.

another Contracting state, as Petrobangla is not the part of the government, and on the other hand *Chevron* is a national of Burmuda which is not a party to ICSID. ICSID denied these contentions. It found that the meaning of investment is not in conflict with Article 25 (1) of the Convention[133] and the contractual dispute arose directly out of the investment. In determining the second question about the responsibility of the government of Bangladesh for Petrobangla the tribunal found that Petrobangla is a *dejure* organ of the government whose actions are attributable to it.[134]

Hence the government's approach towards its obligation to submit to international arbitration tribunals does not appear to be positive in reality. This, in turn, may affect the commitment of Bangladesh to international tribunals as stipulated in BITs and other contracts and therefore, its trustworthiness to contracting parties would likely be in question. As a result, Bangladesh may lose its reputation as an investment-friendly country. For example, there has been much antagonism surrounding the *Chevron* saga. The embassy officials of the UK, a major capital-exporting state commented that the repeated interventions by the government in the Chevron dispute left a 'chilling effect' on foreign investors.[135]

7.8.4 Reasons for reluctance to international arbitration

The government however has some reasons behind the defiance of its commitment to international arbitration. It is noted that government officials sometimes justified not adhering to arbitration agreements on certain grounds that include *inter alia* a lack of cultural awareness, inadequacy of legal skills in conducting international arbitration, bias on the part of the arbitrators, and the tribunal's disregard of issues pertaining to environmental regulation and the protection of human rights.[136]

The cultural differences between the west and the east are very obvious in respect of settling disputes through arbitration, which has a long history in western economic society. Karen Mills highlights that there are many cultural factors such as body language, attire, and manner of address by a lawyer or arbitrator which can affect the outcome of proceedings and

[133] Ibid. The tribunal decided this matter in consideration the *Salini criteria*. See *Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morrocco* (2001) ICSID Case No. ARB/00/4 42 ILM 609.
[134] Ibid.
[135] Faruque, Sami and Yasmin, above n 116.
[136] Ibid.

thereby discourage parties from opting for international arbitration.[137] This is the case with the Bangladesh government's side which has felt that its foreign counterparts who are more smartly presented and adept at argumentation unfairly motivate the arbitrator's opinion in their favour.

The allegations against the bias of arbitrators are not new. It is almost an accepted fact that the arbitration system traditionally harbours bias against developing host states. Sornorajah has identified it as one of the in-built deficiencies of the international arbitration system. According to him, most arbitrators come from a commercial background, without a prior experience of dealing with disputes involving sovereign states and they are more prone to extend notions of commercial dispute resolution without adequate consideration of public laws.[138] The perception of bias has led many developing countries, especially those from the Middle East and Asia, to avert from international arbitrations.[139] Some scholars have identified the dominance of a small and closely-knit group of Northern arbitrators to be a reason for developing states to lose confidence in the neutrality of international arbitration. However, Maniruzzaman argues that this negative attitude of developing countries will be removed in future as international arbitration institutions are increasingly realising the wisdom of taking a more balanced approach, and as more arbitrators are appointed from developing countries.[140]

In the Saipem case the government partly argued that they found the ICC's role biased as it disregarded the governing laws of the arbitration and evidence and therefore the government moved to a local judge court and finally the High Court Division of Supreme Court to stay all proceedings of ICC.[141] The government officials' allegation of bias also refers to the *Niko* international arbitration case regarding the setting up of a gas pipeline where an uncontrolled blow-out of the pipe-line caused huge damages to the surrounding environment and human life in *Magur Chara* and *Tengratila* in Bangladesh. In this incident, *Niko*'s breach of its

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[137] Karen Mills, 'Cultural Differences & Ethnic Bias in International Dispute Resolution: An Arbitrator/ Mediator's Perspective' (Paper presented at the International Arbitration Conference, 2006, Kuala Lumpur) <http://www.arbitralwomen.org/files/publications> 3 March 2012.

[138] M Sornarajah, 'A Law for Need a Law for Greed? Restoring the lost law in the International Law of Foreign Investment' (2006) 6 (4) *International Environment Agreements: Politics, Law and Economics* 329, 348.

[139] Economic Research Group, *Impact of International Arbitration Proceeding: Governmental Approach and Investment Climate in Bangladesh* (Working Paper 1/2010) <http://www.ergonline.org/ifc/index_of_SGAPP.html> 10 January 2012.

[140] AFM Maniruzzam, 'The International Law of Foreign Investment in the Age of Globalization: From Panic to Panacea' (2006) 6 (4) *International Environmental Agreements: Politics, Law and Economics* 365-369.

[141] *Saipem v Bangladesh*, above n 35, para 143.

contractual obligation was evident. But the arbitrators didn't focus on that. The officials are convinced that the arbitrators disregarded what they produced as evidence. [142]

In addition, the decision of the tribunal in this case in regard to its jurisdiction over Petrobangla, an agency of the government in making liable for the payment of compensation claimed by Niko for outstanding gas bill seems to be biased as it conflicts with the provision of the ICSID Convention. Under the ICSID Convention in respect of arbitration between foreign investor and agencies of a state, there is a requirement of making a designation by the state to the tribunal that such agencies can participate in arbitration.[143] Bangladesh made no such designation in respect of Petrobangla.

The defiance of arbitration agreements may be justified where the investment proves to be detrimental to host states in terms environmental protection, human rights, and the question of sustainable development. For instance, the *Magur Chara* and *Tengratilla* blasts in Bangladesh, and the Bhopal disaster in India demonstrate the capacity for the lack of concern for the values of environmental protection, human rights, and sustainable development by many foreign investors. In principle, the investors are expected to comply with the laws and regulations of the host country whenever they come to invest in a foreign country. It is a common expectation that the investors will have regard for the inhabitants and the resources of the locality where they operate. If they are found to be negligent, the host state can derogate from the general standard of protection with regards to those particular investors and ignore the contractual and treaty rights. Dine states that if investors have been detrimental to host state's environment, human rights etc, those investors should not receive the protection promised in the treaties.[144]

The author supports the government officials' contention about international arbitration's lack of concern for the violation of environmental protection and human right by investors as evident in the *Magur Chara* and Tengratila blasts. International arbitration, although it claims to be neutral and impartial, indeed often becomes unfriendly to developing host countries. There are two reasons in support of this argument. Firstly, in international

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[142] *Niko Case*, above n 121, para 95-104, 575.

[143] See The Convention on the Settlement of Investment Disputes between States and the Nationals of Other States 1966, art. 25(1) (3). The article 25 (1) states that 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 o the Centre by that State) and a national of another Contracting State…. The article 25 (3) states thatConsent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

[144] J Dine, *Companies, International Trade and Human Rights* (Cambridge: 1st ed., 2004) 17.

arbitration proceedings the foreign investors always enjoy the status of a complainant against the host country. As the investors are often from the capital-exporting countries, they normally remain more influential where the host countries are developing and less-developed countries. Secondly, arbitral jurisdiction involves mainly legal and economic disputes. For example, according to article 25 (1) of the *ICSID Convention* the disputes must be a legal dispute arising directly out of an investment. The legal issues are basically determined by the BITs and respective contracts between host states or their agencies and the foreign investors that address more the economic issues such as expropriation, compensation, and repatriation. They less often address non-legal or non-economic issues such as the environment, human health and safety, and human rights. The international arbitral tribunals therefore treat these issues as extra-legal elements and thus they remain outside the scope of arbitral jurisdiction. Although ICSID reports state that ICSID is established to be more than an investment dispute settlement institution, it is meant to facilitate investment flows with a view of economic development,[145] due to the lack of reference to development and non-economic aspects, these statements appear to be cosmetic, and to an extent even fraudulent. Unless there is a change in the jurisdictional approach by including references to developmental aspects and balancing the rights of investors and host states in seeking remedies, the purpose of arbitration is less likely to serve the interest of developing and least-developing host states.

In addition to the abovementioned, there are some other points of reluctance which are common in the context of other Asian countries. They are mainly the immediate and long term costs, delays in progressing cases, poor enforcement and problems with finding the right arbitrators.[146] A study identifies these issues as the reasons behind the limited number investor-state cases from Asia in ICSID. For example, the *Bangladesh v Chevron* case took almost five years to be decided, *Niko's* claim in ICSID was recently set aside after almost three years. More importantly the *Saipem* case decision took five years to reach.[147] As a result, Bangladesh is facing a huge amount of associated costs, including the charge of proceeding, fees for the arbitrators and other extra expenditure for officials for their recurrent trips to Washington.

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[145] Ibrahim FI Shihata, *Introduction by Secretary General*, ICSID Annual Reports 5 (1984) <http://aryme.com/docs/adr/2-2-2790/informe-arbitraje-ciadi-2001-icsid-annual-arbitration-report-en.pdf > 30 December 2013.

[146] Luke Nottage and J Ramesh Weeramantry, 'Investment Arbitration' in Asia: Five perspectives on Law and Practice in Vivienne Bath and Luke Nottage (eds.) *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Rutledge, 2011) 36.

[147] The arbitration suit started on 5 October, 2004 and the award was declared on 30 June, 2009. See *Saipem v Bangladesh*, above n 35.

Thus Bangladesh, along with other developing and least-developed states, has developed a reluctance to participate in international jurisdiction. This reluctance should not be explained as a tendency of non-compliance with treaty provisions for dispute settlement. Nevertheless, this situation is not expected to drive the benefit of FDI flow through motivating foreign investors.

7.9 Exhaustion of Local Remedies: A Point of Contention

The exhaustion of local remedies creates dilemma both in treaty based and contract-based arbitration. It is clear from the attitude of investors that due to the option between local courts and international arbitration, or the absence of an express condition about the exhaustion of local remedies, they are more prone to international tribunal for remedies and are not even willing to exhaust the local remedies if it is already started by the counterpart host state. This is evident from the Niko case as mentioned earlier. Following Niko's blow-out incident, Bangladesh filed a lawsuit against Niko in 2008 demanding compensation on different grounds for delivering gas in violation of contractual terms and conditions as well as environmental damages in *Tengratilla*. Niko first agreed to settle the dispute (a claim of compensation by Petrobangla) through arbitration conducted in Bangladesh based on international rules. Niko had also preparation to defend the law suit. Finally in the apprehension of losing the lawsuit and its negative impact on the company's finance it lodged an arbitration suit with the ICSID in April of 2010 for realising the outstanding gas bills for the Feni gas field and settlement of the government's case over compensation issues for the *Tengratila* gas field blow-outs. Niko sought the verdict of ICSID on whether the company was responsible for compensation out of the *Tengratila* blow-outs and a declaration that it was not liable.[148]

Against such a situation the government contends that foreign investors always show reluctance to exhaust local remedies on a self-induced plea. However, in the dispute resolution procedure under JVA between Niko and Bangladesh there is no condition for the exhaustion of remedies of the local courts. Accordingly Niko's role cannot be said to be in violation of the agreement.

There are two fundamental questions that can be raised here; one is whether arbitral remedies under ICSID can be entertained while a lawsuit is pending in a domestic court of

[148] *Niko Case*, above n 121, para 95-104, 575.

the host countries, another is whether ICSID can entertain an arbitral case where there is already an agreement between the investor and host state to settle the dispute by arbitration at the domestic level of the host country. With regard to the first question, in the arbitration process the ICSID Convention does not require an investor to exhaust local administrative and judicial remedies as a pre-requisite for arbitration, unlike the *UNCITRAL Model Law*. According to Article 26 of the ICSID Convention consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. Under this provision, ICSID can entertain the complaint of *Niko* while the lawsuit is pending, but it appears to be conflicting with the exception reflected by the phrase 'unless otherwise stated'. The exception in the JVA between Niko and Bangladesh was related to an option to settle the dispute by local arbitration process before ICSID.[149] Before entertaining the case ICSID should at least examine whether the local arbitration process is sought. Entertaining any case without examining the exhaustion of prior procedures reveals the 'pro-investor-bias' jurisdictional character of ICSID that reduces the reliability of ICSID among developing host states.

The provision for the exhaustion of local remedies is recognised by the principle of customary international law. Customary international law requires that an investor exhausts all local remedies available before its home state may bring a claim on its behalf by exercising diplomatic protection.[150] Dozler stated that according to traditional international law, before an international claim on behalf of an investor may be put forward in international proceedings, the investor must have exhausted the domestic remedies offered by the host state domestic courts.[151] In a remark on the *ELSI Case* the International Court of Justice observed that the local remedies rule is a fundamental principle of international law that cannot be excluded except by express words having that effect.[152] Judge Schwebel also observed that the presence of an arbitration clause excluded the need to exhaust local remedies.[153] Article 26 of the ICSID Convention as mentioned above states that the exhaustion of local remedies is not a condition for the admissibility of a claim unless there is

[149] See *Joint Venture Agreement for The Development and Production of Petroleum from the Marginal /Abandoned Chattok and Feni Gas Field between Niko Resources (Bangladesh) Limited and Bangladesh* (2003) art.18 (2) (3) (4).
[150] Ursula Kriebaum, 'Is the European Court of Human Rights an Alternative to Investor-State-Arbitration?' in Pierre-Marie Dupay, Francesco Fracioni, and Ernst-Ulrich Petesmann (eds.) *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 228; CF Amerasinghe, 'Local Remedies in International Law' (1992) 86(3) *The American Journal of International Law* 626, 627.
[151] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) 215.
[152] M Alder, 'The Exhaustion of Local Remedies Rule after the ICJ's Decision in ELSI' (1990) 39 (3) *International Comparative Law Quarterly* 641, 648.
[153] S Schwebel and G Wetter, 'Arbitration and Exhaustion of Local Remedies' (1989 revisited) 23(4) *American Journal of International Law* 951, 954.

a express requirement in the instruments - for example the BIT or FTA or agreement between the parties.[154]

The requirement of an express provision appears to be favourable for powerful investors wishing to dominate the parties in the host country in respect of their negotiation about dispute settlement. But where there is an option for both local remedy and international arbitration and the state party has already placed the litigation in the local court, the investors should on principle participate there, otherwise it would be disregarding the national sovereignty as per the *Calvo Doctrine*[155]which has been universalised through the adoption of Article 2(2)(c) of the *Charter of Economic Rights and Duties of the States*.

Only the insertion requirement cannot be a plea from a logical point of view. This is because the matter of the exhaustion of local remedies is implied in every contract. When foreign investors undertake consciously the risk of establishing contracts with the legal system of a host state, they should not be permitted to remove themselves from it merely by inserting an arbitration clause in their contracts.[156] The non-requirement of the exhaustion of local remedies curtails the right of host states' to litigation in the domestic courts at the event of the breach of domestic law provisions by a citizen.

In view of an established treaty or contract-based practice for international arbitration, the way out from this potential risk for the interests of the host state is to negotiate qualified access to international arbitration through BITs. The access to international arbitration may be subjected to different kinds of procedural requirements, such as the resort to local remedies, the requirement to use domestic remedies for a certain period of time, or that the direct admissibility can be justified only where the remedies are not available in the laws of the host countries.[157]

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[154] See *Waste Management v Mexico* (2004) 43 ILM 967para 97; *Generation Ukraine Inc. v Ukraine* (2003) 44 ILM 404(2005), ICSID Reports 240, para 20.30.
[155] See for discussion, Paul Newcombe and Paradell, above n 46.
[156] Sornarajah, above n 2, 221.
[157] See Ursula Kribaum, 'Local Remedies and the Standard for the Protection of Foreign Investment', in Christina Binder et al. (eds.) *International Investment Law for the 21st century* (Oxford University Press, 2009) 417, 420.

7.10 Way out for Resolving Conflicting Situations

It is drawn from discussion on the conflicting situations between foreign investors and the government of Bangladesh that despite the existence of contract-based or treaty-based method for dispute settlement both are divided in their own ways in terms of their preference. Under this situation, the point of reciprocal satisfaction in relation to dispute settlement mechanisms is absent and this has ultimately led to the long-standing distrust of investors in the prevalent system in Bangladesh. The prevalence of such a situation is an impediment to the growth of a smooth and stable dispute settlement system and a situation balancing the competing interests of both parties. To resolve such a situation a way can be devised by introducing relevant provisions in the national legislation and two other treaty instruments such as BITs and individual agreements between the parties. The devise can attract the following matters:

1. A specific substantive principle for dispute settlement should be introduced in the national FDI legislation with clear definition of jurisdiction. A consent-based dispute settlement clause should be included in general terms.
2. The requirement for the exhaustion of local remedies can be imposed as a condition under FDI legislation if the allegation is lodged by the state party with a local competent court for the breach of contractual obligation by the investors. If the requirement of the exhaustion of local remedies is decided by the BITs between contracting state parties, the investors of the contracting state must comply with this.
3. The transfer of the matter of dispute settlement to the international arbitration may be made by the consent of both parties. During the preceding is on in the local courts, the investor will not be allowed to transfer the matter to international arbitration unilaterally.
4. In enforcing arbitral awards there must be a prescribed time for the local civil court. Failing this, the responsibility will lie with the HD of the Supreme Court.
5. The provision relating to access to international arbitration in the case of dispute settlement between investor and state party in BIT or individual investment consent should be qualified.
6. The jurisdiction of the dispute settlement under agreement between investors and host state Bangladesh should be extended by the mutual consent of the parties to labour, environment and human right issues as a legal matter.

7. A proposal should be made to ICSID to establish region-based arbitral centre such as one in South and East Asia so as to reduce the cultural gap and the associated costs for countries in this area.

CHAPTER 8

CONCLUSION AND RECOMMENDATIONS

8.1 Purpose of the Thesis

The importance of FDI as a vital source of development is undeniable for a least-developed country such as Bangladesh, being beset with multiple socio-economic problems such as resource scarcity, a high-rate of unemployment and huge infrastructural backwardness. To ensure FDI-induced development in Bangladesh, there is no alternative to the application of development-oriented regulation. Regulation is simultaneously a pressing need in all developing and least-developed host countries. A mere liberalisation policy for FDI can be a stimulus for raising the investment flow, but is unable to achieve the desired long-term benefits. On this premise, this thesis has sought:

(a) to examine the existing FDI regulatory frameworks as established by laws, policies, and BITs applicable to the entry and post-entry operation of FDI in Bangladesh;
(b) to evaluate the extent to which they are supportive for achieving development goals; and
(c) to assess the extent to which development issues are pursued in the relevant legal and policy frameworks.

A consistent argument throughout the whole evaluation and analysis has been that the development aspects of FDI are almost ignored in the existing legal and policy frameworks. Even the core law of FDI is comparatively incomprehensive, focusing only on the protection of investor’s interests. Therefore, the thesis has underscored the need for formulating a development-oriented regulatory framework for FDI in Bangladesh in a way that should strike a balance between the competing interests of foreign investors and the host country. The investors must drive their business gain and Bangladesh must attain its development goal. Thus FDI can serve the purposes of both stakeholders by creating a win-win situation rather than the existing winner-loser situation.

On the basis of a thorough and integrated study of the available regulatory aspects catalysing or linked to development, such as entry regulation, tax and capital regulation, environmental regulation, regulation for the protection of human rights, and the protection of investment, a number of conclusions have been reached and these include specific recommendations for future changes in the legal regime of FDI in Bangladesh. The purpose of this chapter is to highlight some of the fundamental development-oriented legal points and arguments in this thesis and in reliance on issue-specific chapter-based findings and present an integrated and broader form of recommendations in consideration of their significant academic and functional value.

8.2 The Regulation of FDI and Development

The regulation of FDI and development is interlinked. The development aspect of FDI requires proper regulation. Without proper regulation a country's sustainable development through FDI remains unachievable and imperfect. The rise of FDI flow through a liberalised policy alone is not a guarantee for development, due to the differing interests and objectives of the investors and the host countries. True development is not automatically achievable through FDI. There are many associated factors which call for the regulation of FDI for achieving the benefits of FDI.

The most basic argument for regulation is premised on the scientific principle that 'every action has a negative reaction'. FDI is a double-edged business element, having both positive and negative effects on the economic, social, and environmental conditions of a host country (Chapter 2). Regulation is essential for maximising the advantages through minimising or curbing the negative effects. Regulation no longer needs to mean a restrictive approach, as it did in the communist era, but a development-oriented approach which enables FDI to contribute to the sustainable development goals of a host country.

Development-oriented regulation supposedly concerns all development considerations about the admission and operation of FDI, but it mostly involves entry regulation, tax regulation in the case of fiscal incentives, foreign exchange control in the case of the repatriation of profits, environmental regulation, regulation relating to the protection of labour and employment rights, and the right to resettlement of internally displaced communities by FDI operation, etc. The guarantee for the protection of investment property is indirectly linked to the development interest of the country.

A development-oriented regulation suitable for developing host countries in this era of globalisation should feature: (i) co-existence between liberalisation and regulation; (ii) a combination of rights and responsibilities of investors and the host state and; (iii) the integration of the public interest and development issues (see Chapter 2) so as to strike a balance between the competing interests of investors and developing and least-developed host countries.

8.3 Minimum Entry Regulation and Maximum Openness

Entry regulation is a very vital component of FDI regulation in terms of development. This study reveals that Bangladesh maintains a very minimal entry regulation policy for approving foreign investment proposals (Chapter 3). The relevant laws and policies reflect an extremely liberal attitude to encouraging foreign investment in response to the ongoing global trend. What is meant by entry regulation is mainly confined to the fulfillment of some administrative procedures, which are equally applied to local investments. There is no screening system for the approval of investment proposals from the perspective of development goals. The approval procedure is simply based on paperwork at concerned governmental agencies.

The concept of entry regulation from the host state's developmental perspective is seldom pursued in existing FDI legislation and policy. The basic elements of entry regulation from the perspective of development, such as local content requirements, employment requirements, and transfer of technology are not introduced in legal or policy documents or BITs either as a requirement for approval or business advantage (Chapter 3).

The equity participation up to 100 per cent is unconditional, whereas in many countries this option is offered with certain conditions in consideration of the development need of the country.[1] Likewise for joint-venture investments there is no requirement as to the share of capital with local partners and the transfer of technology in particular. However under product-sharing contracts the requirement of transfer of technology, training for human capital development, and the handover of some heavy machinery after conclusion of the contracted work is stipulated in the contracts of *Petrobangla* with foreign oil companies.[2]

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[1] For instance, in Malaysia the foreign investors are permitted to hold up 100 per cent of the equity with meeting different conditions such as requirement of export of 80 per cent of its product, and not competing with locally manufactured products for local markets. See Malaysian Industrial Development Authority, *Malaysia Investment in the Manufacturing Sector: Policies, Incentives and Procedures* (4th ed. Reprint , March 1990) 40.

[2] See Bangladesh Oil, Gas and Mineral Corporation (Petrobangla), *Model Product-Sharing Contract* (2008) <http://www.eisourcebook.org/cms/Model%20Production%20Sharing%20Contract%20PETROBANGLA%202008.pdf> 30 December 2013.

8.4 Incentives and Potential Economic Risks

The study reveals that the purpose of fiscal and financial incentives to attract foreign investment is not duly fulfilled in Bangladesh; rather it suffers from the worse effect of incentives in terms of revenue losses and potential risks to capital control. The negative impact of fiscal incentives appears to be immense. This is particularly the case with tax holidays which prove to be ineffective for encouraging industrialisation across the country. Tax holidays have become an element for causing consecutive revenue losses in the last decade due to their rampant misuse by corporations taking advantage of their long duration, lack of proper regulation, and administrative corruption. They also exacerbate the existence of a narrow tax base (Chapter 4). In fact, both direct and indirect tax incentives create a huge amount of tax expenditure which in reality outweighs the expected revenue.[3] Such a high rate of tax expenditure may be considered imprudent and irrational for country such as Bangladesh.

The financial incentives such as low interest rate bank loans, export incentives, and repatriation of profit are offered in Bangladesh without due regard for the associated economic concerns and without proper regulation (Chapter 4). As a result, they serve the business purpose of foreign investors more than contributing to the national economy. To evaluate them individually, the equal facility for bank loans at low interest rates creates an opportunity for foreign multinationals to invest without any capital transfer, which is one of the beneficial aspects of foreign investment. This equal treatment indirectly impedes the growth of SMEs, which are considered to be the heart of industrialisation in least-developed countries. In addition, the lack of proper regulation for the realisation of non-performing loans is another problem.

As regards the benefit of export incentives the study finds that these have been able to contribute to the increase in the volume of exports and thus the earning of foreign currency (Chapter 4). However, the associated costs for export incentives are higher than the social and economic benefits. In addition, due to the absence of restrictions on importing foreign raw materials and conditions for using local contents, gaining the expected benefits from FDI remains distant, and on the contrary this absence paves the way for the dispatching of foreign

[3] See Ahsan M Mansur, Muhammad Yunus and Biplob Kumer Nandi, 'An Evaluation of Tax System in Bangladesh' (Policy Brief, International Growth Centre, 2011) <www.theigc.org/publications/policy.../evaluation-tax-system-bangladesh> 29 December 2013.

currency. The lack of strong legal restrictions on the marketing of products locally by the foreign exporting companies also creates a negative impact on local industries.

The study also finds that there exists a full repatriation facility in Bangladesh without any restriction, save in exceptional economic circumstances and difficulties.[4] The exceptional circumstances are not defined formally but are left to the discretion of the government to determine. The official procedure for repatriation is minimal and no clearance of financial dues or performance of tax obligations is required except at the event of the liquidation of the company (Chapter 4). Such an unrestricted situation in general has the potential to encourage the unauthorised exercise of this facility by the powerful multinationals, causing a negative impact on the control of foreign exchange outflows.

The features of fiscal and non-fiscal incentives in Bangladesh reveal that they are more costly than their resulted benefits, as the economic considerations and development objectives are not rightly taken care of in offering incentives and these incentives are investor-biased (Chapter 5). The prevalent situation requires legal and policy regulation to attain the development benefits of incentives.

8.5 Inadequate and Un-enforced Environmental Protection Regulation

The environmental regulation of FDI operation is endorsed by international law and given much importance in the present era for achieving sustainable development through FDI. The concern for addressing regulation and the control of environmental performance of multinationals, the main players of FDI, through national legal and policy frameworks and bilateral treaty negotiations is growing in urgency day by day in the face of evidences of negative impacts of their performance on the environment, particularly in developing host countries (Chapter 5). Although the developed economies are ahead in this race in terms of their legal preparations which are already in place, the developing and least-developed host states are coming forward with special attention towards FDI operations having environmental implications. Reviewing the existing legal arrangements, this thesis finds that core FDI legislation in Bangladesh is devoid of any responsibility principle for environmental performance, and there are no separate guiding principles for FDI environmental performance (Chapter 5). The responsibility principle has recently been

[4] *The Foreign Private Investment (Promotion and Protection) Act* 1980 (Bangladesh), s.8 (1) (2).

accommodated in a BIT between Bangladesh and Denmark in pursuance of a Model BIT text adopted in 2009.[5]

The national legal framework established by ECA 1995 and ECR 1997 appears to be inadequate and suffers legal gaps and loopholes in terms of a sound and strong environmental regulation. It lacks substantive principles addressing the wide range of waste management and compliance mechanisms, including mandatory auditing and compliance monitoring, and a public reporting and accountability regime (Chapter 5). The mandatory EIA system suffers legal specificity in terms of its substantive nature.[6] The element of social impact assessment is not properly accommodated. Similarly, the mandatory EMP system does not include the large area of waste management plans.[7]

The regulatory mechanisms mandated by the law are not proved to be effective for the enforcement of environmental regulation because of diverse problems. The MOEF lacks coordination in intra-ministerial activities and the institutional capacity to address environmental problems. DoE as the main regulatory body has played many roles for the enforcement of environmental regulation, most importantly the development of an EIA guideline and inspection and monitoring system (Chapter 5). It nevertheless suffers from the lack of regulatory and institutional capacity, lack of inter-agency links, procedural inefficiency, lack of in-house skilled and efficient professionals, and regulatory limitation (Chapter 5). The judicial mechanism as established by the *Environment Court Act 2000* is obviously a new addition to the enforcement mechanism. But the litigation opportunity for individuals under this court is limited because of the scope of intermediary bureaucratic intervention.[8]

To sum up, the existing environmental legal and regulatory mechanisms are not adequate and strong for the proper regulation of investment operation in general and foreign investment in particular, and they are not duly enforced. This calls for redesigning or modifying existing legal framework with categorical specification environmental accountability for foreign investment operation. Similarly, it calls for narrowing the gap between law and enforcement by strengthening the enforcement mechanisms.

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[5] The Model BIT is titled *The Reciprocal Agreement on the Promotion and Protection of Foreign Direct Investment between Bangladesh and Others, 2009*. Article 4 of the text deals with the environmental accountability of the investors.
[6] See *The Environment Conservation Rules 1997* (Bangladesh), s.7.
[7] Ibid.
[8] See *The Environment Court Act 2000* (Bangladesh), s.5 (3).

8.6 Inadequate Protection for Human Rights

The legal responsibility of MNCs and the development agencies for the protection of human rights in their investment operations is a growing concern today. The protection of human rights is indispensable for attaining the development objective of FDI. In this context the study has reviewed the existing legal regime in Bangladesh with respect to the protection of human rights with special reference to labour rights and right to involuntary resettlement which are often and potentially affected by FDI operations of MNCs and development agencies.

The study finds that the core FDI legislation has no reference to responsibility for the protection of human rights by the investors in general (Chapter 6). However, the recently drafted model BIT text in Bangladesh incorporates a provision relating to the protection of human health and security that covers the human rights issue in part (Chapter 6). The *Constitution of Bangladesh* only attributes the responsibility for the protection and promotion of human rights to the state, not to any non-state entity even indirectly.[9]

The protection regime of labour rights is not strong or adequate in national legislations. The BLA 2006 falls short of international standards in relation to freedom of association and collective bargaining, and equality in employment due to certain restrictive approaches. The legal framework of OSH appears to be comprehensive, but not focused in line with international standards. In addition, there are inconsistencies between laws and enforcement mechanisms. Compliance measures and enforcement mechanisms are not strong enough to implement and protect labour and employment rights. This is because the internal monitoring and inspections are uncoordinated, poorly-staffed, and the obligation for periodic monitoring is absent in the legal framework (Chapter 6). Moreover, judicial procedures are lengthy and time-consuming and reportedly employer-biased.

The law applicable law for EPZs workers does not truly recognise workers' rights to freedom of association, collective bargaining, and international standards of setting minimum wages. The law does not even permit establishing any labour court. Workers have little confidence in the prevalent arbitration system for dispute settlement between workers and employers.

[9] See *The Constitution of People's Republic of Bangladesh* (1972), arts. 81-84.

As regards involuntary resettlement the study finds that no specific policy or legal framework has been developed as yet. The legal framework established by the ARIPO 1982 is not focused on the protection of rights related to involuntary resettlement. It has legal deficiencies in terms of international human rights standards regarding issues of prior consent of the affected persons for relocation, adequate rehabilitation, and compensation measures. The law under ARIPO curtails the right to access to justice by imposing restriction on judicial remedy in dispute resolution arising out of compensation. Likewise, in the special legislations of the CHT district, the focus on indigenous people's participation in the acquisition or requisition of their land or industrial plot allotment is absent.

Finally, it is expedient to say that the issue of human rights protection, particularly labour rights and the right to resettlement is still not a consideration in formulating the legal framework. Thus reforms in the legal framework are required in view of the protection of the human rights of those affected by investment operations.

8.7 The Interests of Host States to be Accommodated in Legal Protection of FDI

The legal protection of FDI involves two main elements, protection against illegal expropriation and protection through dispute settlement mechanisms. The protection regime for foreign investment in a country should be formulated in such a way that it accommodates the interests of host states. The study finds that the expropriation principle under the FPIA 1980, although not very categorical or comprehensive, creates a check and balance between the interests of investors and host states as it provides a wide range of prohibitions and conditional permissions (Chapter 7). But in the case of conditional permission the law still follows the contentious and traditional 'Hall formula' which was historically designed for the protection of the interests of the North investors.[10] Therefore, the principle relating to compensation requires a change in terms of the method of calculation of amount in consideration of host state interests at a given time.

The dispute settlement mechanism is not provided by FDI legislation and there is no specific policy guideline in this context. It is determined by the BIT negotiations or individual investment contract with foreign parties. The study finds that most BITs of Bangladesh traditionally provide for three common options such as conciliation, litigation in the local courts or arbitration, or international arbitration, which are to be invoked in a consecutive

[10] M Rafiqul Islam, *International Trade Law* (Law Book Company, Australia, 1999) 246.

way. But in the event of a conflict of perceived interests foreign investors are reluctant to invoke remedies under local courts or arbitration; they mostly prefer international arbitration. Conversely, the Government of Bangladesh, or any local partner of foreign investors, maintains a reluctant attitude towards international arbitration, alleging that it is investor-biased and ignorant of host state development interests. Under such a situation the introduction of a binding provision for dispute settlement is required with a pre-condition of the exhaustion of local remedies on the basis of mutual agreement of the parties.

8.8 Recommendations for a Development-oriented Legal Regime

This thesis makes some general and specific proposals for modifications, changes and additions into the existing legal regime to make it development-oriented for attaining the objective goal from FDI in Bangladesh.

8.8.1 Entry regulation

Proposal 1: Adoption of a screening policy by BoI and BEPZA

The BoI and BEPZA as administering agencies for foreign investment should adopt a concrete screening policy for the approval of FDI proposal. The screening policy must pursue the considerations as suggested in the section 3 of the FPIA 1980 that include the possibility of foreign investment to contribute to the employment opportunity, development of capital, technical and managerial resources, discovery and better utilisation of natural resources, and strengthening the balance of payment and economic development of the country on the whole. The screening must have regard for the impact of foreign investment on the local economy.

Proposal 2: Imposing mandatory screening in high-tech, environmentally risky and innovative industries

According to the NIP 2005 requirement of strict screening of technology brought in by foreign investors, BoI and BEPZA should introduce a mandatory screening system before it approves any application for investment in high-tech, environmentally risky, and innovative industries. This policy proposal needs to be translated into legal principle either in the FPIA 1980 or in the ECA 1995.

Proposal 3: Introducing an entry requirement as a pre-condition for incentives in NIP and other policies

The NIP and newly adopted *Energy Policy 2005* offer unconditional fiscal and non-fiscal incentives. To make them benefit-driven the incentive policies should be redesigned with the condition of the fulfillment of certain entry requirements relating to green investment, use of local raw materials, sustainable use of energy and human skill development etc.

8.8.2 Fiscal and financial incentives

Proposal 1: Limitation on tax deduction and exemption scope under the *Income Tax Ordinance* 1984

A. Curtailing tax holidays and introducing reduced corporate tax in industrial undertakings

The facility for tax holidays should be limited to outside the two main cities of Bangladesh, Dhaka and Chittagong. As for eligibility criteria, the tax holidays should be granted only to labor-intensive industrial sectors in the regional divisions. The duration and percentage of the reduction should be comparable with similar or neighboring economies.

B. Introducing tax credits and investment allowance for reinvestment or extension of existing projects

As the tax holiday facility has proved to be misused enormously or has the potential to be misused in the case of reinvestment or extension of projects, the tax credit system or investment allowance can be introduced instead. The duration of the tax credit and investment allowance should be on the basis of the size of the industry and the valuation of the assets.

C. Introducing separate rules regulating the tax exemption facility

A legal provision in the framework of tax deduction under the *Income Tax Ordinance 1984* should be introduced empowering the NBR to make rules regulating the commencement, operation, and termination of tax deduction. Alternatively a separate schedule can be added in the Ordinance on the operational procedure of the tax deduction.

D. Introducing a compliance monitoring measure in the legal framework

As there is still the lack of a compliance monitoring system for continuing qualifying requirements, one should be introduced in the existing regulatory framework. Under this provision, a tax privilege may come to an end in the event of failure to comply with ongoing qualifying conditions as well as in the event of a violation.

E. *Conditional tax deduction from export-oriented industries in the EPZ*

The export-oriented industries in the EPZ areas enjoy plenty of fiscal facilities at the advantage of being located in special industrial zone and export-oriented entity. A policy should be determined that fiscal incentives will be based on their level of exports and the same time the import of foreign raw materials by the companies has to be limited on their availability from the local sources.

F. *Introducing a permanent review committee or cell for fiscal incentives*

Although the NBR enjoys the jurisdiction of tax collection, deduction and exemptions, a permanent review committee or cell should be formed under NBR to assess the impact, effects and compliance rate of fiscal incentives.

Proposal 2: Changes in the provision of repatriation under FDI legislation

The provision for the permission of free repatriation of profits under section 8 of the FPIA 1980 should be modified with the condition of 'after payment of corporate income tax and the fulfillment of other financial obligations'. The amount of tax may be any percent of the profit transferred depending on the level of capital contribution of such investors from his own source (home country and loan in abroad) to the enterprise. The amount of reinvestment will not be taxable and during the tax exemption period the profit transfer should be conditional with re-investment in the project or specific ratio. The issue of repatriation at the event of liquidation should be added as legal provision in the FPIA 1980 with the requirement of compliance with the provision of existing *Company Act 1994*.

In addition, under section 8(2) of FPIA 1980 the phrase ‘exceptional financial and economic difficulties’ needs to be categorically defined to be consistent with commonly used international terminologies in the said respect.

8.8.3 Environmental regulation

Proposal 1: Introducing an accountability principle in the FPIA 1980

A specific provision attributing the responsibility for compliance with national environmental legislations should be introduced in the FPIA 1980.

Proposal 2: Adoption of an environmental guideline for FDI by the BoI

The BoI may introduce an environmental guideline for foreign investment. The guideline should introduce the policy for restriction on the approval of FDI project having the potential risk to pollute the environment and destroy the natural resources, or impair the health of human beings. It should include pre-approval screening and a post-approval inspection, audit, and waste management policy and also an implementation guideline to be effected by BoI in conjunction with an inter-ministerial environmental body. The guideline should be based on the principles of National Treatment (NT).

Proposal 3: Some reforms in the ECA 1995 and ECR 1997

A. The ECA 1995 and ECR 1997 need to be redesigned in order to be consistent with contemporary global changes in relation to environmental regulation. It should incorporate comprehensive provisions relating to a concrete waste management policy, mandatory audit and compliance monitoring system, accountability and compensation for violations, and incentives for investment in the reduction of greenhouse gas emissions and environment-friendly technology transfer.
B. There should be a clear and specific substantive principle relating to conducting EIAs with a mandatory local consultation and public reporting provision.
C. The application of 3R principles should be incorporated into the waste management system.

Proposal 4: Formation of an environmental regulatory cell under the BoI

As the BoI is the main governmental agency to deal with the activities of local and foreign investment, a provision for establishing a special regulatory cell can be incorporated in ECR 1997 with jurisdictional description to work in conjunction with the DoE to supervise, inspect, and review the environmental performance of industrial undertakings or physical infrastructural establishments.

Proposal 5: Strengthening environmental courts under the *Environment Court Act 2000*

The existing environmental courts established under the said Act need to be strengthened with the expansion of civil and criminal jurisdiction, including administrative negligence and the right of direct prosecution or litigation by the victims.

Proposal 6: Redefining environmental accountability issues in the BIT model text

Since in the recently adopted BIT model text the environmental accountability issue is not broadly defined, it needs to be redefined in a comprehensive way in line with internationally recognised environmental responsibility standard under different soft law regimes.

Proposal 7: Implementation of policies under NIP 2010

Some legal and regulatory measures need to be undertaken for the implementation of the environmental policy under NIP 2010 particularly in respect of environmentally-friendly transfer of technology.

8.8.4 Development of human rights accountability of investors

Proposal 1: Specific provision in FDI law with regard to the protection of human rights

There must be a provision in the FDI legislation attributing the responsibility to foreign investors for the protection of human rights in their operations. The provision may categorically state their responsibility to comply with international labour standards under ILO Conventions endorsed by their home countries and also recognised by the Constitution of the People’s Republic of Bangladesh. In addition, it may lay down the general principles for obligation for the protection or respect for international human rights, including the honour, dignity and traditional customs of the society in Bangladesh.

Proposal 2: Modifications in the BLA 2006

A. In relation to right to the freedom of association and collective bargaining the statutory principles under this Act must be consistent with international standards as set forth by ILO Conventions. Therefore the principles restricting the formation of trade unions and the rights to collective bargaining should be amended or repealed.

B. There should be a specific accountability regime with regard to the protection of OSH in the Act.

C. The provision relating to mandatory compliance monitoring and reporting should be introduced in the legal framework of labour rights.

Proposal 3: Revising or merging applicable labour legislation in EPZs

A. The EPZs *Workers Welfare Association and Industrial Relation Act* 2010 should be amended to recognise the right to freedom of association and collective bargaining and the right to a minimum wage in the fullest way in line with international standards.

B. Alternatively, the Act can be abolished or merged with the BLA 2006.

Proposal 4: Adopting policy and legislative reforms for involuntary resettlement

A national policy or guidelines should be adopted for the resettlement of the people affected by development, mining or manufacturing projects. The policy should comprise of the potential environmental impact of the projects, impact of relocation of the people, free consent and consultation with the potentially relocated people, their options for relocation, and their rights pertaining to resettlement.

Proposal 5: Modifications in ARIPO 1982

A. The legal framework of land acquisition and requisition under ARIPO 1982 should be modified by incorporating the components of human rights pertaining to resettlement, such as the free consent of the owners of the land, options for resettlement, adequate compensation and options for resettlement, and the right to legal protection against arbitrary decisions of the authority dealing with acquisition.

B. The term 'public purpose' under ARIPO should be explained to remove its jurisdictional ambiguity.

C. A legal framework should be introduced for the acquisition of land for commercial purposes by local or foreign investors.

8.8.5 Modifications and amendments to the FPIA 1980

Proposal 1: The formulation of a comprehensive legal framework under the FPIA 1980

In order to be comprehensive, the legal framework under the FPIA 1980 should consist of both substantive and procedural principles. The principles should include issues relating to the forms of investments with the mention of conditions from the development perspective, investment guarantee measures (i.e., application of principle of national treatment protection, fair and equitable treatment and full of the person and property of the investor), the rights and obligation of foreign investors, dispute settlements, state management of foreign investment, and implementation of the investment law and contracts.

Proposal 2: Modifications in the existing legal framework of FDI

A. Integration of development-oriented entry requirements

The considerations under section 3 of the FPIA 1980 application for the approvable of investment should give the force of legal binding and therefore the word 'may' needs to be replaced by 'shall'. In addition, employment and the use of local raw materials should be integrated as a condition in the legal framework for fully owned and joint-venture establishments either for authorisation or gaining advantages. In the case of a joint venture, the foreign partner's contribution to capital as well as transfer of technology should be given priority. Fully foreign-owned capital must give priority to purchasing equipment, machinery, materials, and means of transport in Bangladesh where the technical and commercial conditions are similar.

B. Change in the principle relating to compensation

The Hall formula of 'adequate compensation should be changed with 'appropriate compensation' provision with a condition to be determined on a case basis including the computation method that considers all local dues to the expropriated entity.

C. Introducing a provision relating to dispute settlement

There should a specific provision in the FDI legislation in regard to the dispute settlement method for legal certainty and uniformity. The principle of law may suggest for the inter-party resolution of a dispute, exhaustion of the local arbitral or judicial process, or the application of international arbitration with precise and specific terms and conditions. It may also propose for establishing a specialised economic court as in China with the jurisdiction of settling foreign investment disputes.

8.8.6 Recommendations for negotiating elements in BITs

As a BIT is the obligation-creating document between states which is followed in the subsequent individual investment contracts, those negotiating on behalf of Bangladesh should base their negotiation on the developments aspects of FDI in relation to admission, incentives, and environmental and human rights protection. To give these issues a perpetual character these should be introduced in the BIT model text.

8.9 Research Outcome

The research undertaken for this thesis has explored the absence and inadequacies of the consideration of development aspects in the existing legal and policy frameworks in Bangladesh for foreign investment, and thus established that the idea of regulation for development has not been pursued in the applied laws, policies and agreements. It therefore has presented some concrete proposals for the integration of development issues in relevant laws and policies, including the BIT model text pertaining to admission, investment protection, incentives and fiscal regulation, capital control and environmental and human rights protection.

The idea of regulation for development was the dominant point in the legal and policy analysis of the whole thesis on the premise that the traditional liberalised approach is attractive for investors, but not supportive of development in a real sense. The legal and policy analysis has been able to demonstrate the exigency of concurrent development-oriented regulation for FDI to derive its real benefit in a host country. The idea of regulation for development is a new concept in legal analysis in the context of FDI regulation in developing and least-developed countries. This thesis therefore becomes an original contribution to international FDI literature as well as to the development of a process of thought to review the FDI legal texts and polices that will eventually lead to the formulation of development-oriented FDI laws and policies.

To be specific, this research will contribute to the development of law, legal knowledge, and scholarship from specific and wider perspectives. From the perspective of Bangladesh, firstly the established idea of regulation will act as a guiding element to influence legal and policy issues of FDI in Bangladesh; secondly, the concept of development-oriented regulation of FDI will help the policy-makers and concerned governmental agencies to change their mindsets in the legal operation of FDI; thirdly, the recommendations outlined above for bringing changes in the regulatory regime, will enable the policy-makers, legislators, and government officials to pursue them in the formulation and improvement of legal and policy frameworks as well as concluding investment agreements; fourthly, it will contribute to the development of understanding and knowledge about FDI regulation for lawyers, legal academics, economists and bureaucrats.

From a wider perspective, firstly it will act as a lesson for similar economies in the formulation of their FDI law and policies and encourage them to review their existing laws from the viewpoint of development-oriented regulation. Secondly, this legal scholarship as a part of international FDI literature may have an impact in the rule-making process of global FDI regulation for development.

Above all the accumulated focus on the development-oriented regulation under this thesis will further encourage academic research on any issue of it in future.

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Appendix 1

Agreement on the Promotion and Reciprocal Protection of Investments between… and the Government of the People's Republic of Bangladesh (Model BIT)

Appendix 2

The Arbitration Act, 2001

Appendix 3

Model Production Sharing Contract (PSC) 2008