Legal Regime of Foreign Direct Investment in Bangladesh: A Critical Analysis

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Abstract

Foreign Direct Investment (FDI) is a potent weapon of economic growth, especially in the current global context. Economic development for the Least Developed Countries (LDC) or developing countries like Bangladesh is mostly dependent on FDI, which remained insignificant until 1993s. In the past twenty years, FDI has become the main focus for Bangladesh, and despite the FDI receptive strategies of the government; arguably, the result achieved so far as is not highly appreciable enough for Bangladesh. Previous Research primarily relied on investigating the impact of certain macroeconomic variables on FDI and thus has been unable to extricate challenges faced by Foreign Investors. To test this gap, laws and policies have been chosen, from the different variables of FDI, as the vital ones. We used nominal and ordinal data to integrate the relationship between the effectiveness of law and the rate of FDI. Loopholes of different statutes have been portrayed to clarify the real scenario of FDI in Bangladesh. The efficacy of the existing forum of dispute resolution has been analysed critically; to justify the role of domestic courts and ICSID, in attracting more frequent investments. Our Findings will indicate that effective laws can preserve the legal rights of foreign investors while keeping its domination and negative effects to a minimum and increase FDI inflows in Bangladesh.

Keywords: FDI, Legal Regime, ICSID, Arbitration, Treaty.

1.0 Introduction

The growing competition for FDI is certain to have an impact on the course of economic development and will encourage the pursuit of continued reforms to improve the investment climate and attract greater foreign investment. The combination of factors as the presence of strategic resources, highly skilled workers available at a low cost, comparatively well-developed infrastructure undoubtedly confers advantages on the

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countries like Bangladesh in attracting FDI. However, experience has shown that the existence of these factors alone is not enough and that it is essential to carry out comprehensive structural reforms and to have active government policies and laws on attracting foreign investments.

The major objectives of this paper are to point out the different statutes, policies, and regulations that govern investment in Bangladesh, to identify the impact and loopholes of present statutes in changing the rate of FDI, and to identify the scope of dispute settlement under the present statutes and to assess the role of Domestic Court.

Both primary and secondary data were collected from different sources. Primary data was gathered from personal visits to different organizations and through the internet. A large number of UNCTAD reports, newspaper reports, policy papers, books on comparative study of Foreign Direct Investment, public recordings, journal of universities have been reviewed critically. Both structured and unstructured interviews were conducted in October 2019 and January – March 2020. Collected data were compared and analysed according to the main object. Collected information was divided into different segments according to the aim of the research.

2.0 The Concept of FDI

Foreign Direct Investment develops a relationship between the direct investor and the enterprise. It shows the dealings between different enterprises. The basic components of FDI are equity capital, reinvested earnings, and intra-company loans. 'Equity-capital' means to purchase shares of an enterprise by the foreign investors. Reinvested earnings denote the earnings which are not distributed as dividends. In reinvested earnings, profits are reinvested by the affiliates. On the other hand, an intra-firm loan refers to borrowing and lending capital between parent and affiliated enterprises. FDI includes the transfer of assets (both tangible and intangible) from one country to another[3] and where the owner of assets can exercise their control. In another way, FDI denotes long-lasting relationships and interest sharing between two entities. This also involves initial transaction and subsequent transaction between affiliated corporations both incorporated and unincorporated. FDI encompasses capital that is provided by a foreign direct investor to an enterprise or capital that is received from an investing enterprise by a foreign direct investor.[4] Generally, the idea of foreign investment is at variance with

[3] M. Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 8.

Portfolio investment which can be differentiated in terms of ownership in share[5] and control in management. Though from the point of taking risk[6] and giving protection there is no distinction between foreign direct investment and portfolio investment but we find a tendency to broaden the scope while defining foreign direct investment.[7]

3.0 Sources of International Law on Foreign Investment

There is no comprehensive and codified law on Foreign Direct Investment. The sources of international law are the basis of 'international law on foreign investment'. Indeed, article 38(2) of the ICJ Statute is the core point to understand the legal regime (international) of Foreign Direct Investment. The sources are treaties, custom, general principles of law, and judicial decisions. *Firstly*, multilateral treaties are a widely accepted source of international law. There are several regional treaties like the NAFTA & ASEAN Treaty, which give the investors the right to invoke arbitration and provide restrictions against the host state. There are almost 3000 bilateral treaties on investment which form customary international law.[8] *Secondly*, custom is an 'unsettled and debated notion in international law' but most of the times, the international community highly accept this. But, the number of customs in the field of foreign investment is very nominal. That any principle explained in the resolution of the General Assembly will form a base of instant customary international law.[9] However, developed states[10] deny the effects of the law creating resolution. *Thirdly*, general principles of law are the third source of international law. Many states try to follow certain principles, for example, 'payment of compensation upon expropriation of foreign property', which is a general principle of law.[11] General principles also got

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4 <https://unctad.org/system/files/official-document/wir2007p4_en.pdf> accessed 25 August 2020. See also <https://ec.europa.eu/eurostat/statistics-explained/index.php/World_direct_ investment_ patterns> accessed 25 August 2020.

5 Edward H Graham and Paul R Krugman, *Foreign Direct Investment in the United Sta*tes (3rd edn, Peterson Institute Press 1995) 7.

6 Ian Brownlie, 'Treatment of Aliens: Assumption of Risk and International Law' in Wener Flume and others (eds), *International Law and Economic Order: Essays in Honour of F.A Mann* (4th edn, München : Beck 1977) 310.

7 Kenneth J. Vandevelde, *United States Investment Treaties* (7th edn, Deventer: Kluwer Law and Txation 1992) 261.

8 F. A. Mann, 'British Treaties for the Promotion and Protection of Foreign Investments' (1981) 52 BYIL 241.

9 B. Cheng, 'United Nations Resolutions on Outer Space: Instant International Customary Law' (1965) 5 IJIL 23.

10 Nicaragua Case [1986] ICJ Reports 14 at 99-100.

11 Chorzow Factory Case [1928] PCIJ Series A No. 17, p 29.

its recognition by Arbitral Tribunal. Still, there are few controversies in respect of accepting certain norms like the sanctity of contract. But any principle in respect of protection and promotion of foreign investment proceeds from consensual approaches of states is highly acceptable. *Fourthly*, judicial decisions, in shaping principle on foreign investment, have an immense influence. For example, in *Chorzow Factory* case,[12] the issue of giving compensation in case of appropriation of property by the host state was decided. In *Barcelona Traction* case, diplomatic protection of shareholders was decided.[13] Very recently, in *Diallo v Congo*[14] case, the question of corporate nationality was determined by the tribunal.

3.1 Legal and Policy Framework on FDI in Bangladesh

3.1.1 Application of Company Act 1994

Two types of legal entities can be formed (public limited and private limited company) under the Company Act 1994. A limited company can be owned by the foreign investors. A public limited company, to raise its fund, can invite the public. In the case of both public and private company, the maximum allowed ownership is a hundred percent. *Firstly*, without being registered, no company can launch its business and to obtain registration the company must have to file an application accompanied by three documents namely Memorandum of Association (MoA), Article of Association (AoA), and any special agreement with the Registrar of Companies.[15] *Secondly*, the proposed company needs to open a bank account subject to making inward remittance ($50000). *Thirdly*, the company needs to submit all necessary documents to RJSC and gets an Incorporation Certificate. After receiving the certificate, the company needs to collect its TIN and VAT certificate. Subject to the approval of the BIDA, the branch office and liaison office can run its commercial activities. Similarly, if any company is willing to adopt a merger and acquisition policy then obviously seeking court's approval is mandatory.[16]

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[12] [1928] PCIJ Series A No. 17.

[13] [1970] ICJ Reports 1.

[14] [2008] ICJ Reports.

[15] The Company Act 1994, s 33.

[16] ibid, ss 12 &14.

3.1.2 Foreign Private Investment (Promotion and Protection) Act 1980

The Foreign Private Investment (Promotion and Protection) Act of 1980 is the first Act adopted to invite foreign investors and to speed up the promotion and protection of foreign private investment. Under article 4, the country is committed to providing fair and equitable treatment, which must be absolute in its true notion, to all foreign and private investors. Interpretation of the terms 'fair and equitable' depends on a particular treaty and manifest intention of the parties. It also includes the protection of foreign property.[17] In *Maffezzini v Spain*, a tribunal held that a more favourable provision of any treaty made by a party would flow through the most favoured nation clause in treaty. Article 5 assures that there will not be any unilateral change of any term or condition under which the industrial undertaking got its sanction. The government shall maintain a non-discriminatory approach for all the investors. What type of non-discriminatory behaviour shall be followed is not described; it depends on the terms and conditions of the bilateral treaty. According to article 6, the government shall pursue specific principles in case of assessment of indemnification or compensation of losses owing to civil commotion, insurrection, or riot. The same rules will apply to both domestic and foreign investors. Secondly, under article 7, the government is empowered to expropriate the property and this expropriation is not always confined to the transfer of property. This is to ensure the ownership of the local private nationals.

Drawback: Under article 7, there will be no expropriation or nationalization of foreign property except for the public purpose. But this term 'public purpose' has not be defined anywhere in this Act. That means the government may take possession of land property for the interest of the country. This is subject to the rule of natural justice. As this is a matter of concern for the foreign investor, so what will constitute 'public purpose' needs to be clarified. Again expropriation of property must be subject to the payment of compensation. Under the present clause, this should be transparent and compensation needs be adequate or just. Similarly, article 8 guarantees repatriation of investment. But this is vague indeed.

3.1.3 Investment Board Act 1989

The main purpose of the Act is to facilitate foreign investment and to play its role as guidance for foreign investors. Section 6 of this Act delineates

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[17] Draft Convention on the Protection of Foreign Property by the OECD Council on 12 October 1967.

the process or condition of forming investment board. Functions of this board[18] include giving all sorts of opportunities to both domestic and foreign investors, implementing policy on capital investment, providing schedule, approving and confirming registration of industries, creating advantages based on structure, determining condition for employment, and implementing the strategy of transferring technology. The FPIPPA of 1980 does not describe the condition of registration but the section 10 of the Investment Board Act states the procedure of registration for industrial undertakings. This procedure is pertinent to only in the case of the non-governmental sector. Section 10 is not relevant for BEPZA or industries under the Small and Cottage Industries Act. Here, the investment board is the competent authority to grant a license under section 11 of the Act. Before granting a license the board shall follow strict regulations including, ascertaining conditions on determining foreigner's credit and supplier's credit, allocating lands, ascertaining period on providing, and enjoying different types of facilities. Section 18 delineates the requisition of land for industrial undertakings. Lastly, registration and licensing with the Bangladesh Investment Development Authority (BIDA) are applicable for joint ventures and national investors too. Registration is mandatory in the sense that only registered industrial undertakings can enjoy tax and non-tax incentives.

Drawback: Only those industrial undertakings described in National Industrial Policy 2010 can enjoy and seek services from the Board of Investment (now Bangladesh Investment Development Authority). But what will be the place for other industrial undertakings? One of the visible loopholes of this statute is not citing the providence of certain projects under foreign ownership.

3.1.4 BEPZA Act 1980

The prime purpose of this enactment is to create, manage, and develop the export processing zone of Bangladesh by the Export Processing Zone Authority. Section 7 enumerates the function of the authority, which includes taking possession of land to create and develop a zone, to allot land to the investors, and to provide necessary facilities. Under section 5A, a board is formed and empowered to formulate different policies, to review activities of the Executive Board, and to issue instructions for effective management. There are three different types of committees namely, executive, consultative, and post sanction clearance committee and the committees will work together for the smooth function of the board. The executive committee is empowered to take possession of land and allot

[18] The Investment Board Act 1989, s 7.

land to investors on sale, lease, or on rent and to allow them to mortgage.[19] Under section 6B, the executive committee shall support the executive board in matters of registration of companies, issuing capital and conducting foreign exchange transactions. One of the significant features of this Act is ensuring accountability and transparency from the part of the authority.

Drawback: The Act has no specific provisions for describing series of industries, which we can establish. To regulate the labour issues both for Bangladeshi workers and for foreign workers, the provisions under the Charter of the ILO, Labour Code 2006 are applicable. Some other regulations also bear the provision on labour issues, for example, the Export Processing Zones Workers Union and Industrial Relations Act 2004, the Export Processing Zones Authority Act 1980, and several instructions from BEPZA. The authority is bound to follow this too.

3.1.5 Export Processing Zones Workers Union and Industrial Relations Act 2004

This Act covers certain issues like freedom of association, collective bargaining, and industrial relation. That means to rely on certain ILO conventions, for example, Convention 87 (freedom of association), 98 (collective bargaining), 29 (abolition of forced labour), 100 & 111 (non-discrimination in employment and remuneration). Generally, BEPZA controls the foreign workers working in this area and obeys the core principles of ILO, and provisions of Labour Code 2006. This Act also reflects the basic principles suggested by the UN. Unfortunately, sometimes the government restricts workers' right to form a union for collective bargaining in the export processing zones and TNCs, as a prerequisite for investment, ask for imposing restriction[20] on the workers.

3.1.6 Bangladesh Economic Zones Act 2010

This Act is applicable both for foreign investors and domestic investors. The basic purpose of this Act is to establish economic zones in underdeveloped areas and to foster economic development through diversification of industry and export zone. The government can establish four kinds of economic zone. Generally, public or private ownership-based economic zone (foreign individual can be a part there), private economic zone (non-resident individual or foreign investors), government

[19] The BEPZA Act 1980, s 7.

[20] UN Submission on Human Rights 1995, TUAC, FDI and Labor standards.

economic zone, and special economic zone are vital ones.[21] The government is empowered to select sites and declare accordingly.[22] The government shall acquire land for establishing an economic zone[23] and can announce special tariff benefits for this zone. Authority will facilitate the way of getting different certificates. If any economic zone developer violates any condition, then the authority may cancel the certificate.

Drawback: But there is no provision to fight against foreign investors in case, they fail to keep their commitment under this statue.

3.1.7 Bangladesh Investment Development Authority (BIDA) Act 2016

Encouraging local and foreign investment in the private sector and providing necessary facilities in establishing industries, are the prime purposes of the Act. BIDA will provide[24] facilities to local and foreign investors. *Firstly*, BIDA can exercise its power to implement government policy (in respect of private investment), create schedule of investment, grant approval of projects, take necessary steps for facilitating investment, and identify different sectors of investments. *Secondly*, there must be an executive body that will be responsible for implementing decisions taken by the governing bodies. *Thirdly*, under section 16, the government will provide a one-stop service. If there is a violation of any term of the contract, the government will take possession of distributed land.[25]

Drawback: However, if any person is aggrieved, when and how he will file a complaint is not mentioned in this Act.

3.1.8 Bangladesh Small and Cottage Industries Corporation Act 1957

According to the preamble of the Act, the purpose of this enactment is to promote development in small and cottage industries. Almost forty-six provisions of this Act deals with few topics like functions of the corporation, rule of tax exemption, procedure of granting a loan in foreign currency etc. The government is empowered to create a room for foreign investment under this Act. Lastly, the corporation may form rules to implement the objectives of this Act.

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[21] The Bangladesh Economic Zones Act 2010, s 4.

[22] ibid, s 5.

[23] ibid, s 6.

[24] ibid, s 8.

[25] ibid, s 27.

3.1.9 Foreign Exchange Regulation Act 1947 & Guideline for Foreign Exchange Transaction 2009

As a signatory state of IMF, Bangladesh applies strict rules and regulations in respect of foreign exchange transactions. FPIPPA affirms the right of repatriation, and one can exercise this right under this Act. Generally, authorized dealers can remit profit and dividends and check relevant documents. Here documents include audit balance sheet, information on outstanding debt. In case of repatriation (capital /capital gains) by foreign-owned companies, strict reporting system needs to follow. But without prior approval of Bangladesh Bank, one can repatriate any proceeds from sales of securities. The same regulation will apply in case of transaction of payment of royalties and transfer of assets. Foreign-owned company can borrow domestically but subject to prior approval of the Bank. The foreign-owned company established in an economic zone can retain a hundred percent of their earnings in their local foreign exchange account. Above all, foreign-owned company needs to comply with strict rules under this Act.

3.1.10 The National Drug Policy 2005 and the Drugs Control Ordinance 1982

The Drug Control Ordinance 1982 deals with certain issues which covers the registration of medicines, cancellation or suspension of registration, prohibition of manufacture of certain medicines, fixation of price of drugs, penalty for manufacture of a certain drug, the penalty for manufacture, stock, or sale of sub-standard drugs, etc. Before the promulgation of this ordinance eight multinational companies dominated this sector. This is a potential sector for the foreign investors but the government should revise existing policy to attract more FDI inflows. There are certain restrictions in importing raw materials; this creates hardship for the importers. To accelerate the purpose of this ordinance there shall be a drug control committee; consist of a chairman and such other members as the committee may appoint from time to time.[26] But the committee should empower to deal with foreign investors.

3.1.11 Public-Private Partnership (PPP) Act 2015

This Act creates a new structure of investment, which will encourage both private and foreign investment. Under section 4, the government is empowered to establish a public-private partnership authority. The

[26] The National Drugs Control Ordinance 1982, s 4.

authority can exercise extensive[27] power to issue policy related to public-private partnership, to resolve any dispute, to develop PP model, to select zone, to approve different projects, to assist in selecting the project, and to execute the project. But overall, management and arbitration is vested in the Board of Governors. The contracting authority is bound to seek assistance from the PP authority in respect of getting approval or scrutinizing documents.[28] The government can provide incentives[29] to the investors to encourage investment. Under section 26, the conditions that need to be complied with are environmental requirements, performance requirement and technical specification. The Act provides a scope of dispute resolution by mutual agreement or by expert mediator or through arbitration.[30] Exhaustion of remedies under this section is mandatory; otherwise an aggrieved party can file any suit directly either in national court or in international court.

3.1.12 Tax Holiday under Income Tax Ordinance 1984

There are 21 sectors where tax holiday is available, and few of which are Active Pharmaceutical Ingredients (API) and radio-pharmaceuticals, automobile manufacturing, barrier contraceptive and rubber latex, basic chemicals or dyes, and chemicals. The government may, through proper notification, extend the zone of tax holiday.

The Foreign investors can enjoy the following incentives:

a) Tax holiday for 5 to 7 years.

b) Corporate income tax exemption for 15 years (power sector).

c) Few sectors, for example, royalties, technical know-how, technical assistance fees and facilities, and on interest of foreign loan, capital gain from transfer of shares, the investor will enjoy tax exemption.

3.1.13 Arbitration Act 2001

The Arbitration Act 2001 is to remove mischief of the previous statute 1940. This Act is an alternative to handling civil cases. UNCITRAL model law was the guideline in adopting this statue. Section 9 of this Act discusses about arbitration agreement. One can invoke the jurisdiction of the tribunal at any time before filing a written statement.[31] Under this Act

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27 The Public-Private Partnership (PPP) Act 2015, s 9.

28 ibid, s 12.

29 ibid, s 17.

30 ibid, s 30.

31 The Arbitration Act 2001, s 10.

the tribunal shall not follow the Code of Civil Procedure and the Evidence Act, as a part of procedure. The court shall enforce any such foreign arbitral award and will follow the same manner applicable for the execution of the decree of the court.

3.2 Policy for Foreign Investment

The government first announced a comprehensive industrial policy in 1999. The main features are such as creating a production-based economy by speeding up investment both foreign and domestic, playing the role of a facilitator by the government, attracting FDI in export-oriented industries, increasing export of manufactures, encouraging balanced industrial development, rehabilitating deserving risk factors of industries, coordinating trade and fiscal policies. Secondly, National Investment Policy 2005 was adopted to increase investment. This policy is to overcome some shortcomings of the FPIPP Act. But there is no specific norm for dispute resolution, and the terms demand for extensive explanation indeed. Under this investment policy, investors should provide adequate information. According to Industrial Policy 2010, if any foreign investor wants to invest in any of seventeen controlled industries under this policy, must seek approval from the ministry. The policy includes industries like infrastructure, electricity etc. National Investment Policy 2010 brings changes to create a friendly environment for foreign investors and to bring a change in the socio-economic development of the country. On the other hand, the National Industrial Policy 2016 framed to reach a target goal. This is a supplementary policy paper. The government adopted an industrial policy in 2010, but the new policy brought some changes with a view to achieving goals. This focuses on productivity and setting up of new types of industries like hi-tech, arts craft. The present IP laid special emphasis on export-oriented and export linkage industries and the government is committed to providing different types of incentives to these industries. The policy emphasizes small and medium scale industries and to implement a time-bound action plan along with industrial growth from 29% to 35%. Some of the key features are: for example, forming small & medium scale industries for industrial development and implementing the time bound action plan of Industrial Policy 2016. The policy also includes establishing an agile and expert industrial and service sector, while keeping the labour force from a specific range of 18% to 25%.

3.2.1 Dispute Resolution Forum for the Investors

Generally, a 'treaty 'begins with a statement that is for reciprocal encouragement and protection of foreign investment. Treaty contains provision on repatriation of profits and compensation for any loss occurred during unrest situation of a country, and rules for settlement of dispute. In many bilateral treaties, there are provisions on forum specifications. Sometimes treaty provides for arbitration as a neutral forum for dispute resolution.[32] In some cases, different clauses are inserted to clarify obligations. Inserted clauses are prescriptive or mandatory in nature, which creates an obligation for the parties to submit the dispute. As a second option, treaty contains a provision that will entitle the parties to submit their dispute unilaterally before the ICSID tribunal.

In many instances, foreign investors lose their confidence in the national court or tribunal of the host state. Hence, bilateral treaties can take a good stance towards resolving disputes. Though for dispute resolution, arbitration is the way, but there is no uniform formula of arbitration. In many treaties, conciliation is mandatory before going for Arbitration. In Asia, most dispute settlement refers to arbitration under the ICSID. Treaties frame in such a way to create jurisdiction under the ICSID tribunal. But a treaty which is only giving reference to arbitration under ICSID will not automatically give jurisdiction to that forum. Rather it will depend on how the words used in the treaty.[33] To justify the submission for arbitration few questions would be tested, for example, (a) whether there is an agreement between the parties or not, (b) whether there is a methodical contemplation to a request for conciliation or arbitration or not, (c)whether there is an agreement obliges the host state to assent for any arbitral proceeding or not. For example, in *Asian Agricultural Products Ltd (AAPL) v Sri Lanka*, for the first time ICSID assumed its jurisdiction based on an investment treaty, which was concluded between UK and Sri Lanka.[34]

3.2.2 Exhaustion of Local Remedies and Arbitration

Under some treaties, resorting to international remedies is subject to prior exhaustion of local remedies, or in some cases, there is a time frame within which the party is bound to seek remedy from the domestic court of the

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[32] W. Peters, 'Dispute Settlement Arrangements in investment Treaties' (1991) 22 Netherlands Yearbook of International Law 91.

[33] Aron Broches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, in the Art of Arbitration, Liber Amicorum Pieter Sanders* (Jan C. Schultz & Albert Jan van den Berg eds, 1982) 63, 68-69.

[34] *AMT v Zaire* (1997) 36 ILM 1531; *Tradex v Albania* (199) 14 ICSID Rev 161.

host state. ICJ in the ELSI case observed that the principle of exhausting local remedies is an international principle and that cannot be excluded unless expressly mentioned in the treaty. According to Calvo doctrine, any kind of foreign dispute shall be decided by the domestic court of the host state. If there is a violation of the treaty directly rather than violation of any contract, then the doctrine will be contested. If any treaty gives absolute right of arbitration, in that case dispute may be submitted directly to any arbitration forum.

3.2.3 Bilateral Treaty and Bangladesh

Bangladesh is a party state of ICSID, NYC, and WTO. There is no comprehensive investment law under the present legal regime. Bangladesh has entered into more than 32 bilateral treaties along with double taxation agreements with many developing countries. Generally, the state feels the necessity to make a bilateral treaty to enhance its vigorous position and this is a promise of protection of capital also. Bangladesh is not an exception. Bangladesh is always in favour of bilateral treaties just because of ensuring inflow of foreign investment even the country is not bothered about surrendering sovereignty. All bilateral treaties were made to protect mutual rights and bring out a friendly environment. Generally, in FDI laws there is no provision for dissolving disputes. For most of the FDI dispute resolutions we have rely on bilateral treaty. In 1990 Sapiem (an Italian Company) entered into a contract with Bangladesh and made an allegation under the dispute settlement clause for delaying in completion of the project. After invoking the jurisdiction of ICC, the forum passed its award in favour of Sapiem, which was later challenged by Bangladesh in the High Court Division of Supreme Court. Under article 5(2) of a treaty made between Bangladesh and Sapiem, Sapiem had absolute discretion to submit its dispute to ICSID. Sapiem submitted its dispute to ICSID. ICSID decided that the decision given by HCD was inappropriate as the division deprived the company of getting its benefit by revoking the ICC award. But the court passed an injunction order against Sapiem to invoke jurisdiction of the ICC for having procedural irregularities. Now, the question is what facilitated the Sapiem to submit its dispute to ICSID. Here if we look at the language of the treaty, it created room for this by its undefined[35] and ambiguous term. Even most of the time, definition of investment is varied from treaty to treaty and creates a fragile situation for Bangladesh.

[35] ICSID Case No ARB/05/7, Award of 30 June 2009, paras 122, 124, 153.

4.0 Findings

4.1 Perception on FPIPPA 1980

In evaluating the present statute on Foreign Direct Investment, Foreign Private Investment (Promotion and Protection) Act 1980, the opinion of scholars and members of the BIDA, is given below. Both the scholars and BIDA authorities evaluated this Act in different ways. They expressed their views, on whether the Act is exhaustive or whether the government should enact a new law. Opinion of experts (table 1):

FPIPPA (not exhaustive one)	70%-75%
FPIPPA (supporting amendment)	82%
FPIPPA (new enactment)	40%-45%

Almost all of the interviewees replied that the Act is not exhaustive to attract FDI. We asked a few scholars[36] of law how they evaluate this Act. According to their view, the government should amend this or adopt a new one. They focused on clarifying certain terms, for example, condition of sanction and condition of launching joint ventures. Clarity of provisions is important so that the investors will not be confused. The members of BIDA, BEPZA claim that the government is taking different initiatives, like commencing one-stop service, adopting new policies, etc. This initiative covers loopholes of the present statute. The respondents are not supporting the promulgation of a new law; they are supporting the rearrangement of an institutional mechanism to combat administrative hurdles and to accelerate the process of granting the license.

4.2 Perception on General Laws relating to FDI

Almost forty percent of the respondents indicated that the existing laws are ambiguous and scattered. This ratio is almost near to the half of the total respondents. Sixty percent considers that statutes are, sometimes or rarely, ambiguous. The majority (seventy-seven percent) of the respondents agreed with the accessibility of laws but according to thirty three percent of the interviewees, sometimes the laws are not accessible. Notable thing is that changing law which is unpredictable according to the perception of sixty-five percent of respondents. On the contrary, thirty-five percent consider it as predictable fairly.

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[36] Interviewees are faculty members of different universities of Bangladesh.

Statement and Responses	Response Options
Laws are ambiguous	
never / rarely / sometimes	60%
always / mostly / frequently	40%
Laws are easy to get to	
always / mostly / frequently	77%
never / rarely / sometimes	33%
Changes in the law and policies are	
frequently /mostly/ completely unpredictable	65%
fairly predictable	35%

4.3 Perception on Determinants of FDI

Few interviewees focused on different points besides the law to justify why Bangladesh is lagging in case of increasing FDI inflows and which we can summarize below.

Factors increasing FDI	Percentage (%)
Political Stability	20%
Tax Rates	10%
Access to Free Trade	22%
Adequate Law and Regulation	25%
Wage Rates	10%
Commodities	13%

4.4 Perception on Role of Court

The respondent's perception of courts as a platform for promoting FDI and Sustainable Development is varied from point to point, and this stated in table 3.

Response Options	Responses
Court Structure and Proceedings in Enforcing Contract	
Supportive	39%
Not Always Supportive	61%

Case Management in Respect of FDI	
Quite Smooth	45%
Very Slow	55%
Court Automation, Alternative Dispute Resolution …..	
Very Fast Sometimes	40%
Very Slow Sometimes	60%
Percentage of Litigation Cost	
Low in Comparison with Other States (South Asia)	47%
High in Comparison with Other States	53%

Almost 61% of the respondent's perception is that the court's structure and proceedings are not supportive in case of enforcing contract on the contrary to this, 39% of respondents consider it as supportive. Case management is smooth, according to 45% of the respondents, and is very slow, according to 55% thereof respondents. Dispute resolution is sluggish, according to 60% of respondent, and litigation cost is high according to 53%.

4.5 Perception on One Stop Service Act 2018

Almost 82 % of the respondents support the screening procedure as a part of a one-stop service. They apprehend that if there is no screening procedure, the investors may deviate from fulfilling performance requirements, and this may create room for exploitation by the multinational corporations. To combat the prolonged system of registration government framed the One Stop Service Act 2018. Investors investing in economic zone now will get all services within 45 working days. According to BEZA, this is a milestone for overall development. Few of the interviewees said that the government should monitor why the service is not promulgated wholly. Probable effectiveness is given in table 3.

Effectiveness	68% (yes)	25%(No)	07%(no comment)

4.6 Perception on Dispute Settlement

A few number of the respondents said that the forum selection for dispute settlement should not be always a choice of the investor-state. Rather, they should exhaust local remedies first then move to International Tribunal. On the contrary to this, few of the respondents argued that forum selection

should not be auto decided, rather invoking jurisdiction of local courts or international tribunal should be at the choice of the investors. Some of the interviewees reject the binding clause inserted in the bilateral treaty. They apprehend that more restricted provisions in bilateral treaty will discourage foreign investors. They support in favour of establishing an international forum for dispute settlement. They raise the argument that the existing court of Bangladesh is not reliable and efficient enough to deal with this type of investment dispute. Some challenged the role of ICSID in respect of dispute settlement. But the majority of the interviewees see this forum as the most prospective arbitration centre. A small number of interviewees suggest invoking the jurisdiction of the International Court of Arbitration.

4.7 Perception on Tax Exemption

Multinational corporations claim tax credit on artificially high price, which is created by them. Many developing states adopt provisions on tax exemption, especially, to attract foreign investment. Foreign investors can enjoy tax exemption under section 144 of the Income Tax Ordinance 1984. Bangladesh has signed agreement on avoiding double taxation with thirty two countries. 75% of the respondents said that the existing tax law is enough to attract FDI inflow in Bangladesh & 25 % demands few changes, and 05% not directly supporting or not denying the impact of the existing law.

4.8 Perception on Trade and Investment Policy

56% of the respondents express their views that the existing trade policy is a liberal one as the government is reducing tariffs and trade barriers in different sectors. On the other hand, 44% of the respondents consider it not a more liberal somewhat restricted one. Few of the interviewees said, mere liberalization does not bring any radical change or increase growth in FDI rather restrictive legal regime is significant. They cited examples of China and Malaysia, where despite existing strict regulation, FDI inwards flow is much higher than that of African and Latin American Countries. They believe that under this regime, the investor will decide how to expand their operation. Some policymakers say that trade logistic costs are the key to indispensable determinants of export competitiveness. Sixty percent of the respondents said that IP 2016 does not cover LPI (combinations of six areas are like transport, infrastructure, custom, shipments, tracing, logistic competence, and timeliness). Directly, forty percent of the respondents think that this IP is quite comprehensive in comparison with IP 2010 to attract more FDI in Bangladesh.

5.0 Analysis

It is generally predicted that a perfect or predictable legal system can attract more FDI. But there is no uniform system of identifying specific characteristics of an ideal paradigm. But an efficient legal system can reduce transaction costs and facilitate the option of enforcing rights and obligation.[37] As a crucial part of the legal system, the law of a country should be exhaustive, clear, stable, and accessible.[38] Again, credibility and predictability of rules and system is another option for creating a platform for foreign investors. If we analyse the opinion of the respondents, the majority of respondents think that the present acts on foreign direct investment are not exhaustive and predictable one. For example, in section 3 of FPIPPA 1980 of Bangladesh, the term sanction is not clarified. To understand the conditions, investors need to go through the Foreign Exchange Regulation Act 1947. This is very sprinkled indeed. According to section 7 of FPIPPA 1980, government will expropriate property only 'for a public purpose against adequate compensation'. But the term has not been defined in any law related to foreign investment. If we analyse the existing legal framework of Ethiopia, Australia and Vietnam, we will find the presence of very concrete and comprehensive laws. Why changing laws are important, can be better understood by citing Vietnam, as an example. We will find that from 1980 to 1986, the investment flow was the same as that of Bangladesh but the curve of the FDI Inward inflow (Vietnam) drastically changed after 1989. The first enactment of that country was in 1987, but later it was amended. Finally, the previous law was replaced by law on investment in 2005. The ratio of investment increased GDP, which is 12 times higher than that of Bangladesh. From our research findings, we can summarize that proper law and regulations and free trade as vital ones to increase FDI inflows gradually.

If we analyse the data given in table 2, we will find that to some extent the laws are not completely ambiguous, but the amendment or the change of law is grossly unpredictable, and this might be a factor for showing less interest by the investors. But sometimes ambiguity may create room for upholding the concept of competitiveness rather than being panic. Beside this, we will find that laws are not consistently applied by the officials. Sometimes bureaucratic excellency becomes a factor with the enforcement of law. Hence, firstly, any opportunity to transfer funds should be clarified more in the statues. Secondly, conditions for joint ventures should be specified clearly. The subject matters of the existing statutes are not wide enough to embrace all probable aspects of FDI.

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[38] Amanda Perry, 'An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality' (2000) 15 (6) American University International Law Review 1627-1657.

Investment incentives become factor which spurs competition among host countries. There is an assumption that incentive will attract more FDI, and this may be a tool to protect infant industries. But if it is not designed appropriately, then it may become a means to undergo a loss. Generally, it imposes burdens on the government. In Bangladesh, incentives are provided under the present scheme based on multi factors. Currently, tariff concessions are given on capital goods, raw materials for a certain period. But the government imposes restrictions on importing materials. Forty percent of the respondents' support that providing incentives can increase FDI, however fifty percent replied that, besides incentives, we should focus on certain other issues. According to UNCTAD, the Annual Investment Report 2020, there is a record drop, which is 55.8%, especially in FDI inflow. This inflow falling is much unexpected, indeed. For example, FDI inflows in countries like Pakistan, Nepal are increasing. In 2019 FDI inflow of BD was 1597 million, Pakistan 2218 million, India 50553 million, and Maldives 565 million.[39] Here decline of inflow is 55.80%. Econometric analysis and different surveys showed that tax incentives cannot influence the decision of MNCs, before selecting any investment location.[40] But this does not prove that tax incentives have no value at all. We need to think about the targeted policy. Many developing countries follow this policy which covers tax holiday or temporary tax rebates and incentives for a certain period. Some leading developing countries are following non-targeted approach. Under this approach, the country offers a low rate tax but not any random incentives. Though forty percent of the respondents supporting these tax incentives, but subject to reviewing policy adopted by Asian and European countries, we can focus on how to reduce tax rates for MNCs for categorized periods, not generally. Because lowering corporate tax denotes the government's interest in determining a stable market for investors. This policy is very effective when the country has less political and macroeconomic stability.

The judicial organ plays a vital role in the case of enforcing the contract. From the of the respondents view, we can summarize that the court performance of Bangladesh in enforcing the contract, managing case, settling disputes is not supportive and very slow (61%, 60%, 55% accordingly). If we examine World Bank's report (index on ease of doing business), Bangladesh is ranked at 176 out of 190 and obtained approximately only 22 points in enforcing the contract. Again litigation cost is higher in comparison with South Asian countries. The overall score

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[39] UNCTAD Report 2019.

[40] Jaques P. Morisset and Nede Pirnia, 'How Tax Policy and Incentives Affect Foreign Direct Investment: A Review' (30 November 1999).

in case of case administration is approximately 7 out of 18. Now development of quality judiciary is the demand of time in attracting FDI.[41] Bangladesh is not following MAI; currently, foreign investment is operating under the regime of regulated openness. If the dispute is between two states, then the application of procedure depends on the bilateral investment treaties. Execution of arbitral awards also depends on the treaties. But, confliction arises in respect of choosing forum, when a dispute is between the foreign investor and the state. Generally, the common inclination of the parties is to protect their own interest. For instance, in many cases, we found that almost all of the decisions pronounced by ICSID are against the interest of Bangladesh. In most of the cases, countries like Bangladesh are not obtaining any specific benefit under this forum. Hence, it's important to make it binding on foreign investors to exhaust local remedies first, and then to keep an option to file case before the International tribunal. Obviously, it will serve justice for the foreign investors also.

6.0 Recommendation

Firstly, a complete investment law is now demand of time. Present statues are very scattered. We suggest preparing a complete Code that will cover different aspects of investment like incorporation and registration of company, paying tax, knowing balance of payment system (generally), and acquiring land for the project etc. *Secondly*, under section 26 of the PPP Act 2015, the conditions that need to comply with are environmental requirements, performance requirement, and technical specification. But it's important to specify the conditions which the investors are bound to follow. *Thirdly*, different industries are under the tax holiday scheme. After 5-7 years, all projects shall enlist under a wide scheme of tax ordinance. After 5 years, the government shall revise the policy. *Fourthly*, the government can open a platform for joint venture under National Drug Control Ordinance 1982. This might enhance the productivity and competition between firms and this policy will pave the way for access to quality medicine. *Fifthly*, how industrial undertakings not listed in Industrial Policy 2010 will be treated need to be clarified. *Sixthly*, government should establish legal information institution so that access to justice will be improved through access to information and should create a database on treaties, this will open a way to research on treaties. *Seventhly*, importance should be given on adopting an electronic case management tool which will include e-filing cases, payment (based on online), service

[41] Sekander Zulker Nayeem, 'Promoting FDI and SDGs through judicial development', The Daily Star (Dhaka, July 23, 2019).

of summons (electronic), and forming Foreign Investment Review Board. *Eighthly*, we need to establish an inward investment agency to eradicate the hurdle like policy incongruity, and multifaceted bureaucratic practice. *Ninthly*, Bangladesh should support multilateral investment rules in natural resource sectors to ensure investment from different countries. Because some countries from the EU support this approach and enjoy benefit arising thereof. *Tenthly*, the government should create different cells to ensure an effective monitoring system and provide technical assistance. *Eleventhly*, most of the model treaties contain safeguard provision. But whenever we find this type of provision in any treaty then the need for sovereign regulation becomes vital. Language of the treaty should be drafted in such a way that will create room for the host state for the application of safeguard provision. The government should formulate integrated policy to encourage joint venture and should follow strictly a specific guideline just avoiding over-regulation and to shun the problems in balance of payment system, in some cases government should limit the share of foreign ownership.

7.0 Concluding Remarks

Inconsistency in different regulations causes hardship for the investors to select the sectors from where to start. Again, lack of proper regulation is a factor for the multinational corporation to exploit the country even by evading taxes. We need a system that will reflect transparency and accountability at the same time. This has two positive impacts of which one is that the country will not face any threat to its sovereignty, and secondly, the rate of FDI inflows will increase. We need an efficient justice system to enforce the contract. Verily, in almost all points of case management, Bangladesh scored almost half points in comparison with that of South Asian Countries, which is highly alarming. We urge for regulated openness and an effective legal regime, which will symbolize two elements, both development and justice. Lastly, we can presume that an effective legal mechanism will attract more FDI inflows in Bangladesh and the government of Bangladesh should take initiatives to rectify necessary laws, to maintain a parallel structure with global and regional mechanisms.

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