

LEGAL AND POLICY REGULATIONS OF SCREENING OF FOREIGN INVESTMENT PROPOSAL IN BANGLADESH

Mohammad Belayet Hossain, Asmah Laili Bt Yeon, Ahmad Shamsul Bin Abd. Aziz *

Abstract

The multinational enterprises (MNEs) have a common intention to maximising their capital investment to gain more profit. In doing so, sometimes they behave irresponsibly towards the host countries, even do not hesitate to bypass the laws of the country. In relation to screening of foreign investment proposal, the host country like Bangladesh may have specific laws or policies; but due to desire to attract more FDI and pressure from the MNEs, the government may be reluctant to impose various requirements or refrain from enforcing them. This paper will discuss the negative impact of FDI in Bangladesh due to lack of effective screening of foreign investment provision, and then will highlight the significance of enacting it into the FDI laws. This paper will address one major question: to what extent the existing FDI governing laws are compatible in relation to screening of investment proposal? In this study, six respondents were interviewed for expert opinions. Findings of this study show that existing laws and policies of Bangladesh significantly lacks effective screening of foreign investment provision. In this relation, recommendations have been provided for consideration by the government.

Keywords

Screening of foreign investment, foreign direct investment, Bangladesh, multinational enterprises, regulation.

* School of Law, Universiti Utara Malaysia

Correspondence: Mohammad Belayet Hossain, Asmah Laili Bt Yeon, Ahmad Shamsul Bin Abd. Aziz, School of Law, Ghazali Shafie Graduate School of Government, Universiti Utara Malaysia. E-mail: galib@ciu.edu.bd

Introduction

Generally, it is accepted that the host countries has authority to impose certain conditions or requirements during entry of any foreign investors into their territory. There is an administrative agency in the host country, whose duty is to ensure that the foreign investors bring tangible benefits for them. The agency has the tasks to ensure that FDI has a positive impact into the local economy and local entrepreneurs are not affected by the entry of a powerful foreign company into any sectors. In reality, many developing and least-developing countries has adopted liberalised screening mechanisms in order to attract more FDI. Whatever, the position may have been in the past, in recent times of rapid growth of industrialisation and economic expansion, the host states including developed countries will not be inclined to support a rule, which shall permit unlimited and unconditional access by foreign investors into their territories.

Despite economic contribution of FDI in Bangladesh, there are also negative effects, which are caused due to lack of legislation and control. In this connection, this paper will analyse whether existing laws and policies of FDI are compatible to regulate screening of investment proposals during entry stage in Bangladesh; if not, then whether is it essential to consider amendment of existing FDI related laws or policies.

Research Methods

This research is a normative juridical descriptive-analytical research. The data was collected through library research and field research, and the library research stage was carried out to find secondary data using primary, secondary and tertiary legal materials. In this stage, a literature review is also carried out on several laws and regulations in several countries that are relevant to the problems studied.

Discussion

1. Screening of Foreign Investment Proposal by the BIDA

In Bangladesh, the Companies Act 1994 requires any company including foreign to complete the incorporation procedures at the Registrar of Joint Stock Companies and Firms first; and then apply for registration in the Bangladesh Investment Development Authority (BIDA). Once any FDI proposal is approved, the BIDA maintains a certain administrative procedure requirement to register it. Depending on the nature of the newly FDI project, the approval or registration procedures differs in BIDA. For instance, to set up a unit by any joint ventures or 100 per cent foreign equity investor, any no-objection certificate (NOC) or prior approval is not required from BIDA. They are only required to register their investment if they wish to take benefit of any fiscal and financial incentives, institutional support, or facilities. Registration with BIDA is compulsory for foreign investors to acquire benefits, if they want to import materials on the “restricted list” as mentioned in the NIP 2016; or import machineries at

concessionary duty rates. Nevertheless, BIDA requires obtaining the pre-registration clearance for investment in insurance companies, banks, RMGs and other financial institutions (Kazi A. Islam, 2019).

In 2016, the government has enacted the BIDA 2016 to encourage and facilitate private investment or foreign investment in Bangladesh. Under the Act, the Bangladesh Investment Development Authority (BIDA) has created a 'One Stop Service' cell to provide all types of services and assistance to private investments including FDI. But, offering one stop service to the existing and prospective investors in real terms is yet to materialize. The officials of several state-owned utility service providers, working for BIDA one stop service, are less capable and less powered to provide necessary service. In this context, the extent of the administrative barriers is quite longwinded and inter-related (Kabir, 2019). Legal ideals or *rechtsidee* grow in the community's value system of good and bad, their views on individual relationships and society and so on, including views on the unseen world (Yuswanto Yuswanto, Marlia Eka Putri, Ade Arif Firmansyah 2020).

Poor policy design and implementation, competitive weakness, structural impediments, low quality of infrastructure and skills, weak institutions, poor governance and administrative hassles represent the administrative barriers that discourage potential FDI. But the main drawbacks in the bureaucratic system are inefficiency and corruption, turning the whole administrative functionaries into a harassing experience. Administrative barriers are also translated in different forms and vary from sector to sector. In Bangladesh, foreign investors face barriers in different regulatory bodies in the form of their policy, legislation and functions. Regarding people who fled from their countries to other countries are called immigrants, but there are no rules that explain clearly (Nurainun Nurainun, Raditya Afrisal Hidayat, Mohammad Syaifur Rijal, Dennis Darmawan Jo, Petrus Avelino F.T 2020).

Although existing regulations provide for equal treatment of domestic and foreign investors, certain discriminatory rules continue with regard to foreign investment. Sanctioning requirements for particular categories of foreign investment, restrictions against capacity expansion, special regulations for supplier's credit and pay-as-you-earn-schemes are some of the areas of differential treatment (Mahbub & Jongwanich, 2019). Moreover, the major quandary of administrative barriers lies in the gap between investment and trade related policies; due to serious lack of co-ordination between the policy implementing agencies of the government, investor's suffering goes up. This induces lot of hassles in the implementation process and creates barriers for the investors in getting due incentives offered by the government and ultimately discourages foreign investors to proceed on.

The BIDA 2016 does not provide any mandatory regulatory authority to BIDA, instead allows BIDA to request other government departments to provide certain services. All the departments have their existing own policy; most importantly, they fear that the Act is curtailing their authority and mandate, quickly leading to intensive turf battles

within the government bureaucracy. The Act also lacks to provide any regulatory authority to BIDA over certain services, such as – tax holidays, reduced custom duties, guarantees against expropriation and sequestration, guarantees about repatriation of capital and profit (M. S. Siddiqui, 2019).

According to the 2016 Act, the mandate of the BIDA is restricted to industrial undertakings. Projects that do not fall within this category are neither required nor eligible to be registered by the BIDA and seek its services or associated incentives. Quite importantly, this leaves aside all the services sub-sectors that are not enumerated as “industries” in the National Industrial Policy 2016. These activities are left somewhat in a vacuum as they cannot get the support of the BIDA and are subject to relatively dispersed entry conditions under sectoral regulations (Guterres, 2019). Besides, the Act does not have any provision in relation to entry requirements at pre-entry stage of FDI to be fulfilled by the foreign investors.

With respect to entry conditions and establishment procedures, the FPIA 1980 remains rather vague and non-committal (Moore, 2013). Although Bangladesh presents itself as open to FDI, due to the limited scope, lack of committal language and a “positive list” approach in the Act, there is space for introducing restrictive practices. A number of past and present restrictions to FDI contained in sectoral laws, regulations or policies are highlighted to illustrate this. They do not constitute an exhaustive list of restrictions to FDI; but indicate how limits or constraints to FDI are implemented under the present framework (M. S. Siddiqui, 2019).

The NIP 2016 has categorised the industries for private investment (either local or foreign) into three groups: thrust sectors, reserved sectors and controlled sectors. The NIP 2016 states that any private investment in the 22 controlled sectors cannot be registered directly with BIDA or Bangladesh Export Processing Zones Authority (BEPZA); an approval or NOC must be obtained from the Ministry of Industry and Commerce, or from the concerned ministry or commission. In such a case, the government retains the authority to fix the equity rate of local-foreign investors for any joint venture project in this sector. Moreover, if a local or foreign investor desires to set up a joint venture with a public sector corporation and public sector’s equity participation is less than 50 per cent, then it should be registered with BIDA. In such a case, the public sector corporation in question has to obtain authorisation from the relevant ministry in order to invest its own resources (Kabir, 2019).

Even though BIDA is the central registering body for private investment, the foreign investor should register with BEPZA in order to set up its venture in an Export Processing Zones (EPZ) or industrial estate (S. M. Salahuddin, 2019). In order to make sure safety measures and good working conditions in the industry, any manufacturing company, which employs 10 or more workers; the Bangladesh Labour Act (BLA) 2006 require them to register with Chief Inspectors of Factories and Establishment.

The BIDA provides ‘one-stop’ service for registering any new investment project and also helps the investors to obtain ‘Fire Licence’ and ‘Environmental Clearance

Certificate' from the Department of Environment. Generally, BIDA maintains simple registration procedures and requires the following documents to be submitted (Kazi A. Islam, 2019):

- a. application in duly filled in prescribed form;
- b. trade License;
- c. certificate of Incorporation along with Memorandum of Association (MOA);
- d. partnership deeds;
- e. deeds of the proposed land;
- f. project profile, if the total project cost exceeds BDT 100 million;
- g. background of the proprietors in officials letter head pad;
- h. list of machinery (with the indication of quantity and price), and the supporting documents of loan (if the project is financed by loan).

Once the investor submit the application with all the required documents to BIDA, after reviewing if its found suitable, then BIDA issues the registration certificate within seven days; however, there are investors who complained about unnecessary delay, administrative corruption and bureaucracy (US Department of Justice, 2019). Apart from BIDA, if any investor intends to register their industry under BEPZA, they need to submit an application in the approved form. According to the NIP 2016, 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 product; or supply 80 per cent of their output as raw materials for exportable items. The same requirement applies to service enterprises. The application requirements are not expressly laid down under any policy; rather follow the guiding principle that is provided by the government from time to time. After receiving it, once the authority is satisfied with the all the required documents, they permit the investor to set up the industry.

Being the central registering or approving authority, the BIDA has extremely lenient policies while considering any FDI proposal; and lacks any policy guideline in consistent with the directives of section 3 of the FPIA 1980. According to section 4(1) of the BPEPZA 1996, the Board has power to formulate policies for the sponsor company and can issue licence for the establishment of a zone. This section seems vague and fails to provide any clear guidance on what set of issues should be considered before formulating policies and grant licence. It has been reported that the board is corrupted and also politically motivated while taking decision or dealing with the sponsor companies (Md Fazlur Rahman, 2015). For instance, Korean EPZ (KEPZ) was developed by Youngone Corporation, a South Korean company engaged in the manufacture and distribution of sportswear and shoes. An impasse between Youngone, the operator of the KEPZ, and the government has been going on for a long time over delays in transferring the deed of the land. The government has blamed

Youngone for its failure to fully use the industrial land in the KEPZ. The government even plans to take back 2,000 acres of the 2,500 acres of land it allocated to the KEPZ in 1999. But the KEPZ authorities say it has not received support from the government as well as the local administration as promised (Md Fazlur Rahman, 2015). The Act lacks to provide any institutional authority to supervise the private EPZ. The cell under the Prime Minister Office (PMO) also does not have enough workforce and capacity to supervise the activities of private economic zones (Md Fazlur Rahman, 2015).

Moreover, Section 19(1) of the BPEPZA 1996 states maximum punishment is cancellation or withdrawal of the licence of the sponsor company but is it sufficient? Section 19(2) allows the sponsor company to appeal to the government if licence is cancelled or withdrawn and the government decision shall be final. In such a case, the Act does not define procedures of cancellation or withdrawal of licence and also raises questions: (a) due to political reason, what if the government intentionally takes action against the sponsor company? (b) why the Act has no provision to appeal to the Court instead of the government? (Md Fazlur Rahman, 2015).

According to the 'Ease of Doing Business' Report 2019, Bangladesh ranks 176 out of the 190 economies in the world. This report shows that the present conditions are not investment friendly and lacks significantly favourable regulatory environment for starting and operating business in Bangladesh. Moreover, Bangladesh made starting a business more expensive by increasing the cost of business registration at the Registrar of Joint Stock Companies and Firms (The World Bank). The summary of the report is as follow:

<i>Topics</i>	<i>DB 2019 Rank</i>	<i>DB 2019 Score</i>
Overall	176	41.97
Starting a Business	138	80.82
Dealing with Construction Permits	138	60.82
Getting Electricity	179	30.81
Registering Property	183	28.91
Getting Credit	161	25.00
Protecting Minority Investors	89	55.00
Paying Taxes	151	56.13
Trading across Borders	176	31.76
Enforcing Contracts	189	22.21
Resolving Insolvency	173	28.20

Table 1: Doing Business Report 2019: Bangladesh

In order to promote a more sustainable and inclusive investment environment, the BIDA has undertaken the following steps for massive reforms to ensure (Kazi A. Islam, 2019):

- a. creation of a true one-stop service for the investors;
- b. facilitate the development of entrepreneurs;
- c. aid the creation of necessary skills to match the needs of higher value production chains; and
- d. efforts to improve the ratings of Bangladesh in various indicators such 'Doing Business report of World Bank', 'Global Competitive Index' of the World Economic Forum and others.

It is hoped that these reforms once implemented will make sure an enhanced business environment and smoother business procedure in Bangladesh; ultimately ensuring Bangladesh's ranking in a much better place in the forthcoming Doing Business reports. Therefore, it remains to be seen whether the BIDA could successfully undertake the above-mentioned reforms.

The current approach to entry and establishment generates a lack of legal commitment, certainty and transparency regarding the country's degree of openness to FDI. As it currently stands, the Act can provide the ground for either a very open policy stance towards foreign investors; or a significantly more restrictive one, based on associated regulations and policies, including sectoral legislation. The stance at first glance is clearly towards high degree openness, even though Bangladesh is not quite as unremittingly open as frequently claimed by the authorities (Kazi A. Islam, 2019).

From the above discussion, it may be concluded that the BIDA lacks any necessary screening method in consistency with widespread standards of admission prerequisite as available in legal and policy regimes across the world. The BIDA also do not have any proper screening method necessary in order to scrutinise the developmental feasibility of an investment project in the whole. The functions of BIDA are restricted to registration of a newly investment project and in relation to it, to ensure that all the prescribed procedural requirements are fulfilled. For this reason, it could be related to any economic matter in part but not on a holistic basis (K. M. Islam, 2018).

2. Screening of FDI in Bangladesh from the Perspective of the Respondents

a. Themes and Sub-Themes

The themes and sub-themes in this study were deduced based on the research question and the response received from the respondents. In this relation, six respondents were asked and their responses centered on the following: screening process, FDI proposal, development goals. This can be seen in the table below:

Research Question	Theme	Sub-Theme
To what extent the existing FDI governing laws are compatible in relation to screening of investment proposal?	Laws relating to screening of investment proposal	Strengthening screening process of FDI proposal
		Development goals as mentioned in the FPIA 1980

Table 2: The Theme and Sub-Theme for Research Question

b. Strengthening Screening Process of FDI Proposal

In this regard, respondents were asked on strengthening the screening process of FDI proposal in Bangladesh. To answer this question, Respondent 1 commented:

Act must define national interest in the form of (a) net economic gain, and (b) national policy compliance. The net economic gain test should include: whether the proposed FDI will bring to the economy new capital, employment, advanced skills and technology, local capacity-building and export-market. And the national policy compliance test should include: whether the proposed FDI complies with its national policies pertaining to defence, security, terrorism financing, mining, the environment, heritage, revenue, and counter-terrorism law and practice.

Respondent 2 opined as follows:

Screening the investment proposal, the FPIA to some extent takes care of that. These are the areas where we need investment and the licensing procedure or licensing process and terms and conditions, in the process that the proposal has to go through, and fulfill terms and conditions. Of course the terms and conditions must not be such as to discourage the foreign investors; or must not be deluded from the realities, it must be consonance with our social conditions and social environments.

Respondent 3 did not answer the question due to lack of expertise in the area. In a similar view with Respondent 1, Respondent 4 has this to say:

Before each and every FDI approval, we should consider national economic gain, quality capital import, local capacity development, technology transfer, skill development, environmental hazard, export diversification etc.

Respondent 4 opined as follows:

I think monitoring and implementation is a big problems. BIDA needs to be more proactive and less bureaucratic and more business friendly. All procedures should be simplified and transparent. Corruption is also another problem.

Respondent 5 further commented:

Officers in BOI (now BIDA) are not helpful. Lengthy procedures and corruption is big problems to get anything done.

Responding to the same question, Respondent 6 has this to say:

In addition to the govt. authority in granting the proposal of FDI, a strong commission can be established to monitor the FDI proposal. The commission should be composed of experts of law, business, politics, international affairs, economics and environment.

c. Development Goals as Mentioned in the FPIA 1980

Respondents were asked about the factors need to be considered to achieve the development goals, which are in section 3 of the FPIA 1980. In this regard, response from Respondent 1 is as follows:

Net economic gain (whether the proposed FDI will bring to the economy new capital, employment, advanced skills and technology, local capacity-building and export-market); and national policy compliance (whether the proposed FDI complies with its national policies pertaining to defence, security, terrorism financing, mining, the environment, heritage, revenue, and counter-terrorism law and practice) should be considered.

Respondent 2 opined:

In fact section 3 keeps a wide area for considerations for the part of the government for allowing inflow of foreign capital. So it is not stating, it depends on the state of development of the country. May be ten years back, it was one particular area where we needed capital; now that we have enough capital, we can shift to some other areas where there's still shortage of capital and technical know-how and technology. So it depends on the development stage that we are in which will determine what will prompt the government to consider and screen the inflow or application for foreign investment in our country.

Respondent 3 did not answer the question due to lack of expertise in the area. In a similar view with Respondent 1, Respondent 4 commented:

There should be incorporated provisions regarding national economic gain, quality capital import, local capacity development, technology transfer, skill development, environmental hazard, export diversification etc.

Respondent 5 opined as follows:

First of all, this 1980 Act should be amended and needs to follow international standard. Different tests like Canada or Australia can be considered to ensure the positive contribution of foreign investments or to achieve development goals.

Responding to the same question, Respondent 6 has this to say:

The aforesaid commission should be formed and should act effectively and the stages and time need to the procedure in establishing an industrial undertaking must be minimized.

Conclusion

From the above discussions and findings it appears that Bangladesh laws and policies, lacks effective provision regarding screening of foreign investment proposal. The FDI laws of Bangladesh have provisions only to promote the inflow of FDI and after post-entry, provide different incentives and protections to the foreign investors. Without proper or compatible regulations, there is a huge possibility of dispute between the contracting parties. Moreover, FDI related laws are scattered and in most cases, not adequate to regulate the FDI in relation to performance requirements.

There are evidences which shows that only liberalisation does not necessarily result in the increased inflow of FDI in the host states. For example, according to the United Nations Conference on Trade and Development (UNCTAD) report in 1999, there are many African states that have a very liberal investment regulation but failed to attract the inflow of FDI. In contrast, China has a restrictive investment regime; even then it has been the largest recipient of FDI amongst the developing world since 1992. Similarly, Thailand, Vietnam have more strict regulation comparing to the Latin American states but they are receiving more FDI than the latter.

In practice, both liberalisation and restrictive regulation could have positive and negative effects in Bangladesh, so it should design its laws or BITs in a balanced way to meet its peculiar needs at any particular time. Bangladesh can follow the footsteps of the developed countries and take guidelines from them if necessary. Based on the WTO principle of 'reciprocity' Bangladesh should design its FDI laws, policies in such a way that all parties interest are preserved equally, thus the economic relations will sustain for a long time between them. Moreover, it is necessary to insert screening of investment provision through legal or policy documents or BITs to control foreign investment in sensitive fields by setting conditions; and FDI must satisfy for the purpose of national interest, fulfill social and economic development objectives.

References

- Agung Prakoso & Rachmi Hertanti, *Webinar Seri Diskusi Keadilan Ekonomi IGJ: Indonesia Dalam Pusaran Covid-19*, Indonesia for Global Justice pada 19 Mei 2020.
- Guterres, A. (2019). UNCTAD: World Investment Report 2018. UNCTAD.
- Kabir, M., Singh, S., & Ferrantino, M. J. (2019). *The Textile-Clothing Value Chain in India and Bangladesh: How Appropriate Policies Can Promote (or Inhibit) Trade and Investment*. The World Bank.

- Mahbub, T., & Jongwanich, J. (2019). Determinants of foreign direct investment (FDI) in the power sector: A case study of Bangladesh. *Energy Strategy Reviews*, 24, 178-192.
- Moore, J. (2013). UNCTAD, Investment Policy Review: Bangladesh. UN Publications.
- Nurainun Nurainun, Raditya Afrisal Hidayat, Mohammad Syaifur Rijal, Dennis Darmawan Jo, Petrus Avelino F.T (2020). "Legal Protection for Refugees Without Identity from Country of Origin". *Hang Tuah Law Journal*, 4 (1), pp. 1-13. DOI: <http://dx.doi.org/10.30649/htlj.v4i1.133>
- Yuswanto Yuswanto, Marlia Eka Putri, Ade Arif Firmansyah (2020). "Local Regulation Patterns Towards Competitive Coastal Tourism in West Coastal Village". *Hang Tuah Law Journal*, 4 (1), pp. 82-91. DOI: <http://dx.doi.org/10.30649/htlj.v4i1.158>