

TRIGGERING ISDS CLAIM FOR THE ENVIRONMENTAL REGULATION OF RAMPAL POWER PLANT UNDER THE BANGLADESH-INDIA BIT 2009

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ABSTRACT

The mechanism of Investor-State Dispute Settlement (ISDS) allows foreign investors to challenge domestic environment-related regulatory measures before investment tribunals for the alleged violations of investment treaty obligations. Yet recently, concerns have been elevated when the government of Bangladesh decided to go ahead with the most controversial Rampal coal-fired power plant near the Sundarbans, where Indian investors made investment. This paper aims to examine whether Indian investors could bring ISDS claim against Bangladesh for the purported breach of legitimate expectations and other clauses of the Bangladesh-India BIT, in case Bangladesh stops, relocates or otherwise regulates Rampal power project in order to protect Sundarbans. The paper finds that in absence of any environment-related provisions in the BIT, the future environmental regulations of Rampal project will be likely to violate several substantive provisions of the treaty which will make Bangladesh vulnerable to ISDS claim by the Indian investors.

I. INTRODUCTION

India is one of the largest trading partners and source of foreign direct investments (FDI) in Bangladesh. These two countries signed a Bilateral Investment Treaty (BIT) in 2009.¹ This treaty is fundamentally modelled based on Indian Model BIT 2004.² Like other BITs, *Bangladesh-India BIT* is designed to establish certain rights and obligations in order to protect foreign investments against the arbitrary and discriminatory measures by the host State. This BIT enables Indian investors to enjoy a number of substantive protections and also

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¹ Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments, 9 February 2009 (entered into force on 7 July 2011) (hereafter, *Bangladesh-India BIT*).

² Subedi. S., "India's New Bilateral Investment Promotion and Protection Treaty with Nepal: A New Trend in State Practice", 28 (2013) *ICSID Review*, pp. 384-404, at p. 385.

provides for an Investor-State Dispute Settlement (ISDS) mechanism.³ Though the treaty has offered a myriad of guarantees to Indian investors in Bangladesh, it allows very less latitude for the exercise of sovereign regulatory powers to protect community interests including the environment.⁴

In general, BITs are perceived as a threat to the environmental regulations of the host States.⁵ A legitimate concern arises can *Bangladesh-India* BIT be a barrier for the protection and preservation of Sundarbans,⁶ since India has made investment in a controversial coal-fired power plant at Rampal which is very close to the Sundarbans.⁷ The likely environmental impact of this heatedly objected power plant has already been studied in detail. Despite the strong opposition and violent protest from the local people and environmentalists, the construction work of this project is going ahead. Arguably, if at any future point of time, Bangladesh decides to stop, displace or otherwise regulate the project, will that give rise to an ISDS claim under the *Bangladesh-India* BIT? The issue has become topical because the project is based upon an agreement between the National Thermal Power Corporation of India (NTPC) and the Bangladesh Power

³ Bangladesh-India BIT has provisions for Most-favoured-nation (MFN) and National Treatment, which are considered as the founding pillars of the treaty. It has also provisions for Fair and Equitable Treatment (FET), protection against expropriation, compensation for losses and repatriation of investment and returns.

⁴ Generally, Environment Related Provisions (ERPs) are featured in different parts of the treaties, from the preamble through substantive clauses and annexes. No such ERPs are found in the Bangladesh-India BIT. See Saleh, M.A., “Bilateral Investment Treaties (BITs) Threatening Environmental Regulation of Host States: The Case Study of Bangladesh”, (1st Senior Advocate Oazir Farooq Memorial Law Conference, Faculty of Law, University of Dhaka, 16-17 September, 2018); Anand, P., “South Asian Bilateral Investment Treaties and Regulatory Autonomy to Protect Environment: Is there a Threat?”, (Society of International Economic Law, Working Paper No. 2016/19, 2016).

⁵ Saleh, M.A., *ibid*; Waelde, T. and Kolo, A., “Environmental Regulation, Investment Protection and Regulatory Taking in International Law” 50 (2001) *International and Comparative Law Quarterly*, pp. 811-848; Behn, D., and Langford, M., “Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration”, 18(2017) *The Journal of World Investment & Trade*, pp. 14-61; Sullivan, J., and Kisey, VS, “Environmental Policies: A Shield or a Sword in Investment Arbitration”, 18 (2017) *The journal of World Investment & Trade*, pp. 131-162.

⁶ Sundarbans is the world’s largest mangrove forest, which has been declared a world heritage site by UNESCO, and also been declared a protected wetland under the *Ramsar Convention*. See Iftekhhar, M.S., “Protecting the Sundarbans: An Appraisal of National and International Environmental Laws”, 13(2011) *Asia Pacific Journal of Environmental Law*, pp. 249-67, at p. 250.

⁷ The Rampal power plant is built within 14 kilometers from the edge of the Sundarbans. This power plant seems to violate domestic environmental laws of India that requires such a project to be set back at least 25 kilometers away from forestland.

Development Board (BPDB),⁸ where the Bharat Heavy Electricals Limited (BHEL), an Indian company was granted the contract to construct the plant. Thus any prospective environmental regulatory measure of the government in relation to the Rampal project in order to protect Sundarbans could be regarded as an intervention with the investment of BHEL and NTPC. Henceforth, a conflict is very much likely between the obligations of Bangladesh under national and international environmental laws and the rights of Indian investors under the BIT.

The objective of this paper is to examine whether Indian investors in the Rampal project could trigger a BIT claim against the legitimate exercise of sovereign regulatory powers to protect Sundarbans by Bangladesh. The paper is based upon three research questions: first, whether an environmental regulatory measure of a host State can be adjudicated before international investment tribunals for the alleged violation of BIT provisions; second, whether a BIT obligation prevails over the national and international environmental law norms; and third, whether any prospective environmental regulation of the Rampal project could violate any substantive provisions of the *Bangladesh-India* BIT. In order to reach a conclusion, the paper is divided into five parts. After introduction, the second part of the paper offers a brief analysis regarding the possibility of escalating ISDS claims for the environmental measures of host States under international investment law. The third part presents a hypothesis of the possible conflict of obligations under international investment and environmental laws in relation to the future environmental regulation of the Rampal project. This part specifically asks should there be any hierarchy among different areas of international law. Besides, this part also elaborates the risk of legitimacy conflict in protecting Sundarbans. The fourth part examines whether international investment tribunals have jurisdiction to hear cases brought by Indian investors for the alleged violations of the BIT. More particularly, this part studies the plausible breach of the BIT provisions, in case Bangladesh stops, relocates or otherwise interferes with India's investments in the Rampal project. The paper concludes finding that the future environmental regulations of Rampal project will be likely to violate several substantive provisions of the *Bangladesh-India* BIT and therefore the Indian investors may use the treaty to bring Bangladesh before investment tribunals alleging that Bangladesh has expropriated their investments.

⁸ It is interesting to note that this agreement was concluded on 29 January 2012 after the *Bangladesh-India* BIT came into force on 7 July 2011.