

Bangladesh & International Investment Arbitration: Current Trends and Future Decisions

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Abstract: The “Investment Law” is a part of public international law. This foreign investment is governed by the rules and regulations of the mutual agreement made by two countries which are known as Bilateral Investment Treaties (BITs). Any dispute arising with regards to foreign investment shall be resolved through Investment Arbitration. Investment Arbitration is a procedure to resolve disputes between foreign investors and host States (also called as Investor-State Dispute Settlement or ISDS). Investment law is very important for economical growth in a country. But Investment law has its dark sides too, which needs to be resolved to get more benefits from foreign investment. It is most important for developing countries like Bangladesh as it needs a strong economical spine to stand up with this fast and advanced world. For this reason reviewing BITs agreement is a must; in order to understand the pros and cons of such agreements and also the predictability of these agreements, there is no other way but to review those agreements before getting into the agreements.

“Investment” is an old concept but it helps the world to get modernized. The history of foreign investment is very similar to the concept of decolonization of the world as the history makes a reference that the European and African or Latin American comes to the Asia for the trade.¹ For doing business in foreign land, this concept of foreign investment has come to modern era of International Investment law. At the beginning of foreign investment, there are no specific rules to follow as the foreign investor thinks that the host countries are inferior to them and they followed the rules from their own countries.² But later they felt the need of protection from the host country as well, so, they wanted to enter into agreement with the host countries³. That is how BITs agreement introduces in trade and Investment Law. It has become one of the advanced branches

¹ Suraya p. Subadi , International Investment Law (Reconciling of policy and Principles), OXFORD AND PORTLAND, OREGON 2008; page no:07

² Ibid p, 09

³ Ibid

of International Public Law. In Investment Law there are some concepts which are important for us to understand properly, such as Bilateral Investment Treaties (BITs) (hereinafter referred as BITs), Most favored Nation (MFN), Foreign Direct Investment (herein after referred as FDI) etc,⁴ these four concepts are the pillar of Investment Law. But most important tool of investment law is Bilateral Investment Treaties (BITs). The first BIT was signed between Pakistan and Germany On 25th November in 1956.⁵ There are 2800 BITs to govern the relationship between states to states for foreign investment in regards of business.⁶

BIT is an agreement between two countries to give protection to a foreign investment by a host country.⁷ BITs is the one which makes the host country's commitment more formally stable to any foreigner investor to believe that their investment won't be wasted, Rather protected. As it gives an absolute right and facility to resolve any dispute by arbitration; so, more foreign investors get interested in investing. Though it's different from any commercial arbitration because of its mechanism to deal with the disputes.⁸ Investment arbitration concerns with the mutual consent and understanding of the parties and chooses international standard to resolve any disputes.⁹ This kind of settlement is also known as Investment-State Dispute settlement (ISDS).¹⁰ For BITs, one state does not need to sue host country to its own country.¹¹ They can file the application before arbitration body to solve the problem in more effective way. The outcome of such arbitration is smoother than in any court in any State. This is the main reason that any state wants to make BITs agreements with other countries of the world.

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⁴ Christoph Schreuer , "Do We Need Investment Arbitration?" (2012) < <https://www.international-arbitration-attorney.com/wp-content/uploads/1do-we-need-investment-arbitrationby-christoph-schreuerinvestment-protection-in-general-and-i.pdf> > Accessed on 4th August in 2020.

⁵ UNCTAD's official page of "Investment Policy Hub", <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh>> Accessed on 4th August in 2020.

⁶ Andrea K. Bjorklund, Yearbook on international Investment law & policy 2012-13, Oxford University Press, First edition- 2014; Page No: 367

⁷ Schreuer, (n 4)

⁸ Shining Guo, Edwina Kwan, Benedict Porter, "Fundamentals | An Overview on International Arbitration" (2020) < <https://www.kwm.com/en/cn/knowledge/insights/an-overview-on-international-arbitration-20200617>> Accessed on 4th August.

⁹ Ibid

¹⁰ Ibid

¹¹ K. Bjorkund, n 6

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Bangladesh is one of the developing countries in the world. The growth of international trade in Bangladesh is increasing. Bangladesh is also a member of International Center for Settlement of Investment Disputes (hereinafter referred as ICSID) on 26th April in 1980.¹⁵ Bangladesh has signed 31 BITs with many other developed and developing countries.¹⁶ A BITs agreement has two factors, firstly protection of investment and secondly promotion of the host country. For promoting, Bangladesh has, Bangladesh Investment Development Authority (BIDA) which is the principal Organization for regulating foreign investing.¹⁷ It also supervises and promotes private investment.¹⁸ Bangladesh offers investors a secure and creative friendly environment that is fitting for establishing any kind of business. It can be stated that Bangladesh is in fact a "dream investment destination."¹⁹ The economical growth has increased because of the foreign investment to \$3.61 billion in 2018.²⁰ This is the main reason that we need to know the concept and necessity over these BITs and other agreements over foreign investment to make more progress in International

¹² Ibid

¹³ Latham & Watkins, "Guide to International Arbitration" (2019) <<https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017>> Accessed on 4th August in 2020.

¹⁴ Ibid

¹⁵ (n 5)

¹⁶ Asjadul Kibria, "Review of the existing BITs", (2019) <<https://thefinancialexpress.com.bd/views/reviews/review-of-the-existing-bits-is-in-order-1561649630>> Access on 4th August in 2020.

¹⁷ BIDA (Bangladesh Investment Development Authority) official website <http://bida.gov.bd/?page_id=146> Access on 6th August in 2020.

¹⁸ Ibid

¹⁹ ASM Sakib Sikder, "Protection of Foreign Investments in Bangladesh : Laws & Policy", (2019) <<https://www.hg.org/legal-articles/protection-of-foreign-investments-in-bangladesh-laws-and-policy-50563>>

Access on 10th August in 2020

²⁰ Trading Economics, "Bangladesh Foreign Direct Investment" (2018) <<https://tradingeconomics.com/bangladesh/foreign-direct-investment>> Access on 11th August in 2020.

trade law. For the protection and promotion of foreign investment, government of Bangladesh has enacted the foreign private investment Act.²¹

By analyzing these 31 BITs they share some similarity which is described summarily in Foreign Private Investment Act, 1980, the common factors of these BITs are that they described what should be considered as investment. Also, section 2(b)²² stated that anything which makes profit or achievement will be known as investment that is similar to Bangladesh Investment Act.²³ In those BITs, the method of transactional is stated in details and as clear it may possible. Moreover, all the BITs have discussed about the settlement mechanisms though mutual agreement about any kind of dispute arising for concerning with both parties. As Bangladesh is a member of (ICSID)²⁴, thus, they can come to ICSID for settlement.

For example, the BITs between Malaysia and Bangladesh was signed on 12th October in 1994 and was enforced in 1996. In the BIT of the Government of Malaysia and the Government of People's Republic of Bangladesh have mentioned about settlement of investment disputes between the parties in Article 6²⁵. It has mentioned that, upon on the request of any contracting party, the ICSID will settle the issues after the parties try to solve the problem between themselves by negotiation or conciliation. After three months of such proceeding ICSID will take the matter in consideration to solve it through arbitration. After the matter has passed to the ICSID, the question of jurisdiction depends on ICSID according to Article 6²⁶ as both parties have given their consent by signing the BITs. Thus, both parties are bound by the decision of ICSID. Investment arbitration shall be conducted within two months and the arbitral tribunal shall reach to its final award by majority of votes, such decision shall be binding on both of the parties. Even any signature country of ICSID, without having BIT with other country may request before the ICSID to look after such matter for settlement and the decision of ICSID will prevail.²⁷

²¹ Foreign private Investment (Promotion and Protection) Act, 1980

²² Ibid , s 2(b)

²³ Ibid

²⁴ Isa Parliament, "India' stands on ISDS", (2017) <<https://www.iasparliament.com/current-affairs/bilateralinternational-relations/indias-stand-on-isds>> Access on 22th August in 2020.

²⁴ On 26th August in 1980

²⁵ BIT between Malaysia and Bangladesh, 1996 art, 6.

²⁶ Ibid

²⁷ International Center for Settlement of Investment Center, 2006 Art 41

Bangladesh has to face ICSID twice for dispute concerning the foreign investment. Both times the jurisdiction of ICSID was absolute and both parties were binding by it. The first case is known *Petrobagla Case or Saipem Case (1990)*²⁸. In the Saipem case²⁹ a conflict has raised due to not performing contract properly which was made by Petrobangla and Saipem. Later ICSID has given its verdict where Bangladesh was liable for not performing the contract properly. However, Bangladesh accepted the decision by ICSID.

Later, in *Niko Case (2010)*³⁰ where Bangladesh has filed an action at Chatak, Sylhet on 7th January 2005 before the Canada based Company named Niko because Niko's flawed drilling had caused two gas blowout and damaged gas wall, human lives and environment. There were many evidences that showed the Niko's operational failure caused these two blows out. Niko is responsible for damages but ignored by Court of Bangladesh claim and had requested to ICSID for the arbitration in 2010. Later Bangladesh also represents their case before ICSID. Afterwards, ICSID had been hearing all the argument and evidences by both parties and given decisions on the corruption claim on 25th February 2019.

Upon hearing to both parties, ICSID had given its final award on liability claims on 28th February on 2020 in video conference, where, ICSID hold Niko liable for the blow out and damages to surrounding nature, Human and gas wall. This is the second time where Bangladesh has to face ICSID.

These two decisions taken by ICSID are very smooth and kept the further trade relation between these two countries as Bangladesh has signed BITs with both Italy and Canada. Besides, even if some country did not have a BIT with the country where they have business, they can also go to ICSID for settlement if any of the country is a state party of ICSID or World Trade Organization (WTO).³¹ Thus, BITs are very important for FDI and growth of Bangladesh.

²⁸ [1990] ARB/05/07 (ICSID)

²⁹ Ibid

³⁰ [2010] ARB/10/18 (ICSID)

³¹ (n 27)

However, BITs have some dark sides. If we see the BITs signed by Bangladesh, such as BIT signed between Bangladesh and Malaysia,³² Bangladesh and India³³ and Bangladesh and Singapore³⁴, there are some flaws that describes the dark sides of Investment Law. As by signing BITs, the government is given away certain sovereign rights, such as nationalization and expropriation where the businessman gets exception, for example, their business won't be expropriation even if they commit serious damages like human rights abuses or environment damages. For attracting foreign investor government needs to give in on taxation by thinking that the unemployment rent will decrease. Nevertheless, the employment rate may be decreasing for these foreign investments but at the same time the employees are not getting proper or standard work place or fair wages. Also, if anything happen in foreign investment or business then government can be sued but not the corporate persons. Basically, the Government or the public are not earning much profit as it seems from the prima facie of these BITs. For BITs, government has to be accountable for any kind of problem caused by the corporate person where business man are getting most of the benefit from all this foreign investment. For this reason many cases are being filed before ICSID for any kind of disputes. Afterward, many countries are reviewing their BITs to gain the most benefit of it. More than 50 countries are reviewing their BITs according to 2015-16 reports.³⁵

Some countries of high capital economy; countries like, Canada, Netherland are reviewing their BITs for more success in foreign investment sector³⁶ Canada has adopted new model in 2004³⁷, So far it is successful for attracting foreign investment and giving safety to Canadian Government. Thus, Bangladesh can also review their BITs to get the best result for foreign private investment. Also, the government of Bangladesh can be protected from the dark sides of investment law if the BITs review thoroughly. As, it can be seen in the most recent BIT signed between Nigeria-Morroco in 2016 which is more balanced and innovative BITs till the date.³⁸

³²(n 5)

³³ Ibid

³⁴ Ibid

³⁵ UNCTAD published, "World Investment Report 2015", (2015)

<https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf> Accessed on: 8th September in 2020.

³⁶ Ibid

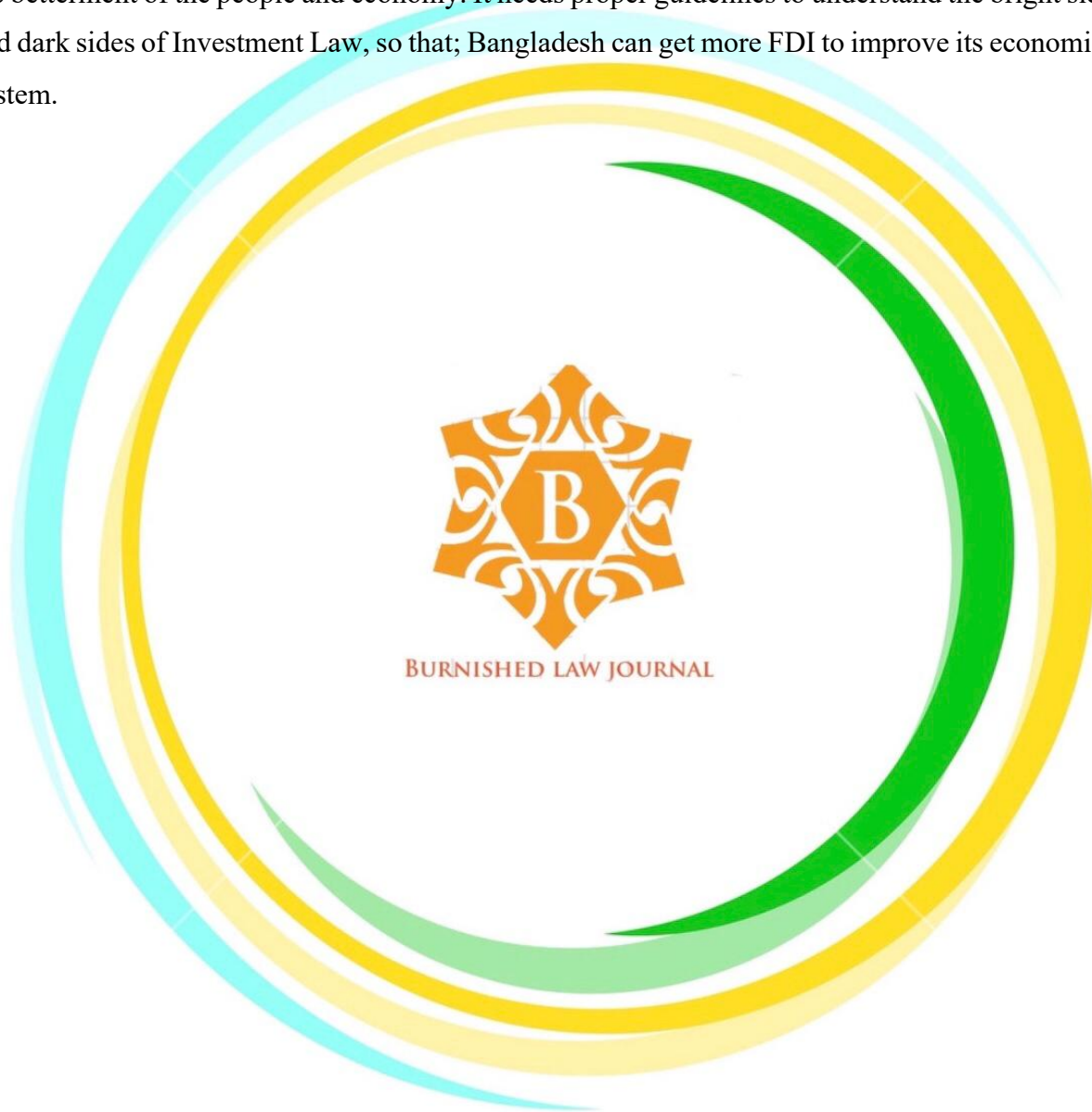
³⁷ CATHARINE TITI, "The Evolving BIT: A Commentary on Canada's Model Agreement" (2013)

<<https://www.iisd.org/itn/es/2013/06/26/the-evolving-bit-a-commentary-on-canadas-model-agreement/>> Accessed on 8th September in 2020.

³⁸ Tarcisio Gazzini, "The 2016 Morocco-Nigeria BIT: Contribution to the Reform Investment treaties" (2017)

<<https://www.iisd.org/sites/default/files/publications/iisd-itn-september-2017-english.pdf>> Accessed on: 8th September in 2020.

Therefore, Bangladesh shall also review their BITs to have balance economy and safety from investment law's Dark sides. To get free from investment law's dark sides, the BITs should be made for public benefit. So that, employees can also get benefited from it not just the owner of the business. Moreover, the government of Bangladesh needs to get more involved in this sector for the betterment of the people and economy. It needs proper guidelines to understand the bright sides and dark sides of Investment Law, so that; Bangladesh can get more FDI to improve its economical system.



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