

LAW ANALYSIS

MAKING BANGLADESH AN ATTRACTIVE FDI DESTINATION

Challenges and options

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FDI has two competing interests: economic development for host states and profit maximisation for foreign investors. It is the lure of maximum profits that persuade foreign investors to invest. The achievement of FDI-induced development requires appropriate balance between the two competing interests in any FDI regulatory regime in host states. FDI is exposed to commercial and non-commercial risks. Foreign investors minimise these risks by investing where profit earnings commensurate with the risk posed. They resort to hedging techniques to control commercial risks, but non-commercial risks are beyond their control. It is this non-commercial risk where Bangladesh can improve significantly. Balanced regulation for development and protection for FDI can create a win-win situation for the parties. Improvements and reforms in internal FDI climate to reduce non-commercial risk may be more palatable than regulatory relaxation to present Bangladesh as an attractive FDI destination.

The US State Department Investment Climate Statements 2018 on Bangladesh has listed some internal impediments to FDI inflows reducing the rate to only 1% of GDP, one of the lowest of rates in Asia. The main barriers listed below are well-known and continuing.

- Inadequate utility and infrastructure services for cost-efficient transportation through functional ports, deep sea port, and railways facilities;
- Insufficient utility services, electricity, gas, and water supplies;
- Poor and fragile technology-based trade facilitation at the customs/ports deterring speedy market access and questionable effectiveness of FDI-related online services;
- Safeguarding workers' rights to association and collective bargain remain unaddressed;
- Weak law, order, and enforcement raise security concerns among foreigners;
- Lacklustre intellectual property rights protection and counterfeit goods prevention and a draft Patent Act 2014 remains under the Ministry of Industries for review ever since;
- Bureaucratic delays, red-tapes, and

corruption remain continuing problem;

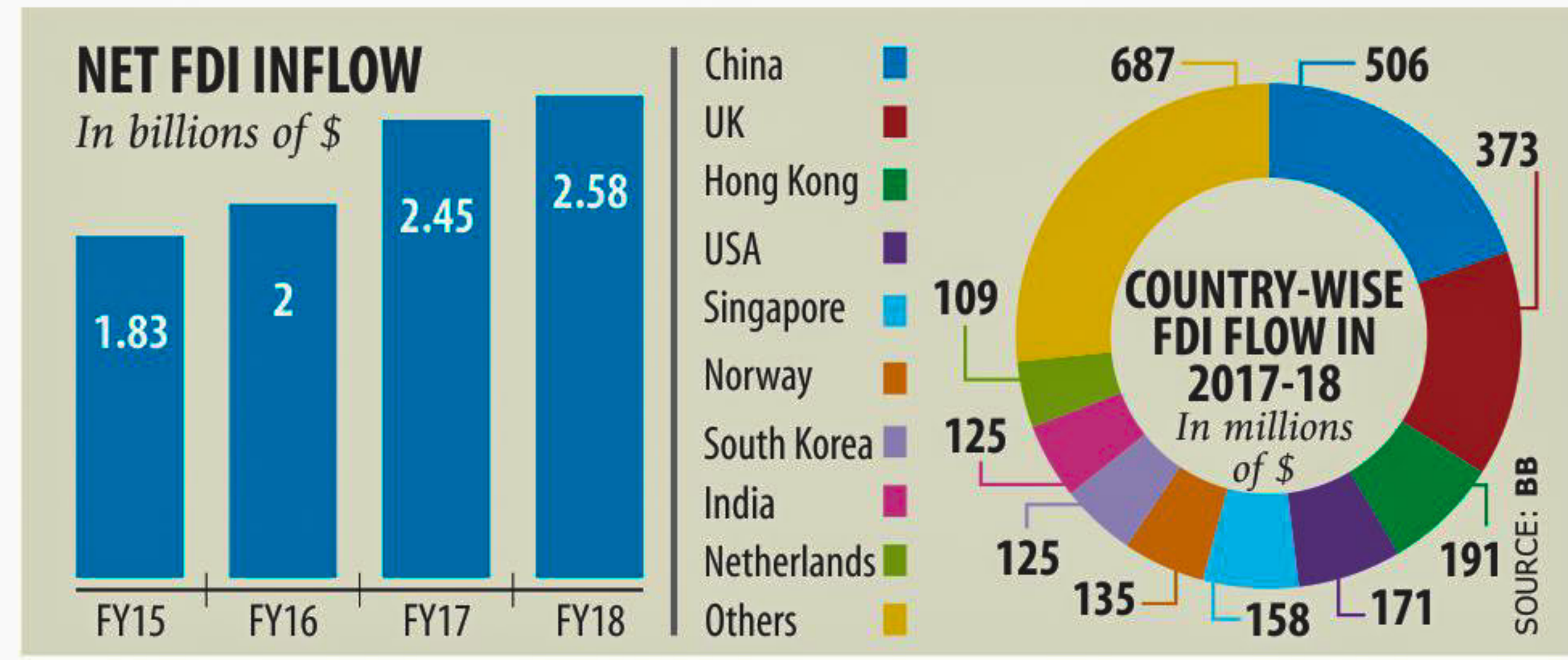
- Lack of judicial independence free from executive interference and corruption in lower courts. Bangladesh scored 2.38/7 in the World Bank 2016 Judicial Independence Index;
- Slow adoption of ADR mechanisms and slow courts impede FDI disputes resolution;
- Underdeveloped capital markets, high dependence of the financial sector on banks, and limited financial instruments amid the risky and unstable banking sector.

Addressing these domestic barriers would go a long way to improve a favourable FDI climate in Bangladesh. The Foreign Private Investment Act 1980 (FPIA) and the National Industrial Policy 2010 (NIP) may be amended to articulate the methods and forums of FDI dispute settlement. Effective local judicial remedies may be provided by establishing specialised courts or chambers in existing courts with judicial capacity for speedy FDI dispute settlement. Foreign investors are gradually turning to the Bangladesh International Arbitration Centre for FDI dispute resolution. This welcoming trend must be capitalised by improving further its functional competence to be a more reliable non-governmental commercial arbitration forum. The US State Department Statements recognise the open policies and generous incentives available under the FDI laws and policies of Bangladesh, which are not the actual barriers to inbound FDI flow. Bangladesh provides enough fiscal and non-fiscal incentives to attract FDI and further incentivised regulatory relaxation would not be a panacea to attract more FDI inflows. Rather it must deal with its internal barriers that scare and turn away foreign investors.

Positive contribution to its development is the primary goal of Bangladesh to invite FDI. Increased FDI inflows do not automatically translate to development, whose achievement requires appropriate regulation. Regulatory relaxation as incentives for inbound FDI calls for scrutiny suggested below to see whether they advance or hinder development in Bangladesh.

Entry screening

Introduce minimum entry regulation to replace the current paperwork-based



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approval procedures. Specific sectors for FDI and requirements relating to inflows of capital and foreign exchange, local content, employment, and technology transfer may be made publicly and readily available. Local equity participation may further be encouraged in joint ventures to control partial equity ownership. The full foreign ownership may be revisited to make it conditional, such as training for human capital development and handover some heavy machinery after the completion of FDI projects. Malaysia requires export of 80% of products and not to compete with locally manufactured products in local markets in approving 100% foreign equity participation. The screening, reviewing, and approving role of the Bangladesh Investment Board should proactively assess the developmental aspects of inbound FDI proposals backed by subsequent performance and compliance monitoring.

National interest
Inbound FDI must pass the national interests test, which should include the net economic benefit and policy compliance. A screening and approval manual with a list of criteria along the line of the regulatory directives in section 3 of FPIA to avoid arbitrary and non-transparent decision-making should be made readily available to prospective investors and used to determine net economic benefits and policy conformity. The net economic benefit must assess whether the proposed FDI would (a) inject new capital or borrow capital from banks in Bangladesh under FDI concessionary loans; (b) bring new technology and

transfer to the local economy; (c) contribute to new employment opportunities and local capacity-building; (d) generate new revenue-earnings; (e) promote trade in local raw materials and exports; and (f) repatriate full or part FDI earnings and/or reinvest in Bangladesh. National laws and policies conformity should require FDI proposals to be compliant with the Constitution and its state policies, and laws and policies on the environment, occupational health and safety, taxation, labour, security, defence, heritage, and natural resource exploitation.

Reasoned incentives
Incentives to attract FDI must be subject to a cost-benefit analysis to prevent revenue losses and capital control risks. Tax holidays are a major cause of consecutive revenue losses due to their abuses by foreign investors taking advantage of long duration, lack of effective control, and administrative corruption. Various direct and indirect tax incentives lead to huge tax expenditure often outweighing the expected revenue. A tax incentive and expenditure review and monitoring mechanism to produce periodic reports for public scrutiny in parliament is necessary. The existing equal facility for low interest rate bank loans provides an opportunity for foreign investors to invest by borrowing substantially from local banks with very little or no capital transfer, which hampers the growth of local small and medium enterprises. Strict requirement of guarantees for the realisation of non-performing loans must be introduced. Export incentives must impose

restrictions on importing foreign raw materials. The repatriation of FDI earnings with no limit or waiting period for remittance (EPIA, section 8) may be revisited to require partial reinvestment or full repatriation only after the payment of corporate income tax and the fulfilment of all other dues and financial obligations.

FDI entails positive and negative impacts for host states, which must take measures to turn positives outweighing negatives. A strict regulatory FDI regime in Bangladesh must be in place to ensure FDI-induced development that should go hand-in-hand with adequate protection to investors. Only those FDI that support development deserve to be invited and protected. Regulatory restraint on FDI is inimical to its national interest is in order and imperative to maximise development. Currently 8 public and 1 private (owned by Koreans) Export Processing Zones (EPZs) are operational and Bangladesh has announced to create up to 100 new privately-owned Economic Zones (EZs) and invited private investors, foreign and local, to develop these EZs. It is high time for Bangladesh to get its FDI laws and policies together. Concentrating on addressing and reforming its internal barriers more than further regulatory relaxation is likely to be rewarding in making Bangladesh an attractive FDI destination.

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LAW WATCH

Fire incidents and our negligence

ON 10 June, 2010, the High Court Division (HCD) of the Supreme Court of Bangladesh ordered the government formed probe committee headed by the home secretary to find causes of the Nimtoli fire incident occurred on 3 June 2010 and to submit a report thereof within three months. It was also required of the government

authorities to explain why they should not be ordered to ensure safe and planned development of Old Dhaka and prevent the unauthorised setting up or use of buildings as warehouses and factories.

Advocate Sara Hossain, the lawyer of the six human rights organisations who moved the petition to the honourable court told The Daily Star

and adequate compensation for the victims' families, The Daily Star reports on 22 February 2019.

The Building Construction Act 1952, in its section 18A, empowers the government to make any provision namely Bangladesh Building Code. The 2006 Building Code specifically deals with general building requirements, control and regulation; fire protection; building materials; structural design; construction practices and safety; building services; alteration, addition to and change of use of existing building; sign and outdoor display; matters relating to administration and enforcement of the above matters.

Despite such laws existing in Bangladesh, monitoring and enforcing safety in construction is still a big challenge due to various limitations such as confusion regarding enforcement authority, shortage of manpower at enforcing agencies, and lack of a national safety certification and licensing programme for engineers, contractors and workers.

Earlier in the case of *BLAST and another v Bangladesh and others*, Writ Petition No. 718 of 2008, the HCD directed the government to explain within four weeks why its failure to date to establish a government agency as provided for under the Bangladesh National Building Construction Code, 2006 for enforcement of the law, does not constitute a breach of its statutory and constitutional duties. The Court also directed the government to submit a statement to the Court setting out what steps it has taken to secure the safety of construction workers since the Code became law in November 2006. However, the current status of the petition is that it is pending for hearing.



PHOTO: STAR

formed committee to identify the unauthorised buildings, warehouses and factories where chemicals, explosives and other flammable or petroleum products (both authorised and unauthorised) were stored and to submit the report to it within three months. It also issued a rule asking the

that the government was yet to respond to the order and rule issued by the HCD after the Nimtoli tragedy and the Court did not pass any further order on this issue. She would move another petition on behalf of her clients before the HCD next week for punishment of the people responsible for Chawkbazar disaster

LAW EVENT

University of Dhaka, the national champion of Jessup 2019

FROM the 31 participating teams, University of Dhaka emerged as the champion of Jessup Bangladesh 2019, and Eastern University as the runner-up team.

Jessup Bangladesh is the national round of the Philip C. Jessup International Law Moot Court Competition. It is the fifth largest qualifying round globally. The 3rd Bangladesh Qualifying Round 2019 was held at Independent University, Bangladesh from February 21-23.

International Law Students Association Bangladesh (ILSA) in association with the Office of Overseas Prosecutorial Development Assistance and Training (OPDAT) - US Department of Justice (DoJ), TEER - City Group, Independent University, Bangladesh, and Bangladesh Chapter of the Asian Society of International Law (AsianSIL Bangladesh), jointly organised the competition in Bangladesh.

The champion team from University of Dhaka bagged both the Best Mooter and Best Memorial award in the competition. On the other hand, BRAC University and Jagannath University were respectively awarded the Second Best Memorial and Third Best Memorial awards. North East University and Northern University

were jointly recognised with the Spirit of the Jessup Award. Jahangirnagar University was announced the Best New Team.

The Attorney General for Bangladesh, Mahbubey Alam declared the competition open on 21st February held at the Amari Dhaka. Mahbubey Alam was the Chief Guest in the inauguration ceremony. The final rounds and closing of the competition were held on February 23.

Judges of the final round Mr. Justice Muhammad Imman Ali, Hon'ble Judge of the Appellate Division of the Supreme Court of Bangladesh, Mr. Justice Syed Refaat Ahmed and Mr. Justice Mamoon Rahman, Hon'ble Judges of the High Court Division of the Supreme Court of Bangladesh graced the closing ceremony. They were impressed with the performance demonstrated by the participants and all highly appreciated the noticeable participation of female law students in the competition.

In the closing ceremony, Mr. Eric Oponga, Resident Legal Advisor, US Department of Justice, OPDAT, US Embassy Dhaka; Mr. Md. Forhad Hossain, Head of Sales of City Group; and Professor M. Omar Rahman, Vice Chancellor, Independent University,

Bangladesh were present. They commended the competition for providing a platform that helps the law students develop and harness their skills.

Mr. Nuran Chowdhury, National Coordinator, Bangladesh Chapter, ILSA greeted everyone in a video message. He shared how Jessup Competition had started in Bangladesh. Mr. A S M Sayem Ali Pathan, Advocate, Supreme Court of Bangladesh & National Administrator of Jessup Bangladesh National Round, 2019, declared the names of the award winning teams. The closing session was chaired by Professor Dr. Borhan Uddin Khan, Advisor, Department of Law, IUB and President, AsianSIL Bangladesh.

Jessup moot court competition gathers law students from more than 100 countries in the international round of Washington DC. The two finalist teams of the Bangladesh qualifying round will be participating in the international round of the 60th Philip C. Jessup International Law Moot Court Competition.

THE EVENT WAS COVERED BY RATHAN RAHMAN RAFID, A STUDENT OF LAW, UNIVERSITY OF DHAKA.

