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ENVIRONMENT

Regulating Rampal Power Project Could Mean Trouble Under the India-Bangladesh BIT

BY PRABHASH RANJAN AND PUSHKAR ANAND ON 11/10/2016 • 2 COMMENTS

If Bangladesh were to adopt regulatory measures against the environmental impact of the power plant, Indian public sector investors could accuse the country of violating BIT obligations.

Representative image. Credit: Reuters/Wolfgang Rattay

The Rampal power project, a proposed 1,320-megawatt coal-based power plant in Bangladesh's Rampal Upazila, has been facing stiff opposition. Given the proximity of the power plant to the Sundarbans, the world's largest tidal halophytic mangrove, concerns have been raised regarding the widespread and pervasive damage that this power plant could have on the ecology of the area. In 1997, the UN Educational, Scientific and Cultural Organisation declared the Sundarbans a world heritage site. The Sundarbans have also been declared a protected wetland under the 1971 Ramsar Convention on Wetlands – an international treaty for the conservation and sustainable use of wetlands.

However, the Bangladeshi government is batting for the project. The merits of the environmental impact of the Rampal power project have already been commented on in detail. Assuming that there is or will be an adverse environmental impact if Bangladesh decides to adopt environmental regulatory measures in the future – stopping the power plant from operating, for instance – it will have to be mindful of its international obligations under the India-Bangladesh bilateral investment treaty (http://investmentpolicyhub.unctad.org/IIA/country/16/treaty/371) (BIT).

The power project is an outcome of the memorandum of understanding signed in 2010 between Bangladesh and India, which led to the establishment of the Bangladesh-India Friendship Power Company Limited (BIFPCL) in October 2015. The primary objective of BIFPCL is to construct, own, operate and maintain a coal-powered thermal power project in Bangladesh. BIFPCL is actually a joint venture between the Bangladesh Power Development Board, a public sector power company, and the National Thermal Power Corporation (NTPC), India's leading public sector power firm. As part of the plans to execute BIFPCIL's mandate, Rampal was chosen as the site for the construction of the coal-fired power plant. Bharat Heavy Electricals Limited (BHEL), India's leading engineering and manufacturing public sector company, was awarded the contract to construct the plant. The Export Import Bank of India is the majorly financier of the project.

Risk of investor-state arbitration

Bangladesh and India signed a BIT in 2009 for the promotion and protection of foreign investment within each other's territory. The BIT provides for an investor-state dispute settlement mechanism, wherein a foreign investor can drag the host country to arbitration before an ad hoc tribunal if the latter adopts regulatory measures that the former believes violate the BIT.

Can Bangladesh be dragged to arbitration by an Indian investor in case it adopts sovereign regulatory measures to mitigate the adverse environmental consequences of the Rampal project, which adversely affect the investor? To answer this question, one will first have to decide whether a BIT tribunal has jurisdiction over such a dispute. For the BIT tribunal to have jurisdiction, the company bringing the dispute must be an Indian investor that has made foreign investment in Bangladesh.

Proving this will not be difficult, given the very broad definition of foreign investment in the India-Bangladesh BIT. Under Article 1(b) of the India-Bangladesh BIT, an 'investment' means "every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party….." and also includes "shares in and stock and debentures of a company and any other similar forms of participation in

a company". Thus, the definition clause is wide enough to cover NTPC's investment in BIFPCL as foreign investment under the BIT. Since NTPC is an Indian company, it also satisfies the definition of investor in Article 1(c) of the BIT. Additionally, apart from NTPC, BHEL is also an investor under the BIT that has made foreign investment in Bangladesh.

Once the jurisdiction hurdle is crossed, the next question is what kind of claims these companies can bring under the BIT. The form of complaints will depend on the nature of regulatory measures. For example, if Bangladesh orders closure of the power plant to stop further environmental damage, NTPC or BHEL can challenge this as expropriation of their investment under the India-Bangladesh BIT if they are not compensated for the loss of their investment or if the quantum of compensation is not in accordance with the BIT. The India-Bangladesh BIT provides for both direct and indirect expropriation.

Another possible instance where Indian companies can mount a BIT challenge is a situation where the judiciary in Bangladesh, say on a petition filed by its citizens, passes an order awarding high amounts of compensation. A case on similar lines is pending before the Permanent Court of Arbitration, where Ecuador has been taken to arbitration by Chevron Corporation after the Ecuadorian Supreme Court ordered Chevron to pay an amount of $9.5 billion as compensation for the damages to the Amazonian rain forests due to its oil exploration activities. The bottom-line is that there can be several conceivable circumstances where regulatory measures taken by Bangladesh could be challenged under the BIT.

Does Bangladesh have a defence?

In such investor-state arbitration, will Bangladesh have any valid legal justification for the measures taken, even if against the interests of the investors? The India-Bangladesh BIT, which will be the most important source of international law applicable to the dispute, does not have any provisions that give space to host states (in this case Bangladesh) to act in furtherance of environmental objectives without worrying about breaching other substantive BIT obligations.

The only exception the BIT has is with respect to measures taken to protect essential security interests, that too only in circumstances of extreme emergency. This sets a very high threshold, making it difficult for Bangladesh to bring environmental measures under this exception. If not the BIT, Bangladesh can defend its regulatory measures to protect the Sundarbans by relying on international environmental law such as the Ramsar Convention (http://www.ramsar.org/about-the-ramsar-convention), the 1972 World Heritage Convention (http://whc.unesco.org/uploads/activities/documents/activity-562-4.pdf) and the 1992 Convention on Biological Diversity (https://www.cbd.int/convention/), which casts an obligation on states to protect and preserve biodiversity within their territory. There are also other international laws Bangladesh can rely on. The BIT tribunal, under the rules of treaty interpretation given in Article 31(3)(c) of the Vienna Convention on Law of Treaties (https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf) will be bound to "take into account" "together with the context" any "relevant rules of international law applicable in relation between the parties", to interpret BIT provisions. Since the tribunal's obligation is only "to take into account" these environmental provisions, one is unsure to what extent this will influence the interpretation of BIT provisions. Given the high ecological value of Sunderbans, perhaps an argument based on the concept of *erga omnes* obligations – obligations owed by a state to the entire international community – can also be made. However, there is considerable debate as to whether erga omnes obligations exist with respect to environmental protection.

Due to textual ambiguity in the India-Bangladesh BIT, the outcome of such a dispute, to a great extent, will not only depend on the kind of regulatory measures adopted by Bangladesh but, more importantly, on the approach of the arbitral tribunal. There have been several investor-state arbitrations where environment-related issues have been central to the dispute. However, the approaches of the arbitral tribunals have not been consistent throughout. On the one hand are cases like *Methanex v. United States of America (http://www.italaw.com/cases/documents/696)*, where a foreign investor challenged an environmental regulatory measure as constituting expropriation. The tribunal said that non-discriminatory regulatory

measures adopted for public purpose following due process do not amount to expropriation unless the state gave specific commitments to the foreign investor that it would refrain from such regulation. This is notwithstanding the effect of the regulatory measure on foreign investment. On the other hand, there are cases such as *Pope and Talbot v. Canada (http://www.italaw.com/cases/863)*, wherein the tribunal focused primarily on the effect of the measures – "whether there is substantial deprivation or not" – of investment to ascertain expropriation. In another case, *Santa Elena v. Costa Rica (https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwirpcbLltLPAhUDqY8KHYBWDXUQFggdMAA&url=http%3A%2F%2Fwww.italaw.com%2Fdocuments%2Fsantaelena_award.pdf&usg=AFQjCNHhCGmXR-Fq15Sj3y7Jcs2L9CpFIA&sig2=xutArKeVMtC2cDA1e1PGYw)*, which has some similarity to possible disputes under the India-Bangladesh BIT, Costa Rica adopted measures to secure the ecology of an area that was designated as a World Heritage Site. The tribunal held that the "expropriatory environmental measures – no matter how laudable and beneficial to society as a whole…are similar to any other expropriatory measure…and where a property is expropriated even for environmental purposes, *whether domestic or international,* the state's obligation to pay compensation remains."

We do not wish to even remotely suggest that Bangladesh cannot adopt environmental measures to protect the Sundarbans. It is also not to suggest that an Indian company shall necessarily prevail in a BIT dispute with the state of Bangladesh. However, it is critical that Bangladesh's executive and judiciary are fully aware of the fact that its environmental regulatory measures could be challenged by Indian companies under the BIT between the two countries. Bangladesh needs to carefully look at its options and tailor its regulatory measures to ensure that it has the maximum impact without violating BIT obligations.

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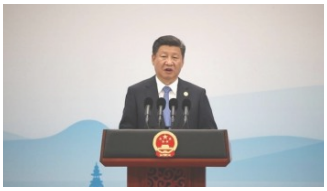

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A K Sinha • 4 months ago

It is certainly one of the few scholarly pieces i have come across recently where potential investor-state arbitration is discussed so extensively. I admire the work of the authors for pointing out the nuances of investment related aspects of Rampal Power project. Article does not only provide perspective of an Indian investor but also talks about the defenses Bangladesh can take under India-Bangladesh BIT. In this respect article provides a balanced view on this potential investor-state arbitration.

I think authors while discussing applicable laws in article 12 of India-Bangladesh BIT have read "essential security interests" and "circumstances of extreme emergency" together, whereas these two notions are separated by "or" in article of the India-Bangladesh BIT. So Bangladesh can take the defense of "circumstances of extreme emergency" as one of the defenses in justifying its environmental regulatory measure even when it fails in justifying "essential security interests" defense. Also the nexus requirement link in article 12 of the BIT is "for"; therefore the threshold to bring environmental measures into BIT exception is quite low and B'desh can successfully do so. However, these are just my observations.

It is interesting when authors conclude that B'desh has to tailor its measure in such a way that its has maximum effect without violating BIT norms. I think we'll have to wait for this as reputation of South Asian countries in the field of investment precedes them.