Critical Reasoning Practice

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Protecting Indian capital in Bangladesh

The dramatic developments in Bangladesh that led to the resignation and fleeing of its former Prime Minister Sheikh Hasina have created a political vacuum and, thus, uncertainty in India's eastern neighbour. Besides the political and diplomatic fallout of this crisis for India, another significant aspect is how this will impact Indian companies operating in Bangladesh. Indian companies have invested in Bangladesh in sectors such as edible oil, power, infrastructure, fast-moving consumer goods, automobiles, and pharmaceuticals. Despite political opposition, the Sheikh Hasina government rolled out the red carpet for Indian investors and adopted several measures to invite them, such as starting designated special economic zones. Unhappy with India's alleged support of Ms. Hasina's regime, her opponents launched an "India out" boycott movement targeting Indian goods. Since Ms. Hasina is no longer in power, the interim or the new government may adopt a hostile attitude towards Indian companies. It might change the existing laws or adopt new regulatory measures that may adversely impact Indian capital. What options do Indian businesses have in such an eventuality?

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Legal protection for Indian investors

As Jeswald Salacuse argues, three basic legal frameworks broadly apply to foreign investment. First, the domestic laws of the country where the investment is made. Second, contracts may have been signed between the foreign investor and the government of the host state, or among foreign investors and companies of the host state. Third, the international law contained in applicable treaties, customs, and general legal principles that have attained the status of international law. The Indian companies that have invested in Bangladesh can use the first two legal frameworks to protect their investments from regulatory risks. For instance, Indian companies can rely on Bangladesh's Foreign Private Investment (Promotion and Protection) Act. However, there are limitations to relying on the domestic law of the host state because it can be changed unilaterally by the state to the investor's detriment at any time. Likewise, contracts may be of limited value when it comes to challenging the sovereign actions of the state that adversely affect foreign investment. Therefore, the third legal framework, international law, assumes importance.

The issue acquires significance with the Joint Interpretative Notes under the India-Bangladesh bilateral investment treaty, diluting investment protection features

The India-Bangladesh BIT

International law cannot be changed unilaterally and can be used to hold states accountable for their sovereign actions. When protecting foreign investment, the most crucial instrument in international law is a bilateral investment treaty (BIT). A BIT is a treaty between two countries aimed at protecting investments made by investors of both countries. BITs protect investments by imposing conditions on the regulatory behaviour of the host state, thus preventing undue interference with the foreign investor's rights. These conditions include restricting host states from unlawfully expropriating investments, imposing obligations on host states to accord fair and equitable treatment (FET) to foreign investment and not to discriminate against foreign investment. BITs also empower foreign investors to directly sue the host state before an international tribunal if the investor believes that the host state has breached its treaty obligations. This is known as investor-state dispute settlement (ISDS). According to the United Nations Conference on Trade and Development (UNCTAD), by the end of 2023, the total number of known ISDS claims that have been brought stands at 1,332.

In case of adverse sovereign regulation, Indian companies can rely on the India-Bangladesh BIT signed in 2009. While India has unilaterally terminated almost all its BITs, the one with Bangladesh continues to exist. The India-Bangladesh BIT contains broad substantive investment protection features, such as an unqualified FET provision that can come in handy for Indian companies challenging Bangladeshi sovereign regulatory conduct.

However, the twist in the tale is the Joint Interpretative Notes (JIN) that India and Bangladesh adopted in 2017 to clarify the meaning of various terms in the 2009 treaty. This JIN, now a part of the BIT, was adopted at India's insistence. As part of overhauling its investment treaty practice to safeguard its regulatory power, India proposed such JINs to several countries. This was done without considering whether India has an offensive or defensive interest vis-à-vis a specific country. This JIN has diluted the investment protection features of the BIT. For instance, taxation measures are excluded from the ambit of the BIT.

Likewise, the FET provision is linked to customary international law that would require a higher threshold to show a violation of the treaty. The JIN has been designed from the perspective of the capital-importing country to safeguard its regulatory conduct from ISDS claims. Between India and Bangladesh, New Delhi is the capital exporter, and Dhaka is the importer. Ironically, the JIN that India developed might work to the advantage of Bangladesh, and not the Indian capital operating there.

The larger question

While Bangladesh provides the immediate reference point, the issue is not restricted to India's eastern neighbour. India's outbound investments have grown manifold. According to UNCTAD, outward foreign direct investment from India in 2023 stood at about $13.5 billion. India is among the top 20 capital-exporting countries. Thus, the issue of legal protection for Indian companies abroad assumes salience. India should, therefore, evolve its investment treaty practice, keeping both its host and home status in mind and not just the former.

The views expressed are personal

Question -1) Which of the following can be inferred from the passage about the impact of the Joint Interpretative Notes (JIN) on the India-Bangladesh BIT?

A) The JIN unequivocally strengthens the investment protection features for Indian companies in Bangladesh.
B) The JIN was adopted to primarily benefit Indian companies investing abroad.
C) The JIN has diluted the investment protection features, making it potentially disadvantageous for Indian investors.
D) The JIN prevents any sovereign actions by Bangladesh that could adversely affect Indian investments.

Question -2) Which of the following best describes the primary concern of Indian companies in Bangladesh following the political developments mentioned in the passage?

A) The potential enactment of laws in Bangladesh that could unfavorably impact Indian investments.
B) The withdrawal of the India-Bangladesh BIT, leaving Indian investments unprotected.
C) The introduction of stricter international laws governing foreign investments in Bangladesh.
D) The possibility of Bangladesh unilaterally strengthening its domestic laws to benefit Indian investors.

Question -3) Why might the India-Bangladesh BIT, despite being in place, not offer adequate protection to Indian investors in light of the JIN?

A) Because the BIT has been completely nullified by the JIN.
B) Because the JIN excludes taxation measures and raises the threshold for proving FET violations.
C) Because the JIN expands the scope of protection under customary international law.
D) Because the BIT allows unilateral changes by the Bangladesh government without consequences.

Question -4) Given the content of the passage, which strategy should Indian companies pursue if the new government in Bangladesh enacts unfavorable regulations?

A) Rely solely on Bangladesh's domestic laws for protection.
B) File claims under the investor-state dispute settlement (ISDS) mechanism using the India-Bangladesh BIT.
C) Renegotiate the terms of their contracts with the Bangladesh government.
D) Withdraw all investments from Bangladesh to minimize risks.

Question -5) What is the potential irony in India's approach to the JIN, as described in the passage?

A) India developed the JIN to favor its investors abroad, but it ended up strengthening Bangladesh's position.
B) The JIN was designed to protect Indian companies, yet it unintentionally empowers the host state of Bangladesh.
C) The JIN was meant to protect Bangladesh's sovereignty, but it also helps Indian companies.
D) India did not anticipate that the JIN, designed from a capital-importing perspective, could disadvantage its own capital exporters.

Question -6) According to the passage, what broader implication does the situation in Bangladesh have for Indian outbound investments?

A) It highlights the need for India to terminate all existing BITs.
B) It shows that Indian companies should avoid investing in politically unstable countries.
C) It underscores the importance of evolving India’s investment treaty practices to consider both host and home country interests.
D) It suggests that international law is always reliable in protecting foreign investments.