



Legal and Policy Regulations of Performance Requirements for Foreign Investors in Bangladesh

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Research Article

Abstract

The multinational enterprises (MNEs) have a common intention to maximizing their capital investment to gain more profit. In doing so, sometimes they behave irresponsibly towards the host countries, even do not hesitate to bypass the laws of the country. In relation to performance requirements for foreign investors, the host country like Bangladesh may have specific laws or policies; but due to the desire to attract more FDI and pressure from the MNEs, the government may be reluctant to impose various requirements or refrain from enforcing them. This paper will discuss the negative impact of FDI in Bangladesh due to lack of performance requirement provisions> It will also highlight the significance of enacting such provisions into the FDI laws. This paper will address one major question: why the foreign investors should be required to fulfill performance requirements during their entry in Bangladesh? In this study, six respondents were interviewed for expert opinions. The findings of this study show that the existing laws and policies of Bangladesh significantly lack performance requirement provisions. In this relation, recommendations have been provided for consideration by the government.

Keywords: Performance requirement, foreign direct investment, Bangladesh, multinational enterprises, regulation.

1. Introduction

Performance requirements, which are also known as business practices are used by the host states as an entry requirement of FDI. According to the United Nations Conference on Trade and Development (UNCTAD), performance requirements are one type of so-called 'host country operational measures' along with various restrictions (UNCTAD, 2001). It requires foreign investors to fulfill certain precise goals in relation to their operations in the host state. It is also

apparent from the tradition that performance requirements may include the entire spectrum of investment operations. The host states impose this requirement with other policy instruments, such as - trade policy, screening mechanisms, and incentives; also to boost numerous development objectives.

Many proponents contend that the host states should impose performance requirements to accomplish certain objectives regarding macro-or micro-economic developments. The development objectives may include export generation and performance, the balance of payment justification, strengthening of industrial bases, technology transfer, development of comparative advantage in a particular sector of the economy, creation of employment opportunities, trade balancing; along with other non-economic objectives such as - political independence and distribution of political power (Smith, 2003). The opponents argue that strengthening local businesses through performance requirements may generate incompetent indigenous firms, which may negatively affect the host states' economy. Moreover, the imposition of performance requirements may also guide to anti-competitive behavior; and loss of FDI due to restrictive business practices by the MNEs. This is because the business interests of MNEs do not always match with a host state's development objectives (Smith, 2003). Despite the economic contribution of FDI in Bangladesh, there are also negative effects, which are caused due to a lack of legislation and control. In this connection, this paper will analyze whether existing laws and policies of FDI impose performance requirements to the foreign investors during the entry stage in Bangladesh; if not, then whether is it essential to consider implementing them through FDI related laws or policies.

2. Foreign Direct Investment

After the emergence of the notion of 'economic globalization', FDI became an essential element of the international economy. It is a renowned phrase, which has gained the specific interest of the policy-makers, academics, national and international investment laws and policies, international financial institutes, and so on. Consequently, various definitions have been developed over the years to define FDI.

The Organization for Economic Co-operation's (OECD) definition of FDI is "the category of international investment that reflects the objective of a resident entity in one economy to obtain a lasting interest in an enterprise resident in another economy" (Gurria, 1996). The United Nations Conference on Trade and Development's (UNCTAD) definition is –

An investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate). (Guterres, 2007)

The OECD and UNCTAD's definitions appear to be constructed with an emphasis on 'long term relationship' and 'lasting interest'. Long-term relationships and lasting interest denote the nature of the investment. It ought to be in a way that creates and enables a continued relationship between the FDI enterprise and investor in an overseas territory; and is related with importance managing authority over the earlier (Duce & España, 2003). The Balance of Payments Manual of

International Monetary Fund's (IMF) defines FDI as "an investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management of the enterprise" (Camdessus, 1993). From this definition, the issue of ownership interest and control appears to be a subject of importance in the definitional construct of FDI.

Apart from different institutions, various scholars also defined FDI. Moosa defined FDI as "the process whereby residents of one country (the source country) acquire ownership of the assets to control the production, distribution, and other activities of a firm in another country" (Moosa, 2002). However, in Moosa's definition, the phrase 'residents of one country' to indicate the investors of FDI limits the scope of the definition; instead, the term 'residents of one country' can be used to include every natural and juristic people based in a state.

Sornarajah defined FDI as "foreign investment involves the transfer of tangible and intangible assets from one country to another country for their use in that country to generate wealth under the total or partial control of the owner of the assets" (Sornarajah, 2017). In this definition, various phrases such as - the transfer of property, tangible or intangible, from one country to another by any investor, either an individual national, private or state-owned company, or any agency, is the fundamental ingredient of foreign investments. According to Sornarajah, the investor must have full or partial ownership, as well as control over the management of the invested assets. This definition appears to be more general and comprehensive.

Seid defined FDI as "foreign investment enables investors to look beyond the constraints of their domestic investment environment and gain access to resources and bigger markets, and maximize investment returns" (Seid, 2018). According to this definition, FDI allows investors to invest their capital outside of the home states, and by investing in the host states; they acquire the right to operate local resources to gain profits.

Apart from the institutions and scholars, the FDI laws of different countries also defined foreign investment. For examples, according to section 2(1) (b) of the FPIA 1980 of Bangladesh, foreign private investment means –

Investment of foreign capital by a person who is not a citizen of Bangladesh or by a company incorporated outside Bangladesh, but does not include investment by a foreign government or an agency of foreign Government.

Article 15 of the Foreign Investment Law 2015 of China expands the definition of foreign investment, which include not an only green-field investment (*i.e.* establishment of a new enterprise) and mergers and acquisitions (including equity acquisition and asset acquisition), but also medium and long-term financing (with a term of more than one year), obtaining licenses to explore natural resources or build/operate infrastructure (such as joint offshore oil exploration, BOT, and others), acquisition of houses, land and other real property, contractual control (such as VIE arrangement) and other forms. (Kituyi, 2019)

Article 3(12) of the Law on Investment 2014 of Vietnam defines foreign investment as "The remittance of capital in cash or other lawful assets by foreign investors into Vietnam in order to carry out investment activities". (Kituyi, 2019) In addition, article 4(h) of the Private Investment Law 2005 of Angola defines foreign investment as: "The implementation of the project by using

assets held by non-residents for foreign exchange purposes, which assets may consist of, other than monetary funds, technology, know-how or capital goods". (Qureshi, 2002)

From the above definitions, it appears that capital investment should be from a foreign individual or company, who is not a citizen of the host country and should invest foreign capital in accordance with the law of the country concerned. It is to be noted here that none of the FDI governing laws in Malaysia including MIDA 1965 defines foreign investment.

Moreover, the two expressions 'long term relationship' and 'lasting interest' referred to above, are the well-known characters of the FDI definitions, mostly used by the financial institutions. The use of these terminologies represents the facet that distinguishes FDI from portfolio investment because portfolio investment does not look for control or permanent interest (Moosa, 2002). In portfolio investment, the control and management of the company are detach from the share of ownership in it; whereas the controlling of invested property is essential in FDI. Moreover, according to Sornarajah, such a distinction is drawn in the economic texts; and in addition, a sound foundation for distinguishing direct and portfolio investment in the law. However, what precisely determines the control is a matter, which is not agreed upon; nevertheless, the frequently used minimum threshold of 10 percent shareholding in a foreign company is regarded as to create a considerable authority over the key policies of an underlying project. (Sun *et al.*, 2000)

From the above discussions, it appears that two key elements are necessary to constitute FDI, which are: (a) an individual or a company need to transfer capital from a source state to a host state, and (b) control of the investor through substantial equity shareholding. In spite of this, a gap exists in these two constituting elements. (Dunning, 1993) The transfer of capital is not a hard and fast condition in many host countries for an investment to be the FDI. The essential issue is the contribution to the legal capital of an enterprise or project by the MNEs or individual, or inter-Governmental agency, or foreign Government-owned Company, or a non-resident national of the host state. For example, investment by a foreign individual or a company for a project-based totally on a loan to a host country is regarded as foreign investment. In addition, in the product-sharing agreement for oil extraction, it is seen that the foreign company comes into an agreement for oil exploration and there is a shift of power from oil companies to oil-producing host states. Oil-producing host state alone has the right to control and disposal it. A foreign company is given a certain percentage of products. In view of this, the authors in their own definition as mentioned above did not articulate the requirement of transfer of capital or control through substantial equity sharing.

Taking into consideration the above analysis on the definition of FDI, it could be said that as one of the most emergent economic matters, the definition of FDI is not static. This tendency is most evident in BITs and national legislations. BITs of capital-exporting have a tendency to broaden the scope of definition so as to bring a variety of activities associated with the investment under treaty protection. On the other hand, the definition in national legislation mostly depends on the state's national economic policies with regard to the urgency of FDI for economic development. Rather it is flexible, progressive in nature, as a result consistently becoming broader and comprehensive. (Bhagwati & Srinivasan, 1998) Moreover, all the above definitions appear to be

similar in context and the crucial phrases from the content of every definitional wordings are the investment by an investor, investment in a foreign country, ownership control by the investor, and investor's right to operate the invested property. Therefore, the authors prefer to define FDI as 'an investment by a foreign individual or corporate body or financial institute in a host country (other than its own), where the investor has specific ownership in the invested property and also has the right to operate in the invested assets'.

3. Regulatory Frameworks of FDI in Bangladesh

This subheading seeks to highlight the relevant laws and policies on FDI in Bangladesh. This would serve as a foundation for discussion in this study concerning the regulatory framework. Foreign investment carries enormous importance in a developing country like Bangladesh. Realizing the significance of FDI, Bangladesh formulated its first Industrial Investment Policy in 1973, revised it again in 1974 and 1975. Thereafter, the Foreign Private Investment (Promotion and Protection) Act 1980 (FPIA 1980) and the Bangladesh Export Processing Zones Authority Act 1980 (BEPZA 1980) was enacted. To make the foreign investment more attractive the National Industrial Policy (NIP) was announced in 1982 and then continued to revise in 1986, 1991, 1999, 2005, 2009, 2010, and 2016.

To promote FDI further, Bangladesh has also enacted The Bangladesh Private Export Processing Zones Authority Act 1996 (BPEPZA 1996); the Bangladesh Economic Zones Act 2010 (BEZA 2010); and the Bangladesh Investment Development Authority Act 2016 (BIDA 2016). With the passage of time, Bangladesh has reformed its regulatory structure in relation to FDI to open up the new avenue and to dislodge the compliances related to the FDI. (Aggarwal, 2016) The legal framework of FDI in Bangladesh is as follow:

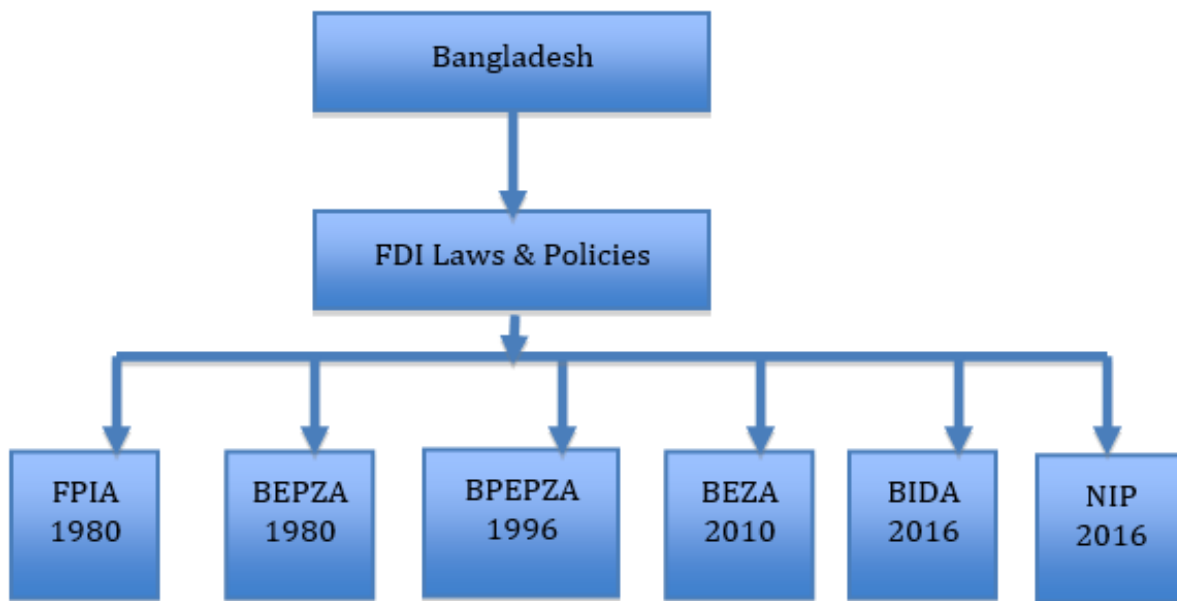


Figure 1: The legal framework of FDI in Bangladesh

3.1. The Foreign Private Investment (Promotion and Protection) Act 1980 (FPIA 1980)

Section 4 of the FPIA 1980 provides for fair and equitable treatment to foreign private investment, with full protection and security. It ensures legal protection to foreign investment in Bangladesh against nationalization and expropriation (s. 7). It also guarantees repatriation of capital and returns from it (s. 8); and equitable treatment with domestic investors in relation to indemnification, compensation, and so on, in the event of loss due to civil commotion and so forth (s. 6). Likewise, sufficient safeguard is also offered for intellectual property rights, such as patents, trademarks, designs, and copyrights. (Bashar, 2018)

The Act appears to be based on the neo-classical theory and follows the national treatment principle of the World Trade Organisation (WTO) (S. 5, FPIA 1980). The scope and coverage of the Act are quite limited, in contrast with many FDI-related laws in other countries in the region and beyond. The entire Act contains seven short substantive articles only.

The FPIA is applicable to industrial undertakings, which are defined to encompass the production and processing of goods; as well as the provision of certain services as defined by the Government. The services considered as “industries” are enumerated in the National Industrial Policy 2016 and include IT-based activities, business process outsourcing, construction, tourism, telecommunications, transport, human resource development, and power generation. Significantly, insurance and finance services are not part of the list. (Kafi *et al.*, 2007)

3.2 The Bangladesh Export Processing Zone Authority Act 1980 (BEPZA 1980)

The Bangladesh Export Processing Zone Authority (BEPZA) was established under the BEPZA 1980, which is the official organ of the Government to promote, attract and facilitate foreign investment in the export processing zones (EPZs). In addition, BEPZA as the competent Authority performs inspection and supervision of the compliances of the enterprises related to social and environmental issues; safety, and security at the workplace in order to maintain harmonious labor-management and industrial relations in EPZs. The primary objective of an EPZ is to provide special areas where potential investors would find a congenial investment climate free from cumbersome procedures. (Eusuf, *et al.*, 2013)

3.3 The Bangladesh Private Export Processing Zones Act 1996 (BPEPZA 1996)

In 1996, the Bangladesh Private Export Processing Zones Act 1996 (BPEPZA 1996) was enacted to bring in foreign investments or joint ventures or for setting up private export processing zones. The Government of Bangladesh also encourages the building of a private economic zone, which is regulated under the BPEPZA 1996. The primary objective is to promote private investment in the EPZs, in doing so, offers various incentives. For example, new factories enjoy tax holidays for 5 years. Also, labor unions and other activities that are often viewed as detrimental to productivity, are banned inside the EPZs. Bangladesh Government also announced 50 percent tax relief in Hi-Tech parks in economic zones.

In accordance with BPEPZA 1996, the country's first private EPZ was developed and is operated by Youngone Corporation of South Korea since the early 2000s. The Government has announced recently that it is planning to establish 100 new EPZ and specialized economic zones (SEZs) in the

next 15 years. In recent times, the Government has approved 37 new Economic zones, which consist of Governmental, non-Governmental, and SEZ. The Government also encourages establishing a more private economic zone. The Bangladesh Government also establishing science and technology-based economic zones to attract more FDI. (Islam, 2019)

3.4 The Bangladesh Economic Zones Act 2010 (BEZA 2010)

In 2010, the Government enacted the BEZA 2010 to make provisions for the establishment of economic zones in all potential areas, including backward and underdeveloped regions and development, operation, management, and control thereof; as well as the matters ancillary thereto to encourage rapid economic development through increase and diversification of industry, employment, production, and export. (Aggarwal, 2016) Bangladesh Economic Zones Authority (BEZA) is a centralized economic zones authority of Bangladesh, which was established by the Government in 2010 under BEZA 2010. The organization is responsible for establishing and managing specialized economic zones (SEZs) of Bangladesh. The actual number of economic zones in Bangladesh is in contention. However, as per data from Bangladesh Economic Zones Authority (BEZA), at present, there are a total of 88 economic zones across the country, of which 59 are Government-owned and 29 are privately owned. (Ahsan, 2019)

3.5 The Bangladesh Investment Development Authority Act 2016 (BIDA 2016)

In 2016, the Government has enacted the BIDA 2016 to encourage and facilitate private investment or foreign investment in Bangladesh. Under the Act, the Bangladesh Investment Development Authority (BIDA) has created a 'One Stop Service' cell to provide all types of services and assistance to private investments including FDI (s. 16 of the BIDA Act 2016).

Under the Act, the BIDA can privatize loss-making state-owned enterprises worth up to Tk100 crore; but if the value is more it will be sent to the cabinet committee on economic affairs for approval. BIDA will determine import settlement, issue no-objection certificates, and declare a certain area as an industrial zone through a gazette notification. It will also help the authorities concerned in land acquisition, work for ensuring efficient use of land, make a list of unused land and structures and frame a policy for its utilization, and frame a guideline for allotting and transferring plots. However, investment proposals under BEPZA, BEZA, private EPZ, Bangladesh Small and Cottage Industries Corporation, and hi-tech parks remain outside BIDA's purview. (Ahmed, 2019)

3.6 The National Industrial Policy 2016 (NIP 2016)

The Government of Bangladesh has adopted a comprehensive array of policies aimed at bringing about significant socio-economic improvements to the citizens of Bangladesh and eventually, self-reliance, for the state. In respect of the private sectors or foreign investors' ability to contribute towards the achievement of these goals, over the years the Government has implemented a number of important policy reforms. These are designed to create a more open and competitive environment for foreign investment.

In order to accomplish the goal of accelerating industrial growth and to increase a greater share of industry in the Gross Domestic Product (GDP); as well as to make the industrial policy responsive to the changes occurring in the worldwide economy, the existing Government announced a new National Industrial Policy (NIP) in 2016. Bangladesh offers generous opportunities for investment under its liberalized Industrial Policy and export-oriented, private sector-led growth strategy. The relevant policies are attractive in the paper; and there are several policy discrepancies that are quite enough to discourage FDI. (James, *et al.*, 2017)

4. Bangladesh and Obligations under TRIMs

Even though opinions differ regarding the imposition of performance requirements in the host states, various initiatives were undertaken through the WTO Agreement on Trade-Related Investment Measures (TRIMs) and other agreements to eliminate this prerequisite. As per TRIMs, four types of performance requirements are clearly prohibited, which are:

- (a) local content requirements;
- (b) trade balancing requirements;
- (c) foreign exchange restricts; and
- (d) export controls.

It also requires the signatory countries to eradicate these requirements in phases, as well as the need to report every existing measure inconsistent with the Agreement (Article 5.1 of the TRIMs 1995). The prohibition under article 5.1 is detrimental for the development of the host states but seems to protect the interests of home states or foreign investors (Collins, 2019). Despite article 5.1, the pragmatic studies illustrate that many developing and least-developed countries (LDCs) are using performance requirements in specific sectors (UNCTAD, 2003). For example, Argentina, Brazil, Chile, China, Colombia, Ecuador, India, Indonesia, Malaysia, Mexico, Philippines, Republic of Korea, South Africa, Taiwan, Thailand, Uruguay, and Venezuela. The developed countries are also using certain performance requirements as part of their economic development (Bureau of Industry Economics, 1995). Moreover, there are a lot of other requirements, which are also prohibited, conditioned, or discouraged by International Investment Agreements (IIAs) at bilateral and regional levels (UNCTAD, 2003). They are, for example, the requirement to establish a joint venture with domestic participation, requirements for a minimum level of domestic equity participation, requirements to locate headquarters for a specific region, employment requirements, etc.

As a signatory of the TRIMs, the government of Bangladesh has withdrawn the quantitative restrictions and has not introduced any new performance requirements, which deviate from the obligations under the Agreement. Along with other LDCs, Bangladesh has requested to extend the time to comply with other TRIMs obligations, which has been approved until 2020 (DESA, 2012). Therefore, Bangladesh has an opportunity to impose any performance requirements as an entry condition of FDI until the approved period.

Moreover, the usually practiced performance requirements in the host states like Bangladesh can be grouped into three foremost categories:

- (a) local content requirement;

- (b) technology transfer requirement; and
- (c) export performance requirements.

4.1 Local Content Requirement

The local content requirements have two main elements: using available raw materials and employing local labors. When the local materials are used, it promotes the sustainable use of resources in numerous ways, as well as benefits the local producers, processors, and owners. It also ultimately contributes to economic and social development; and helps to build up an import-substitution product regime. In Bangladesh, the present laws and policies do not require foreign investors to use any local materials and services. They are free to use raw materials produced locally, or from outside of the country at a competitive price. Moreover, the government provides cash compensation or duty drawback facilities applicable to the export items, to encourage the use of local materials in garments, pharmaceutical, and some other non-traditional exports. Bangladesh also offers the benefits related to the Generalized System of Preference (GSP) to importers in developed countries when the share of raw material is 60 percent or more (CUTS, 2013).

In relation to local content requirements, for example, an employment requirement is necessary for Bangladesh to create more employment opportunities; and to reduce the unemployment rate. The employment requirement is deemed to be essential in a country where there is a huge crisis of employment opportunity; and where economic and social sustainability depends largely on the expansion of employment opportunities. The employment requirement can be imposed for different purposes. There is evidence that in South Africa and Malaysia it has been imposed to diminish racial imbalances and has had success in addressing this issue. In developed countries, these requirements are sometimes attached to the granting of incentives, for example in Ireland the grant cost per job created was the key guideline for offering incentives. In Portugal, the creation of local employment is a requirement for granting certain benefits or advantages to the investors concerned. It can also help to provide quality training and productivity-related skills because there is a scarcity of quality workforce. Even though Bangladesh is suffering from a huge unemployment crisis, but there is no requirement to recruit local people in the foreign-invested industries or projects. Instead, the government grants work permits to foreign professionals without any restriction; and also with a 50 percent tax exemption when requested by foreign investing or joint-venture companies (Islam, 2015).

Sections 10-12 of the Bangladesh Economic Zones Act 2010 states that the government may provide tariff benefits, financial benefits, or other benefits to the foreign investors in the EPZ areas. These sections do not specify whether the government follows national treatment (NT) or most-favored-nation treatment principles (MFN) of the WTO. Moreover, according to section 13, any zone or organization could be exempted from the application of all or any of the provisions of the various Acts including the Labour Act 2006. To protect the workers' rights, foreign investors should not be allowed to be exempted (Ahmed & Dev, 2014). This is because the Labour Act has been amended several times since the Rana Plaza incidents to protect the poor workers in

Bangladesh, so foreign investors should be compelled further to protect workers right rather than being exempted.

Therefore, to resolve the enormous employment crisis and unsustainable use of raw materials, it would be extremely advantageous to introduce the use of local content as an entry requirement in foreign-owned or joint-venture enterprises, rather than offering incentives or business advantages. In doing so, the development goals as mentioned in section 3 of the Foreign Private Investment Act 1980 (FPIA 1980) could be achieved easily.

4.2 Transfer of Technology Requirement

Even though technology transfer is one of the primary objectives of host states but it is quite rare to impose it as an entry requirement of FDI. This is because it is quite difficult to enforce and monitor this requirement; also to identify the type of technology that would be most desirable for the host states. Moreover, the absorptive capability of the host state is very important to introduce successful technology transfer, especially in the case of research and development (R&D). However, the importance of imposing this requirement is paramount for the development of industrial and service sectors in developing and LDCs like Bangladesh (Andrenelli, 2019).

In Bangladesh, the existing FDI governing law *i.e.* the FPIA 1980 do not have any focus on technology transfer requirement. The only technology transfer requirement exists in product-sharing contracts in the oil, gas, and mineral resource sectors. Petrobangla (national oil company) has designed a model product-sharing contract introducing the requirement of the transfer of technology. The agreement between Petrobangla and foreign oil companies requires the transfer of technology; including regular training to develop local human capabilities, handing over selected heavy machinery after completing the contractual work (Article 25 of the Revised Model Production Sharing Contract 2012).

The National Industrial Policy 2016 (NIP 2016) has a general emphasis on technological development and declares high-tech related investment as a thrust sector for this purpose. It states that the industrial policy should not consider FDI merely as a means of complementing domestic resources for industrialization. It should also ensure that foreign investors bring new technology into the country. The strict screening of FDI would therefore be necessary. To that end, the industrial policy should clearly lay down that foreign investors shall not be accorded permission to invest and conduct business in this country unless they bring the latest technology. Moreover, acquisition, adoption, and adaptation of foreign technology have been integrated as foremost objectives under the Science and Technology Policy 1986. However, there is no specific initiative so far through FDI law or other policies to compel foreign investors to bring or transfer their technology into Bangladesh (Jabbar, 2018). Thus, Bangladesh could consider adding the technology transfer requirements as an entry condition into the FDI legal or policy framework; or into the international treaties. In such a case, guidance could be taken from other countries, such as - Vietnam. Article 29 of Vietnam's FDI Law states that the transfer of foreign technology to Vietnam in foreign investment projects may be carried out in the form of capital contribution of the value of technology or technology purchase made based on a contract in accordance with the

law of technology transfer. The Government of Vietnam encourages the accelerated transfer of technology, especially of advanced technology.

4.3 Export Performance Requirement

There are newly industrializing host states, such as - South Korea, Singapore, Taiwan, and Hong Kong, which imposes export performance requirement as an entry condition of FDI. Export performance requirements assist the host state to integrate into the world economy; as well as, allow them to customize the operations of MNEs to their own development objectives. It also requires MNEs to export a certain percentage of the manufactured materials, thus increases the foreign exchange earnings. Moreover, many growing economies of the developing world are following the footsteps of the developed states, which also used 'foreign investment-assisted export policy' during their period of development (Chang, 2015).

Bangladesh adopted the Privatization Policy 1992, which initiated the export-led private sector development activities, and also encouraged investment in intensive sectors (Ahmed, 2000). Moreover, the NIP 2016 emphasize export-oriented economic growth and thus, offers different kinds of fiscal and duty incentives (chapter 13 of the NIP 2016). To receive these incentives, both local and foreign companies are required to export 80 percent of their products or exportable goods into other countries. However, it lacks any prescribed limit for any foreign investors for exports as a requirement for approval. The Export Policy 2015-2018 of Bangladesh does not have any such provision in relation to export control policy.

Furthermore, Bangladesh Bank has waived to receive the prior permission to open back-to-back letters of credit for all export items, as long as such exports conform to guidelines for adding domestic value United (Nations & ICC, 2000). Therefore, even though the foreign investors may oppose the export performance requirement as a protectionist practice; but the probable advantage of the export requirement is apparent for supporting export-led industrialization in Bangladesh.

5. Performance Requirements in Bangladesh from the Perspective of the Respondents

5.1 Themes and Sub-themes

The themes and sub-themes in this study were deduced based on the research question and the response received from the respondents. This can be seen in the table below:

Table 1: The Theme and Sub-Theme for Research Question

Research Question	Theme	Sub-Theme
To what extent the existing FDI governing laws are compatible for foreign investors to fulfill the performance requirement?	Laws relating to the performance requirement	Foreign investors and performance requirement
		Performance requirement and inflow of FDI

5.2 Foreign Investors and Performance Requirement

In this regard, Respondents were asked whether foreign investors should be required to fulfill the performance requirement in Bangladesh. To answer this question, the opinion of Respondent 1 is as follows:

This should be at the top of the function of the national authority, which is seriously lacking in BD. There is a myth among many relevant officials the FDIs means economic gains, which is so far from reality. The periodic check of performance at a regular interval must be introduced.

Respondent 2 commented:

It is part of the agreement that the know-how, managerial skill, and technology should gradually be transferred to the local components; and there may be conditions also because initially when you apply for investment in Bangladesh, you have to seek permission from the government, the legal regime is there. So depending on the nature of industry or area, where you are investing, the government may put conditions in the license that you have to fulfill these, that means putting ratio percentage that these much will have to be from the local people and then technicians of that level can only be brought from abroad, and you have to have so much percentage of people skilled–unskilled, etc. from the local market. So these are terms and conditions of the license as well as of the conditions in the bilateral agreement or whatever it may be.

In answering the same question, Respondent 3 has a similar view with Respondents 1 and 2. He opined:

Yes, foreign investors should be required to fulfill the performance requirement.

Respondent 4 has a similar view with Respondents 1, 2, and 3. He has this to say:

Yes, every investor should be required to fulfill a minimum performance requirement either it be local or foreign. Investment without economic commitment cannot serve the purpose of a nation. Commitment to saving the environment, generation of employment, enhance export volume, diversification of export items, all these consolidated create performance requirements.

Respondent 5 opined as follows:

To accomplish the development objective, I think MNCs can be required to fulfill this requirement.

Responding to the same question, Respondent 6 has this to say:

The government should not be strict to require foreign investors to fulfill the performance requirement. But, yet, considering the economic interest of the country, the government should adopt a balanced provision requiring a minimum fulfilling of the performance requirement.

From the above, it can be concluded that all participants opined that performance requirements should be imposed on foreign investors through a balanced legal framework. Performance requirements such as – environmental protection, employing local citizens, purchasing materials from the local markets, exporting a minimum percentage of items, etc. In addition, the Government must ensure a periodic check of performance on regular basis.

5.3 Performance Requirement and Inflow of FDI

Respondents were asked that if the government enacts laws or policies regarding performance requirements like many developed countries, whether it will have any negative effect on the inflow of FDI in Bangladesh. In this regard, Respondent 1 opined:

Yes, this possibility may not be ruled out. But there is no economic gain to win a race to the bottom and does any state want any FDI that is not economically beneficial?

In a similar observation with Respondent 1, Respondent 2 was of the view that “in my opinion, any such regulatory conditions relating to capitalization and performance requirements, will not affect the inflow of FDI”. He explained:

One thing we have to always remember that developed countries are not short of capital, they are overflowing with capital. The return from invested has diminished in those countries. So return from other countries, which are less developed. The capital is hungry for the market and the market is hungry for capital. So they have to come to Bangladesh in order to get a larger profit against the capital they have made in their own country. So it is not the charity they are doing in a country where they are investing, it is for earning profit to their capital, which is idle in their own country.

He further explained:

In connection with Asian Energy, I suppose some economist pointed out that when it was questioned or anxiety was expressed that if the coalmines of Bangladesh are not allowed to a company, which came with permission to exploit; they said that so long as we have the coal they will come again and again to us. So meanwhile it is an advantage, so long as we retain it that's to our advantage. So that is how the economists say that foreign capital will come but of course there is a competition for bringing in the capital.

Respondent 3 has this to say:

That may, to some extent, affect FDI inflow. But if that is necessary for the national interest, the government will have to do that in a rational way so that our national interest is protected and at the same time inflow of FDI is not massively affected.

Respondent 4 has a similar view with Respondents 1, 2, and 3. He was of the view that "It may have some primary effect but in the long run this type of law with reasonable provisions may be beneficial for the country". He further suggested:

Capitalization and performance requirement of embodied in any new law, there should be conducted an impact analysis prior to such enactment.

Respondent 5 opined as follows:

According to me, if the laws and policies are fair and transparent, and balanced, there should not be any problem with FDI inflow. If we look at China for example, despite being a communist country and a lot of restrictions in place, it's attracting more and more foreign investments.

Responding to the same question, Respondent 6 has this to say:

As a developing country, to strengthen the economic development of the country, Bangladesh should take a liberal and easy policy to attract more FDI. So, if it enacts the laws regarding the aforesaid matters it might affect the inflow of FDI.

Furthermore, Respondent 2 suggested as follows:

It calls for an in-depth examination of the legal regime and sector-wise investment, so in this short campus, the general suggestion will be that we must have data first of all. How many companies have in the state, how much profit they have earned and whether there is any benefit to our country by this capitalization; or it is only allowing them to take more by inflating the value of the assets. So if we have a legal regime and data; and legal regime for a proper rating of the valuation of the assets,

not fictional or irrational, but the actual real value of the assets, and if there is any legal regime for capitalization; because all investors will ultimately want to have some share in the increasing of the value of the assets, apart from the profit.

From the above, it can be said that imposing performance requirements might have an initial negative effect on the inflow of FDI in Bangladesh; but in order to protect the national interest, it is necessary to include performance requirements into the legal framework. It is to be remembered that foreign investors always look to invest in developing or LDCs to make more profit compared to their home countries. Besides, China is a very good example, where foreigners are investing hugely despite being a communist state with a lot of restrictions.

6. Findings

The findings of the study are outlined as follows:

6.1 Local Content Requirement

The findings reveal that the existing FDI laws and policies do not require foreign investors to use any local materials and services. The foreign investors are free to use raw materials produced locally, or from outside of the country at a competitive price. Moreover, the government provides cash compensation or duty drawback facilities applicable to the export items. The findings further indicate that even though Bangladesh is suffering from a huge unemployment crisis; but there is no requirement to recruit local people in the foreign-invested industries or projects. Instead, the government grants work permits to foreign professionals without any restriction; and also allows 50 percent tax exemption.

6.2 Transfer of Technology Requirement

The importance of imposing a technology transfer requirement is paramount for the development of industrial and service sectors in Bangladesh. The findings of this study show that the FPIA 1980, which is the primary FDI governing law has no focus on technology transfer requirements for foreign investors. The NIP 2016 and the Science and Technology Policy 1986 emphasizes that foreign investors should bring new technology to Bangladesh. In this regard, findings further indicate that both policies lack to provide any detailed guidelines on how to ensure that the foreign investors comply with this requirement; or compel them to bring or transfer their technology into Bangladesh.

6.3 Export Performance Requirement

There are many developed host states, which imposes export performance requirement as an entry condition of FDI. This requirement assists them to integrate into the world economy; as well as, allow them to customize the operations of MNEs to their own development objectives. The NIP 2016 emphasize export-oriented economic growth and thus, offers different kinds of fiscal and duty incentives; however, findings show that it lacks any prescribed limit for any MNEs for exports as a requirement for approval. The findings also indicate that the Export Policy 2015-2018 of Bangladesh does not have any such provision in relation to export control policy. Moreover,

the Bangladesh Bank has waived to receive the prior permission to open back-to-back letters of credit for all export items.

7. Recommendations

7.1 Adopting Regulations for Local Content Requirement

The government should adopt FDI laws and policies in order to require foreign investors to use local materials and services. Foreign investors must be required to use raw materials produced locally; in case of unavailability, they must obtain prior permission from the relevant authority. The government should rethink the existing policy of providing cash compensation or duty drawback facilities to the export items. Moreover, like Malaysia, while issuing the license for setting up an industry, it should include employing the minimum number or percentage of local citizens, protecting the environment, enhance export volume, diversification of export items. The periodic check of performance at a regular interval must be introduced.

7.2 Amending Existing Regulations for Technology Transfer Requirement

The government should consider adding the technology transfer requirements as an entry condition into the FDI legal or policy framework. In doing so, the FPIA 1980, which is the primary FDI governing law must have specific provisions on technology transfer requirements for foreign investors. Moreover, the NIP 2016 and the Science and Technology Policy 1986 should include details guideline on how to ensure that the foreign investors comply with this requirement; or compel them to bring or transfer their technology into Bangladesh. The transfer of foreign technology to Bangladesh in foreign investment projects may be carried out in the form of capital contribution of the value of technology, or technology purchase made based on a contract in accordance with the law of technology transfer. The Government of Bangladesh should encourage accelerating the transfer of technology, especially of advanced technology.

7.3 Amending Policies for Export Performance Requirement

The NIP 2016 or future NIP should have provisions regarding the prescribed limit for any MNEs for exports as a requirement for approval. The Export Policy 2015-2018 should also have a provision in relation to export control policy. Moreover, the Bangladesh Bank should require foreign investors to receive prior permission to open back-to-back letters of credit for all export items. Most importantly, the government should establish a strong monitoring body to observe export performances of MNEs at regular intervals. There should be a clear provision in circumstances, where the foreign investors fail to comply with export performance requirements.

8. Conclusion

From the above discussions and findings, it appears that Bangladesh's laws and policies lack any provision regarding performance requirements for foreign investors. The FDI laws of Bangladesh have provisions only to promote the inflow of FDI and after post-entry, provide different

incentives and protections to the foreign investors. Without proper regulations, there is a huge possibility of disputes between the contracting parties. Moreover, FDI related laws are scattered and, in most cases, not adequate to regulate the FDI in relation to performance requirements. There are shreds of evidence that shows that only liberalization does not necessarily result in the increased inflow of FDI in the host states. For example, according to the United Nations Conference on Trade and Development (UNCTAD) report in 1999, there are many African states that have a very liberal investment regulation but failed to attract the inflow of FDI. In contrast, China has a restrictive investment regime; even then it has been the largest recipient of FDI amongst the developing world since 1992. Similarly, Thailand, Vietnam has more strict regulations comparing to the Latin American states but they are receiving more FDI than the latter.

In practice, both liberalization and restrictive regulation could have positive and negative effects in Bangladesh, so it should design its laws or BITs in a balanced way to meet its peculiar needs at any particular time. Bangladesh can follow the footsteps of the developed countries and take guidelines from them if necessary. Based on the WTO principle of 'reciprocity' Bangladesh should design its FDI laws, policies in such a way that all parties' interests are preserved equally, thus the economic relations will sustain for a long time between them. Moreover, it is necessary to insert performance requirements through legal or policy documents or BITs to control foreign investment in sensitive fields by setting conditions; and FDI must satisfy for national interest, fulfill social and economic development objectives.

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