# Rampal Power Project in Bangladesh and its Ramifications: Interplay between Environment Protection and Foreign Investment Protection

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**Abstract**

The Rampal power project in Bangladesh, a joint venture between India's National Thermal Power Corporation and Bangladesh Power Development Board, has faced opposition due to its potential adverse impact on the Sundarbans, a UNESCO-declared world heritage site and Ramsar site. The Project's environmental impact has raised concerns among environmentalists, civil society, and the public. However, the Government remains committed to implementing the Project, raising questions about the interplay between environmental protection and foreign investment protection. This research examines the Rampal power project's ramifications in the complex relationship between ecological legal provisions and investment law. It explores the legal frameworks governing the Project and analyzes the implications of the India-Bangladesh Bilateral Investment Treaty on Bangladesh's ability to withdraw from the Project in case of adverse environmental effects. This research is relevant to international environmental law, investment law, and domestic legal regimes and can contribute to the ongoing discourse on balancing environmental protection and foreign investment protection.

**Keywords**: Rampal, Environment, Foreign Investment, International Law, Investment Dispute

## Introduction

Unlike other branches of international law, international investment law has been almost purposefully developed in isolation (Shornarajah, 2015). Such compartmentalized development aids in promoting the sectional interest in investment protection to the detriment of the global interest in environmental protection and the protection of human rights, labor rights, cultural rights, and the rights of indigenous peoples (Shornarajah, 2015). The burgeoning law on human rights and environmental protection also creates instability in an area of law (investment law) designed solely to protect foreign investment (Shornarajah, 2010). As a result, in many cases, the aim of investment protection increasingly conflicted with the purposes of environmental protection. At a specific time, the relationship between ecological and investment law has changed. Three indicators indicate the changing relationship between foreign investment and environmental concerns. Firstly, several states have recognized the increasing importance of foreign investment in their overall environmental protection strategy. Secondly, they have begun to incorporate environmental considerations into investment treaties. Finally, environmental issues increasingly affect investment disputes (Vinuales, 2012). Environmental and investment protection interact at three regulatory levels: international law, domestic law, and contractual arrangements (Vinuales, 2012). At different interface levels, conflicts frequently arise between one international obligation from investment treaties and another from domestic and international law. Previously, there was an unwillingness to reconcile these two interests in conflict. The inherent tendency of arbitration tribunals to place investment protection above other considerations is still a hindrance to integrating these two interests.

Globally, multinational corporations are interested in investing in developing countries with weak environmental regulatory regimes. For such powerless regulatory authorities, they are considering developing countries as havens. They may make profits without bearing the costs associated with

compliance with the strict regulatory standards they face in their home states (Shornarajah, 2010). As a result, states began to make new investment treaties that incorporated provisions on environmental protection as a consideration. These developments are beginning to show results in investment arbitration. It has further influenced the attitude of investment tribunals to consider ecological interests.

Bangladesh is undertaking the Rampal power project close to the Sundarbans in this global, regional, and domestic reality. This mangrove forest has implications on many folds, including cultural, economic, ecological, and even sustenance of inhabitants living in the adjacent areas. Suppose Bangladesh decides to implement regulatory measures in the future, such as shutting down the power plant to address the potential environmental damage to the Sundarbans. It must also consider its international obligations under the India-Bangladesh Bilateral Investment Treaty (BIT). This paper explores different aspects of this Project– through the prism of domestic and international environmental law, a site for the interface between foreign investment protection and environmental regulation under international law, and the contours of a potential investment dispute under international law.

**Rampal Power Project: An Overview**

The coal-fired Rampal power project in Bagerhat District, Bangladesh, is located in Rampal Upazila. The Bangladesh Power Development Board (BPDB) and India's leading public-sector power firm, the National Thermal Power Corporation (NTPC), signed a Memorandum of Understanding (MoU) in 2010 to start the Project. This 50-50% joint venture agreement under the India-Bangladesh Bilateral Investment Treaty (BIT) sought to build a 1,320-megawatt imported coal-based power plant in Khulna. Bangladesh-India Friendship Power Company (Pvt.) Limited (BIFPCL) is the 2012 joint venture. India and Bangladesh will each own 30% of this Project's equity. Indian Exim Bank will loan US$1.6 billion. Bharat Heavy Electricals Limited (BHEL) built the plant. This power plant started producing electricity in December 2022.

The 2×660 MW Maitree Super Thermal Power Project, on 1834 acres, is 14 kilometers north of the world's largest mangrove forest, the Sundarbans. Due to its universal value, UNESCO declared it a world heritage site in 1997. The 1971 Ramsar Convention on Wetlands designated it an internationally significant wetland. The Sundarbans' 10 km perimeter is an Ecologically Critical Area (ECA). Bangladesh's last Bengal Tiger habitat is a Protected Area with six wildlife sanctuaries (Ahmad, 2009).

According to the Rampal Power Project EIA, the combustion of 4.72 million tonnes of coal will be required to generate 1,320 megawatts of electricity, producing 7.9 million tonnes of ash. This ash comprises 80% dry fly ash and 20% bottom ash, which contain hazardous substances such as arsenic, lead, mercury, nickel, vanadium, beryllium, barium, cadmium, chromium, selenium, and radium. In addition, the power plant will also emit 18 million tonnes of carbon dioxide, 142 tonnes of sulfur dioxide, and 85 tonnes of nitrogen dioxide daily. Consequently, the natural concentration of sulfur dioxide and nitrogen dioxide in the Sunderbans will significantly increase, posing a threat to the forest ecosystem (CEGIS, 2013).

According to the EIA report, the power plant would need 9,150 cubic meters of water per hour from the Passur River near the Sundarbans to cool and rotate turbines. After releasing 5,150 cubic meters, the plant would extract 4,000 cubic meters per hour from the river. Water loss would affect the river's

salinity, flow, tidal patterns, habitats, and ecosystem (CEGIS, 2013). Another issue is the massive amount of coal brought into the forest.

Due to its proximity to the Sundarbans, the power plant's environmental impact has been strongly opposed. This beautiful and unique ecosystem is in danger with the coal-fired power plant and rampant industrialization. In March 2016, the World Heritage Centre and IUCN called for the cancellation or relocation of the Rampal power plant, which threatens the Sundarbans. However, the Bangladesh government will implement the Project and guarantee that the Rampal power plant will not harm the Sundarbans. Furthermore, the Ministry of Environment and Forest has approved 150 industrial projects around Sundarbans in the ECA zone.

## Rampal Power Project and Environmental Issues: A Snapshot of National and International Legal Regimes

### *Domestic Environmental Laws of Bangladesh: Addressing Rampal*

The Bangladesh Environment Conservation Act (BECA), 1995, requires an Environmental Clearance Certificate (ECC) from the Department of Environment (DoE) for any project. Under the Act, the Environment Conservation Rules, 2023 (Rules) detail ECC issuance procedures. It categorized projects by site and environmental impact. After applying, large power plants in the Red category will receive a site clearance certificate and ECC. The application should include a feasibility study, EIA, EMP, NOC, etc. The DoE will issue a project-favoring site clearance certificate after approval. The entrepreneur can develop land and infrastructure after receiving site clearance. The Rules restrict Red category projects to industrial, industrialized, or empty areas.

Rampal Power Plant promoters chose the site in 2010 and bought the land immediately, contrary to the Rules. In 2013, the CEGIS–Bangladesh government body conducted an EIA, even though international standards require neutrality (Transparency International Bangladesh, 2015). The DoE approved it without question. The process was illegal. The Rules don't punish this flagrant lawbreaker.

In 1999, under the BECA, the Government declared a 10 km periphery around the Sundarbans an Ecologically Critical Area (ECA), an area rich in biodiversity and environmentally significant that needs protection from destructive activities. The Gazette notification lists ECA-prohibited activities and processes. Cutting down or collecting trees, hunting or killing wild animals, establishing industries that pollute soil, water, air, and noise, fishing and other activities that harm aquatic life, and any other actions that may destroy or alter soil and water are prohibited in ECAs. The BECA punishes such ECA activities and processes. The Government must take immediate action and create a management plan for the affected area. The same Act established "Ecologically Critical Areas Management Rules" in 2016. Such projects are allowed near ECAs. It states that the National Committee will oversee government development projects in any ECA and give directions. The DoE must approve any change to an ECA's land class. The power plant will also change air, water, and sound, exceeding the Environment Conservation Rules 2023 for such an ecologically sensitive area.

The Bangladesh Forest Department declared parts of the Sundarbans a wildlife sanctuary and reserve forest (Farooque, 1997). In 2012, the Forest Department designated three 32-km Sundarbans River and Canal dolphin sanctuaries. The Project is near these Bagherhat districts. Bangladesh's Forest

Department manages reserve forests and wildlife sanctuaries (Hasan & Sultana, 2009). The Wildlife (Preservation and Safety) Act, 2012 prohibits industries and brickfields within two kilometers of sanctuaries. Given such legal provisions, it is understandable that the Rampal thermal power project is heavier than other industries banned for environmental reasons. Furthermore, suppose Bangladesh's environmental laws limit other low-scale industrial activities. Why should a large thermal power plant operate in an ecologically sensitive area?

Bangladesh must clean its citizens' environment by law. Article 18A of the Bangladeshi Constitution requires the State to protect and improve the environment and preserve and safeguard natural resources, biodiversity, wetlands, forests, and wildlife for present and future generations. Bangladesh implemented the National Energy Policy in 2008. In 2012, it created SREDA to promote renewable energy. The fifth pillar of the 2009 Bangladesh Climate Change Strategy and Action Plan is mitigation and low-carbon development. Bangladesh wants low-carbon, resilient growth. Bangladesh sent the UNFCCC Secretariat its INDC in September 2015. Bangladesh can reduce its emissions and help limit global temperature rise to two degrees or 1.5 degrees above pre-industrial levels by following its INDC. A total contribution to reducing GHG emissions by 5% from Business as Usual (BAU) levels by 2030 in the power, transport, and industry sectors, based on existing resources, and a conditional 15% reduction, subject to appropriate international support in finance, investment, technology development and transfer, and capacity building. Thus, its policy is anti-coal and pro-renewables.

***How Far Environment Courts Step into Rampal Project?***

The Environment Courts Act of 2010 repealed the 2000 law, establishing three Environment Courts in Dhaka, Chittagong, and Sylhet and an Environment Appellate Court in Dhaka. The Bangladesh Environment Conservation Act 1995 gives Environment Courts exclusive jurisdiction over offenses and compensation claims. The Environment Courts cannot try crimes against forests, forest resources, wildlife biodiversity, fisheries, water resources, and other natural resources (Akhtaruzzaman & Sajal, 2016). It is feasible and desirable for people to seek legal recourse from the environmental court for environmental degradation (Akhtaruzzaman & Sajal, 2016). Unfortunately, the Environment Courts cannot order the Government to correct its grossly flawed EIA as a project stakeholder. The DoE is responsible for filing cases in the Environment Courts, and the public has no direct access to them. As a result, DoE's environmental clearance certificate credibility has been questioned. Logically, DoE would not challenge Rampal power project environmental degradation in the Environments Court.

***Supreme Court of Bangladesh as the Last Resort to be ventilated***

Environmental degradation can be legally addressed in the High Court Division (HCD) of the Supreme Court of Bangladesh for violating fundamental rights. Since the apex court expanded the fundamental right to life to include a safe and healthy environment (Dr. Mohiuddin Farooque Vs. Bangladesh and others [2003] 55 DLR 69), the "right to the environment" is well-recognized in our legal system. First, we may seek the writ of *mandamus* because one of the Director General of DoE's statutory functions is to prevent probable accidents that may cause environmental degradation and pollution, take safety measures, determine remedial measures, and issue directions. Second, since this Project's EIA was done and approved illegally, we may request a writ of *certiorari*.

This forum has been searched for such remedies several times. However, the nation's highest court disappointed the petitioners. Three public interest litigation writ petitions have been filed. On February 28, 2011, the Centre for Human Rights Movement filed a petition challenging the Government's decision to build the power plant at Sapmari-Katakhali Mouja of Rampal. On March 1, the HCD ordered the Government to explain why the power plant decision should not be illegal. It also asked the Government to keep the power plant setup unchanged. On August 21, 2011, Bangladesh's Attorney General asked the HCD to issue an order to sign the agreement during the Indian PM's visit to Dhaka next month. The HCD then ruled that India could sign a deal to build the Sundarbans coal-fired power plant.

On January 31, 2012, Save the Sundarbans filed a writ petition against the Government's coal-fired power plant near the Sundarbans. The HCD ordered the Government to justify the proposed power plant near the Sundarbans in two weeks on March 22. On September 29, 2013, four Supreme Court lawyers petitioned the HCD to halt construction until a committee of local and international experts assessed the Project. They asked the court to order the Government to build the power plant in an environmentally friendly area, alleging that the Government had allowed the plant to be built near the Sundarbans without conducting an environmental impact assessment. The writ petition "had no substantial merit," and the petitioners had no jurisdiction to move it, so the court rejected it. Despite the Sundarbans' potential damage, the HCD allowed the Government to build the Rampal power plant in Bagerhat.

**Relevance of International Environmental Law to Rampal Project**

Several Multilateral Environmental Agreements (MEAs) protect Sundarbans, a mangrove forest with high biodiversity of mangrove flora and fauna on land and water. Article 4(1) of the 1971 Ramsar Convention on wetlands requires states to establish nature reserves on wetlands, whether listed or not, and provide adequate gardening mechanisms to conserve wetlands and waterfowl. Article 4 of the 1972 World Heritage Convention requires each State Party to identify, protect, conserve, present, and transmit its cultural and natural heritage to future generations. The State Party must use all its resources to carry out these actions. It may also request international assistance and cooperation.

Article 6 of the 1992 Convention on Biological Diversity (CBD) requires each contracting party to develop national strategies, plans, or programs to conserve and sustain biological diversity, including relevant convention measures. Additionally, sectoral or cross-sectoral plans, programs, and policies should incorporate biological diversity conservation and sustainable use. Articles 8 and 9 offer different biological diversity protections. Moreover, the Preamble of the CBD states that– "in cases where there is a major risk of reduction or loss of biological diversity in significant magnitude, inadequate scientific knowledge should not be used as an excuse for delaying necessary measures to avoid or diminish such a threat."

The 1979 Convention on Migratory Species provides in Article 2 for taking necessary steps to conserve such species and their habitat and avoiding taking action for migratory species becoming endangered. As this mangrove forest serves as a reservoir of Green House Gases, pertinently climate change legal regime is also relevant. The UN Framework Convention on Climate Change (UNFCCC) was adopted in 1992. Article 2 says the ultimate objective is to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

The Rampal power project may affect two international environmental law principles. The first is the "Principle of sustainable development," which requires environmental protection to be integrated into development (Sands et al., 2018). It also requires critical environmental scrutiny of all human economic development decisions (Sands et al., 2018). Judge Weeramantry, in the ICJ Gabčíkovo-Nagymaros Project case (separate opinion), stated that sustainable development was more than a concept and had normative value. He stated that 'the right to development and environmental protection are important principles of current international law and the principle of sustainable development... is an integral part of modern international law.

The precautionary principle guides international environmental law without scientific certainty (Sands et al., 2018). Without scientific evidence, the principle recommends anticipatory protective action for development activities that may impact the environment. A prima facie case that a measure or development program may cause environmental damage should not prevent further action (Freestone & Hey, 1996). The precautionary principle requires those who want to do something that may harm the environment to prove it will not (Kravchenko et al., 2013).

States, international organizations, and international adjudicatory bodies accept these principles. These are also incorporated into international instruments, and many states have adopted and recognized them judicially. Despite academic disagreements about the legal status of these principles, the broad support and evidence of state practice in instruments like the Rio Declaration, the UNFCCC, and the CBD support the claim that they have become customary international law (Sands et al., 2018). For example, in 2019, the High Court Division of the Supreme Court of Bangladesh ruled in Human Rights and Peace for Bangladesh (HRPB) v. Bangladesh and Others (Writ Petition No. 13989/2016) that the "Precautionary Principle" and "Polluter's Pay Principle" are customary international law and part of Bangladeshi law.

Erga Omnes obligations—obligations owed by a state to the international community—can also be used to argue that Sunderbans has high ecological value (Ranjan & Anand, 2016). However, there is debate over whether Erga Omnes's obligations exist for environmental protection and how the States would handle such absolutism (Birnie, Boyle & Redgwell 2009).

## Investment Protection and Rampal Power Project: A Review of Municipal and International Legal Regimes

### *Basic Provisions of Investment Law in Bangladesh and its Implications*

Bangladesh's Foreign Private Investment (Promotion and Protection) Act 1980 promotes and protects foreign capital. Sections 4-8 of the Act require the Government to treat foreign private investment fairly and securely in Bangladesh. The terms of sanction, permission, or license the Government grants to an industrial undertaking with foreign private investment cannot be changed unilaterally to alter the conditions under which such undertaking was sanctioned adversely. Foreign private investment shall not be treated less favorably than similar private investment by Bangladeshi citizens in applying relevant rules and repercussions. Foreign private investment will receive the same indemnification, compensation, restitution, or other settlement as Bangladeshi citizen investments in civil commotion, insurrection, or riot. Foreign private investment may only be expropriated or

nationalized for a public purpose and compensated at market value in a timely and transferable manner.

Foreign private investment guarantees capital transfer, returns, and liquidation proceeds in the event of industrial undertaking liquidation. The Government may exercise its right to guarantee in exceptional financial and economic circumstances by applicable laws and regulations. These are Bangladesh's investment law fundamentals.

**India – Bangladesh BIT 2009**

The BIT preamble states that India and Bangladesh—Contracting Parties—want to create conditions encouraging investors from one State to invest in the other. The India-Bangladesh BIT broadly defined "investment" as "every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party" and "shares in and stock and debentures of a company and any other similar forms of participation in a company." In addition, it defined "investor" as "any national or company of a Contracting Party." This BIT applies to all investments made after January 1, 1980, by investors of either Contracting Party in the territory of the other Contracting Party accepted as such by its laws and regulations. Under this BIT, each Contracting Party must encourage and create favorable conditions for investors of the other Contracting Party to invest in its territory and admit such investments by law and policy.

This BIT applies Bangladesh's investment law's "National Treatment (NT)" and "Most-Favoured-Nation (MFN) Treatment" principles. It states that investors of either Contracting Party shall not be nationalized or expropriated directly or indirectly in the territory of the other Contracting Party except for a public purpose by the law on a nondiscriminatory basis against fair and equitable compensation. Under the law of the Contracting Party making the takeover, the other party's appropriate judicial or administrative authorities must promptly review the expropriation and related matters. In the event of foreign investment losses due to war or other armed conflicts, a state of national emergency, or civil disturbances in the latter Contracting Party, the principle of National Treatment will apply to indemnification, compensation, restitution, or other settlement.

This BIT provides investor-state dispute resolution stages and forums. Negotiations will begin. If negotiation fails or is not attempted, the dispute must be sent to any of the Contracting Party's competent judicial, arbitral, or administrative bodies as admitted or to international conciliation under the UNCITRAL Conciliation Rules. Arbitration is possible if conciliation fails. The International Centre for the Settlement of Investment Disputes (ICSID) can arbitrate disputes when both parties are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, or if both parties agree, under the ICSID Additional Facility for the Administration of Conciliation, Arbitration, and Fact-Finding proceedings governed by Additional Facility Rules 1979. After the above proceedings, the other party can pursue diplomatically if a contracting party fails to comply with the award or decision of such body, conciliation Forum, or Arbitration Forum. This BIT also allows State-State Dispute settlement.

The host state's laws govern all investments under this BIT's dispute settlement laws. Most importantly, this BIT states that the host Contracting Party may take regulatory measures to protect its essential security interests or in extreme emergencies by its laws normally and reasonably applied

on a nondiscriminatory basis. After ten years, this BIT will be automatically extended unless either party gives the other written notice of its intent to terminate.

***Joint Interpretative Statements for Indian Bilateral Investment Treaties***

India issued a Joint Interpretative Statement (JIS) for all Indian BITs on February 8, 2016, and shared it with States with whom they have investment treaties for signature. This JIS clarifies BIT standards interpretation and application. The JIS includes interpretative notes for many clauses, including definitions of "investor" and "investment," Fair and Equitable Treatment (FET), NT and MFN treatment, expropriation, taxation exclusion, and vital security interests.

Bangladesh signed this JIS first in July 2017. The India–Bangladesh BIT now includes this JIS. It would clarify the India–Bangladesh BIT in any dispute. This JIS changed FET, appropriation, and essential security interests the most. It states that FET under the concerned BIT does not require compensation for measures to further public policy objectives, such as protecting and improving natural resources and the environment.

Reinterpreting the expropriation clause, it says any measures or actions by the host state to further public policy objectives, such as protecting and improving natural resources and the environment, are not expropriation. This JIS included a broad NPM clause covering human rights, the environment, public health, the financial system, and fiscal policy. This broad NPM Clause helps host states achieve their non-investment policy goals (Sinha, 2017).

The JIS radicalized the essential security interests clause. It says when a state regulates and defends critical security interests or extreme emergencies following its laws reasonably applied. Defense decisions are non-justiciable. Even in cases of damages or compensation, arbitral tribunals cannot review such decisions.

**Potential Investment Dispute on Rampal Power Project and its Ramifications**

The India-Bangladesh BIT will regulate Rampal Power Project investments. Suppose Bangladesh adopts any environmental regulatory measure to mitigate. In that case, an investor-state dispute may arise with the negative environmental impacts of the Rampal project, and the investor believes it violates the BIT. The foreign investor may dispute Bangladesh's environmental regulations in any of the BIT's arbitral tribunals. If so, this BIT will settle the dispute. Jurisdictional issues must be resolved before resolving this dispute (Ranjan & Anand, 2016). The BIT tribunal can only hear disputes from Indian investors with Bangladeshi investments. The BIT's broad definition of "investment" covers NTPC's investment in BIFPCL as a foreign investment (Ranjan & Anand, 2016). The BIT defines "investor" as an Indian company, so NTPC qualifies.

Then, regulatory measures will determine complaints if Bangladesh closes the power plant to prevent environmental damage. Finally, if NTPC is not compensated for the loss of their investment or the compensation is not by the India-Bangladesh BIT, they can challenge this as expropriation (Ranjan & Anand, 2016). Bangladeshi regulatory measures may be challenged under the BIT in several scenarios. This section will examine the Investor-State Arbitration issues that the Arbitration Tribunal will use to resolve the dispute.

**Position of Bangladesh under International Environmental Law**

Bangladesh may also use international environmental laws like the Ramsar Convention, the World Heritage Convention, the Convention on Biological Diversity, the Convention on Migratory Species, and the UNFCCC to defend its Sundarban's protections. These MEAs require both Contracting Parties to strengthen their environmental regulations.

Bangladesh can also use other international laws. Under Article 31(3)(c) of the Vienna Convention on Law of Treaties 1969, the BIT tribunal must consider the context and any "relevant rules of international law applicable in the relation between the parties" when interpreting BIT provisions. Therefore, in resolving this investment dispute, the BIT tribunal must consider relevant international environmental laws and the MEAs' obligations to protect Sundarbans' environment.

**International Law on State Responsibility and Potential BIT Dispute**

In this potential BIT dispute, India's failure to control multinational corporations investing in Bangladesh is a valid claim. State responsibility is currently defined in Article 5 of the International Law Commission's (ILC) Draft Articles on State Responsibility. This article states that a person or entity that is not an organ of the State under Article 4 but is authorized by that State's law to exercise elements of the Government's authority is considered an act of the State under international law when acting in that capacity. Article 8, another draft article, holds people accountable for "acting on behalf of the State" or "exercising elements of governmental authority in the absence of official authorities and in circumstances which justified the exercise of those elements." If a foreign citizen or corporation does harm abroad, their home state is liable (Shornarajah, 2010).

Dicta in the Nicaragua Case (Nicaragua v. United States of America, 1986, ICJ Reports 14) would indicate that a state is responsible for the acts of unrelated persons if it controls them. If controlled, these people are state agents. The court stated (para. 109): "What the Court has to determine is whether or not the relationship of the control to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of that Government, or as acting on behalf of that Government." Based on this formulation, the home state may be responsible for multinational corporations acting within its borders to harm the host state or its people (Shornarajah, 2010).

The 2010 Indian EIA thermal power plant guideline prohibits similar projects within 25 kilometers of ecologically sensitive areas like forests, rivers, and sanctuaries. Due to the Government's environmental awareness, the National Green Tribunal and India's Ministry of Environment, Forest, and Climate Change have canceled several coal-fired power plants and coal mining projects. The Indian company broke all government rules while pursuing this Project. In this case, India cannot avoid responsibility since it has not allowed its instrumentality (NTPC) in its territory due to environmental harm but has allowed it in another country. The home state has to ensure that the corporate national making the foreign investment complies with ecological damage laws in both the host state and internationally (Shornarajah, 2010). Before investing, the multinational corporation must not take it abroad (Shornarajah, 2010).

**International Investment Law and Potential BIT Dispute**

Bangladesh's regulatory measures and the arbitral Tribunal's approach will determine this potential BIT dispute's outcome. Arbitral tribunals have not consistently handled such disputes. However,

several investor-state arbitrations have involved environmental disputes. For example, a foreign investor challenged an environmental regulatory measure as expropriation in Methane v. US (UNCITRAL [NAFTA] Ad hoc Arbitration, final award, 2005). However, the Tribunal stated that "nondiscriminatory 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."

In Chemtura Corp v. Canada (UNCITRAL award, 2010), a state that interferes with environmental protection commits a non-compensable, regulatory expropriation. The Tribunal in the Chemtura case upheld the respondent's police powers. Canada took these measures within its mandate, non-discriminatorily, to raise awareness of lindane's health and environmental risks. Such a measure is a valid police power exercised by the State, not a takeover.

A World Bank tribunal (in *International Bank of Washington v. OPIC*, 1972) had previously held that the fact that the interference with the foreign investment was for an environmental purpose justified the interference. Likewise, courts have held that priority must be given to legislation seeking to protect the ecological concerns of a state, particularly when such matters are mandated by an international convention, even though the action taken would breach a foreign investment contract (Shornarajah, 2015). On this basis, the Australian High Court justified federal legislation that gave effect to obligations to protect the Great Barrier Reef, a protected area under the World Heritage Convention, even though it stopped sand-mining in the nearby Fraser Island under a concession given by the state government (Shornarajah, 2015).

Some early arbitration awards ignored environmental concerns, but more recent ones do. For example, Costa Rica took steps to protect the ecology of a World Heritage Site in Santa Elena v. Costa Rica (ICSID Case No. ARB/96/1, 2000). However, the Tribunal found that "environmental expropriation measures – no matter how laudable and beneficial to society as a whole...are similar to any other expropriation measure." even for environmental purposes, the State must compensate."

In Marion Unglaube v. Costa Rica (ICSID, Case No. ARB/08/1, 2012), Costa Rica created a Pacific Coast leatherback turtle national park and expropriated the investor's several plots of land there. The investor supported government environmental goals. "While there can be no question concerning the right of the government of Costa Rica to expropriate property for a bona fide public purpose, expropriation must be compensated," the Tribunal stated. The Tribunal also ignored environmental issues in Metalclad Corp. v. Mexico (ICSID, Case No. ARB (AF)/97/1, 2000) and S. D. Myers Inc. v. Government of Canada (UNCITRAL, Partial Award, 2000).

Santa Elena, Metalclad, and S. D. Myers involved facts that suggested environmental concerns may not have driven state regulation. The broad dicta in the awards suggest that investment protection was separated from other values like environmental protection (Shornarajah, 2015).

M. Shornarajah argued that even if the investment treaty does not include environmental protection, multilateral instruments with these standards now constitute customary law and would take precedence over investment protection (Shornarajah, 2015). Thus, environmental protection obligations under customary international law should take precedence over bilateral investment treaty investment protection obligations (Shornarajah, 2015).

Article 12 of the Bangladesh-India BIT's exceptions for regulatory measures—"essential security interests" or "circumstances of extreme emergency"—leave room for environmental protection regulations. International law allows the BIT's necessity and emergency clause to justify environmental standards. In the Gabcikovo-Nagymaros case (Hungary v Slovakia, ICJ Reports, 1997), the necessity defense was first recognized for environmental protection before the ICJ. Public emergency clauses and the necessity defense have been invoked in a series of investment disputes under Argentina–US BIT, including Continental Casualty v. Argentina (ICSID, Case No. ARB/03/9, 2008), Metalpar v. Argentine Republic (ICSID, Case No. ARB/03/5, 2008), Sempra Energy International v. Argentina (ICSID, Case No. ARB/02/16, 2007), LG&E International Inc. v. Argentina (ICSID, Case No. ARB/02/1, 2006), etc. Damages are a practical question if an emergency or necessity defense is successful. This potential dispute has no breach, so no compensation is due.

In light of the Joint Interpretative Statement of India, to which Bangladesh has consented, any environmental regulatory measures by the host state (here Bangladesh) will not be considered confiscated and will not violate the fair and equitable treatment standard. Even if Bangladesh takes any lawful measure to stop the power plant by defending vital security interests or circumstances of extreme emergency, it will be non-justiciable and unquestionable at any forum. Thus, by this JIS, the case of Bangladesh as a host state has become more robust and predictable as the regulatory space has expanded.

**Conclusion**

Inherently, the Rampal power plant may environmentally affect the Sundarbans. However, investors from India and Bangladesh are assured of adopting the latest technologies to tackle all potential environmental concerns. On legal considerations, Rampal Project is relevant to environmental and investment legal regimes where both share a complicated relationship. The former sought to protect the environment even at the cost of development, whereas the latter seemed more concerned with economic dividends and growth. Such intrinsic contradiction must be dealt with due to caution and attention by the parties to ensure sustainable development. Although the India-Bangladesh Bilateral Investment Treaty (BIT) does not explicitly include a provision for factoring in environmental considerations when assessing the legitimacy of regulatory measures, it does contain a clause regarding necessity and emergency. This clause may be used to validate environmental regulatory standards without violating significant provisions and obligations under the BIT. Secondly, Bangladesh can now rely on the Joint Interpretative Statement to validate regulatory measures to protect the environment and natural resources. Bangladesh's regulatory actions could also be justified by depending on international law in general and international environmental law in particular. Investment treaties are located within the fabric of international law, not beyond it, and have to be interpreted in the broader context of international law not solely for investment protection but also placing sensitivity to other issues and, most significantly, environmental considerations. It would be inappropriate if BITs are interpreted without reference to wider societal values like human rights or environment and only with regard to economic values and profits. It may be submitted that Bangladesh can re-negotiate this first-generation BIT to insert an express provision for environmental regulatory measures. Because unless there is a clear defense based on environmental rights in the BIT, arbitration tribunals might show reluctance in recognizing the priority of the environmental standards. That is why a precise treaty formulation stating the priority of environmental goals is necessary.

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