

Legal Insight!

CHAMBERS INITIATIVES

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THIS IS OUR HALF YEARLY LEGAL WRITINGS KNOWN AS "LEGAL INSIGHT", A PART OF OUR LEGAL INITIATIVE. WE HAVE ANALYSED THE MAJOR EVENTS AND CHANGES IN LAWS TAKEN PLACE IN THE LAST SIX MONTHS IN BANGLADESH AND GLOBALLY HAVING IMPACT ON BANGLADESH. WE HAVE ORGANISED IT UNDER NINE HEADINGS AS PER OUR NINE PRACTICE DEPARTMENTS COVERING THIRTY TWO [PRACTICE AREAS](#).

Commercial

After graduation from its LDC status to a developing country in 2026, Bangladesh will be exposed to several risks due to non-availability of many protections which are available to an LDC. For example, there is a risk that different subsidies and dumping duties imposed may be subjected to challenge under SCM and AD Agreements. And customs duties and supplementary duties may also be challenged for not following the safeguard principle under GATT.

The relevant question now is whether the new Import Policy Order 2021-24 have addressed all those issues? Whether several principles, for example, non-discrimination (MFN, National treatment), fair competition, reciprocity, transparency, economic development, predictability, etc. of WTO are reflected in the new IPO? Has it considered the impact on tariff, rules of origin, specific requirements, etc. after signing of Free Trade Agreement (FTAs) and Regional Trade Agreement (RTAs)? No complaints were ever filed against an LDC before; it is often filed against developed or another developing country by another developing or developed country. Disputes are normally arising from alleged violation of one or more agreements of WTO.

The demand and supply of foreign currencies will see a balanced condition by next January-February as predicted by the Bangladesh Bank as the country's exports and remittances have become surplus compared to imports. The Central Bank also claimed that they are working to check both under-invoicing and over-invoicing, foreign exchange smuggling, and revenue earning. The Customs Intelligence also has been working

on stopping abuse of incentives by using fake IP and ID from different processing zones by integrating ASUCODA and BEPZA interface. Several budgetary supports came from international organisations. Banks are opening LCs depending on their foreign currencies reserve. Automation and robotics are offering options for promoting resilience in supply chainsⁱ. The number of international trade disputes is expected to be decreasing soon.

Construction (Projects & Energy)

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It is the policy of the Government to secure its own resilience, energy independence and energy security, and to become “a net green energy exporter to the world”. With international and other investment support, the Govt. aims to reach 30% renewable energy by 2030 and at least 40% by 2041, with grid resilience and modernization. The government has taken the policy to convert some coal plants into green energy facilities.

On the other hand, poorer countries secured a deal at United Nations climate, i.e., COP27 summit to create a fund for climate-related damageⁱⁱ. A significant amount of funds will certainly be disbursed in the renewable energy sector. The relevant question will be how the Govt. will be implementing such a project? Through IPP, PPP or through state owned enterprise or corporation? Are there enough non-agricultural lands available? Will the land acquisition process and procurement methodology meet the international standard? This will require detailed legal due diligence as land acquisition will be the most challenging part for such a project.

Corporate

The Company Bench of Hon'ble High Court under an application filed under Section 396(2) read with Section 138(6) of the Companies Act, 1994 and Rules 8 and 263 of the Companies Rules-2009 relieved a company from fine incurred for the delay in filing the prospectus with the Registrar of Joint Stock Companies & Firms at Dhaka. The Registrar of Joint Stock Companies and Firms were also directed to accept the prospectus. However, the Hon'ble court did not exercise the power under the above-mentioned sections as the said sections did not expressly confer power to pass such direction rather exercised the power under section 151 of Code of Civil Procedure, 1908 (CPC) “*in giving an ancillary or consequential Order directing the RJSC to accept the prospectus even if the same is delivered to it after expiry of the time...*”. Regarding the rule 263, the Hon'ble court observed that: “*no Court of any country/jurisdiction has ever been vested with the inherent power through a Rule and, similarly, only an Act of Parliament can empower a Court of law to exercise its inherent power.*”

The above decision will be helpful and work as a precedence in several applications arising under the Companies Act 1994 where related express power has not been conferred to the Hon'ble Company court by the said Statute.

Bangladesh Labour Rules 2015 has been amended further. The amendment updated safety standards and added new rights for the female workers and so on.

Similarly new EPZ Labour Rules 2022 is now available. The rule supplied sets out the detailed procedures in relation to the provisions of EPZ Labour Act 2019.

Dispute resolution

The Evidence (Amendment) Act, 2022 has brought significant changes with the admissibility of audio and video records, electronic documents like email, expert evidence, etc. Although there are some presumptions associated with authenticity of such documents or records, proving authenticity if needed would require expert evidence, certificate from licensed, recognised Certifying Authority. As expected, the amendment is already changing the legal landscape of Bangladesh as previously the said evidence was not admissible and proving a particular fact was challenging without such evidence.

The Hon'ble court in an arbitration application filed before the Arbitration Court confirmed that the power to issue an order for examination of any signature by handwriting expert is conferred upon the arbitral tribunal only under section 17(ka) of the Arbitration Act, 2001. Section 7Ka has limited powers and the civil court cannot travel beyond the limited powers while exercising the power conferred upon it under the Arbitration Act of 2001.

Shipping

The Bangladesh Flag Vessels (Protection of Interest) Act 2019 was enacted repealing 1982 ordinance. The Act, however, subject to some exceptions, allowed at least fifty percent of the sea-borne cargoes relating to foreign trade of Bangladesh to be carried by Bangladesh flag vessels. Similar schemes have been applied by other states to promote national carriers. The Convention on a Code of Conduct for Liner Conference, 1974 allows promotion of local flag vessels by allowing them to take part in trade having better shares compared to third country flag carriers. However, the same must be based on fairness to other flag carriers and after considering the impact on trade and commerce. As the country is graduating, there is a substantial risk that such provision may be challenged directly or indirectly along with other principles like non-discrimination, etc. on the ground that it violates GATT's safeguarding rule as there is no national emergency justifying such provision. The provision has already been reviewed by the WTO review panel.

Draft new mandatory measures, to cut the carbon intensity of existing ships, have been agreed by an International Maritime Organization (IMO) working group. The proposed amendments to the MARPOL convention would require ships to combine a technical and an operational approach to reduce their carbon intensityⁱⁱⁱ.

Taxation and Finance

Taxation

Tax

The Hon'ble Appellate Division in an appeal filed against a writ petition denied giving a retrospective effect of tax exemption to a 'container terminal'. *"As the 'container terminal' in question was not within the purview of physical infrastructure facility when the petitioner company filed an application seeking tax exemption and thus the NBR justly and legally rejected the application for exemption."* The outcome could have been different if the terminal acted promptly. Legal due diligence at the start period on availability of the exemptions would have saved much of the efforts.

VAT

The Hon'ble High Court Division in three writ petitions decided that direct demands made by NBR without sanction in law because *"resort to the statutory process under section 55 provides the unobstructed access to a participatory liability determination process that a section 55(1) show cause notice, as is a necessary prelude to the access to such a participatory process, is held by this Court as a sine qua non to the Petitioners' constitutional rights under article 31 remaining guaranteed under the scheme of the VAT Act."* Any demand made not following the procedure laid down in the VAT Act, such demand has been held by the Hon'ble court as not a demand in the eye of law. This has been decided as amenable to writ jurisdiction as the same is unauthorized exercise of statutory power. It is possible to avoid a regular appeal process in cases where there is a clear jurisdictional error.

Finance

The Foreign Exchange Regulation (FER) Act, 1947 does not recognize virtual currencies. Virtual currencies are neither approved foreign exchange/currency nor approved form of transactions/investments under the Act, 1947. Any transactions, made in/from/to Bangladesh for obtaining virtual assets or its subset- virtual currencies, are not allowed by Bangladesh Bank laws. Any violation of the instructions is contravention of Act, 1947 and may be a cognizable offence under the said Act^{iv}.

In the light of the civil and criminal charges brought against FTX founder Sam Batnkman-Fried for *"one of the biggest financial frauds in American history..."*^v involving misappropriating FTX.com, a bankrupt company that formerly operated a cryptocurrency exchange and crypto hedge, customers' deposits and using those to pay expenses and debts of Alameda Research, his crypto hedge fund, it seems the steps taken by Central Bank is praiseworthy.

International

Bangladesh must now gradually align with other developing countries on its participation and commitment, as a WTO member, by reviewing and/or strengthening its institutional ability, IP related legislations and by withdrawing actionable subsidies, anti- dumping duties, safeguarding policy, etc. Similarly, gradually upgrading the tariff commitment under schedule of concession will be needed. Bangladesh must also keep best possible preferential access of export items to the developed countries.

Most LDCs who are graduating lack's relevant capabilities and expert professionals, as WTO laws and jurisprudence are constantly growing and are complex. On the other hand, government officials stay busy with their regular duties involving WTO. It is difficult for them to deal with disputes.

The Government of Bangladesh updated its Patent laws, formed several committees with different officials and published a policy allowing use of external professionals. It is expected that the government officials collaborating with different committees and professionals will be able to deal with the challenges of graduation and be able to minimize and/or deal with any potential disputes in future after graduation.

IT & IP

Intellectual Property

Bangladesh Patent Act 2022, replacing earlier law, enacted by the Government allowing patent protection for 20 years in line with TRIPS. Besides, now compulsory licences only are issued by the government. The Act must be analysed if the same supplies protection to the Patents which are foreign-registered, enforcement mechanisms and effective protection available for violation and if the court or other authority so empowered is allowed to grant Damages and so on.

Information Technology

Digital technology supplies increased visibility and opportunity to manage supply chain risk in multiple ways. ("Supply chain strategies: For many companies, the traditional balance is ...") "Digital supply networks leveraging advanced technologies such as the Internet of Things, AI, robotics, and 5G can break down functional silos and business-to-business barriers to help connect a complete supply network, which can enable real-time visibility, collaboration, agility, and optimization across supply ecosystems^{vi}.

IT is increasingly becoming unavoidable in the daily life for business as recently NBR made Electronic Fiscal Device (EFD), Sales Data Controller (SDC), Point of Sales (POS) software mandatory. At the same time, cyberthreats have become more complex as threat actors use more sophisticated techniques. The financial risks that can stem from loss of confidentiality, integrity, critical business processes, and information assets can be large. In addition to direct costs, operational impacts such as an inability to produce goods and services, system downtime, missed opportunities, and an outsize focus on incident or breach management impacts can be significant^{vii}. Having an enforceable contract should be the first steps towards cyber security followed by forensic investigation and if needed filing a case at cyber tribunal.

Investment

Industry policy is a set of policies designed to favour certain industries. The identification of those industries is sometimes akin to picking winners but usually based on some variants of comparative advantage for receiving preferential treatment. At the same time, it may also involve propping up or easing the fall of declining industries^{viii}. National Industrial Policy 2022 is focusing on the establishment of diversified export-oriented



industries, creating a conducive environment for the cottage, micro, small and medium industries and attracting more local and foreign investment in the country^{ix}. According to the industrial policy, foreigners who invest \$1 million or transfer \$2 million to a recognised financial institution in the country, the Bangladesh government would consider offering him/her citizenship. If any foreign national invests at least \$2 lakh, he or she would get permanent residence in Bangladesh.

However, the Policy must now follow WTO agreements like SCM, ADA and GATT and so on. The Govt. also published the Light Engineering Industry Rule. Both Industrial policy and the rule requires detailed analysis if the same is compatible with WTO agreements, if so, how far the incentives, subsidy and safeguarding policy support will survive under WTO Agreements.

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ⁱ The Wall Street Journal

ⁱⁱ The Wall Street Journal

ⁱⁱⁱ IMO

^{iv} Bangladesh Bank

^v The Wall Street Journal

^{vi} The Wall Street Journal

^{vii} The Wall Street Journal

^{viii} Rethinking the Industrial policy by M Mahmood, the Financial Express

^{ix} The New Age

