LAW *opinion*

Developing International arbitration culture in Asia

PROFESSOR DR A F M MANIRUZZAMAN

There is a great need for a change of attitude. The judiciary as well as the legal profession have to appreciate the reality that, in the era of globalisation, dispute settlement by alternative methods is not only a domestic matter but also an increasingly growing international phenomenon in the context of cross-border transactions. They must be prepared to absorb international values, norms and principles while performing their professional functions in the field of international dispute settlement

IN many Asian countries, the settlement of international commercial disputes and enforcement of arbitral awards remain as grave a cause for concern for foreign investors as ever. This may be attributed to a number of factors which include the following:

(i) A tendency for local courts to be non-cooperative and to have an anti-arbitration bias. In the context of international energy project contracts, there are a number of instances of local project participants and government agencies having employed local court orders as a means of delaying and even halting international arbitration proceedings completely. These follow claims that project deals were made through corruption and thus were invalid or unenforceable. Such court orders have been made in relation to the Himpurna and Patuha projects (Mid American Holdings), the Karaha Bodas project(EPL and Caithness Energy), and the Paiton project in Indonesia (Edison Mission Energy, Mitsui and General Electric), the HubCo project in Pakistan and the Dabhol project in India (Enron).

(ii) The inability of local courts to appreciate the ethos of international private dispute settlement.

(iii) The inefficiency of local courts in enforcing awards.

(iv) A serious lack of understanding by local courts of international arbitration rules and conventions, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('the New York Convention').

(v) Local protectionism.

(vi) Manipulation of the system by a local disputing party.

(vii) Occasionally, corruption.

Specific problems affecting arbitration in Asia

Difficulties in enforcing awards

Commentators have found particularly acute problems in relation to the enforcement of arbitral awards in some Asian countries. In this regard, arbitration often faces stumbling blocks on grounds not usually found elsewhere. These include the following:

(i) Failure by a signatory State to the New York Convention to ratify the Convention by way of enabling legislation. An illustrative case is the decision of the Supreme Court of Bangladesh (Appellate Division) in Bangladesh Air Service (Pvt) Ltd v British Airways PLC [(1997) 49 Dhaka Law Reports 187]. A summary of this case in the Yearbook Commercial Arbitration contains the following statement:

"It was pointed out that though Bangladesh had acceded to the New York Convention, it had not passed implementing legislation. Thus the New York Convention could not be relied upon to enforce a foreign award in Bangladesh" [YB Comm Arb XXIII (1998) 624 at 625].

(ii) Failure by a State party to ratify a bilateral investment protection treaty providing for ICSID arbitration.

(iii) The absence of mechanism or guidance for courts on the enforcement of foreign arbitral awards, coupled with adverse judicial attitude to enforcement.

(iv) Judicial interference with arbitration on public policy grounds. An illustrative case is the decision of the Supreme Court of Pakistan in Hubco v. WAPDA [Civil Appeal Nos. 1398 & 1399 of 1999], where the court refused to enforce an arbitration agreement providing for ICC arbitration in London and upheld the jurisdiction of the Pakistan courts to determine a major dispute. The central issue was whether allegations of fraud, illegality and corruption raised by one party (a government party) against the other (project company / foreign investors) precluded the resolution of disputes by arbitration as a matter of public policy and, as such, rendered them non-arbitrable.

Another relevant case is Saipem SpA v Bangladesh Oil Gas and Mineral Corporation [MLR (2000) (AD) 245]. In this case, the High Court Division of the Supreme Court of Bangladesh, acting under 5 of the Arbitration Act 1940, revoked the authority of an ICC arbitral tribunal constituted under the ICC Rules (ICC Arbitration case no. 7934/CK) at the request of one of the parties. The lower court held that the tribunal had conducted the arbitration proceedings improperly by refusing to determine the question of admissibility of evidence and the exclusion of certain documents from the record. Accordingly, the tribunal had acted in manifest disregard of law and the arbitral proceedings were likely to result in a miscarriage of justice.

The Appellate Division of the Supreme Court declined to interfere with this order in the interests of justice. The decision caused some clamour in the international community. For example, the Editor of the ASA (Swiss Arbitration Association) Bulletin described it as "in stark contrast with a number of principles of international arbitration" such as Kompetenz-Kompetenz. The commentary maintained that there was nothing improper in the conduct of the arbitral tribunal. Its conduct was -- "completely in line with public policy as well as with standard arbitration practice. The facts reported do not show that the Arbitral Tribunal has overstepped its discretion to freely assess and weigh the evidence ..."

(v) Misinterpretation by the courts of the New York Convention.

(vi) Occasionally, ambiguities in a country's arbitration law.

Lack of expertise in arbitration and ADR and gaps in legal education

Another pertinent issue that haunts the dispute resolution scene in the region is that, despite the recent moves towards the modernisation of arbitration law in many Asian countries, in some of them there is available very little arbitration or any ADR expertise, either at the Bar or on the bench. Legal education in many Asian countries is not geared to this particular specialisation; insufficient resources are in place to educate and train professionals in the field towards the goal of creating a viable and thriving atmosphere for international commercial arbitration. These problems will continue to afflict international commercial arbitration in the region unless effective measures to overcome them are undertaken soon. In the wake of current liberalisation of international trade and investment in an increasingly globalised world, it is not enough to modernise international arbitration laws alone in the Asian region. Rather, there should be developed a proper infrastructure in terms of educated, trained and experienced professionals, specialist judges and judicial officials in the field.

There is also a need to establish more arbitration centres and to make arrangements for regular training programmes to update professionals and judges with knowledge of recent developments in the field. Unfortunately, many Asian countries are still lagging behind in these respects.

Conclusion and suggestions for improvement

These problems and challenges currently facing international commercial arbitration in Asia are, however, just teething troubles that can be overcome over time. Undoubtedly, Asia is gradually emerging from its past and into the present era of globalisation. It has a vision for its future co-existence in the global market place. In order to make Asia an acceptable region for dispute resolution, therefore, the following tentative suggestions are offered.

(i) Most Asian countries are developing countries. In order to enhance education and develop professional skill and knowledge in ADR, including arbitration, both at the Bar and on the bench and beyond, the World Bank and the Asian Development Bank could take the initiative to sponsor courses and training programmes locally. These could be offered by such bodies as the Chartered Institute of Arbitrators (London and its East Asia Branch, based in Hong Kong), the International Development Law Institute (IDLI, Rome), the International Chamber of Commerce (ICC) Institute of World Business Law and other professional bodies and international organizations.

(ii) Furthermore, international development banks, national, regional and international business bodies or multinational energy companies could take similar initiatives. The money would be well spent in the sense that if a congenial atmosphere could be created for ADR by enhancing education and developing professional skills, knowledge and awareness in ADR, the international business community as a whole would reap great benefits in return over time.

Without the enlightenment of its members, no community can expect progress and prosperity. Similarly, without the establishment of sound dispute settlement mechanisms and the enlightenment of the people who deal with them, the international business community cannot be expected to have confidence in a country, especially if it is a developing country. This will, in turn, affect that country's prospects for economic development.

(iii) Once the legal intelligentsia of a country is well groomed in ADR methods by educational activities and training programmes and an appropriate ethos is thereby created, legal and judicial reforms can be effectively carried out. Thus, the seeds of reform must be sown in the fertile legal terrain. Without providing a congenial atmosphere, for change, modernisation of law in tune with the expectations of the international business community cannot be achieved. Undoubtedly, an improved legal system and an efficient judiciary can stimulate the economic development and progress of a country.

If, however, the underlying conditions for legal change are not created in a country, the mere fact of legal change will not bear any fruit there in the long run. In this respect, international development agencies such as the World Bank, the Asian Development Bank, USAID, and other relevant international organisations such as WIPO, WTO and UNCTAD can take the initiative in myriad ways to help build the legal infrastructure of a developing country. Already, work is going on in that direction, thanks to the efforts of a number of development agencies, but more is needed in the future. It has been noted:

"...[M]any developing countries, often with foreign assistance, have undertaken judicial reform programmes to strengthen the independence of the judiciary, improve the training of judges and court personnel, provide courts with the necessary material sources, modernise the judicial procedures, increase access to justice, and develop alternative methods of dispute resolution."

However, more educational activities and training programmes in all forms of ADR are needed for lawyers, judges and dispute settlement professionals in developing countries in order to help them gain positive benefits from globalisation. At present, not enough is being done.

(iv) Donor countries and development agencies could take initiatives and design methods for increasing transparency in national laws and practice concerning foreign investment and dispute settlement in Third World developing countries. Regular publication of information on these

matters, together with information and statistics about court activities and actions in connection with foreign investment disputes, information about dilatory tribunals and accounts of the work of other dispute settlement agencies in a particular country could be a means of ensuring or promoting transparency in these respects. The 'rogue state' could be held to account. Donor countries and development agencies could jointly apply a 'carrot and stick' policy to a country in providing development aid and financial assistance.

(v) There is a great need for a change of attitude. The judiciary as well as the legal profession have to appreciate the reality that, in the era of globalisation, dispute settlement by alternative methods is not only a domestic matter but also an increasingly growing international phenomenon in the context of cross-border transactions. They must be prepared to absorb international values, norms and principles while performing their professional functions in the field of international dispute settlement, otherwise their professionalism will prove moribund and will be useless to the international business community.

Much in-depth research is needed to find out how dispute settlement by various ADR methods could be promoted and international commercial disputes effectively and finally resolved in Asia. Various business organisations, international development agencies, national professional organisations and regional organisations in Asia could make valuable contributions in this regard.

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HUMAN RIGHTS *analysis*

Corporate social responsibility: a mere option or compulsion for protection of human rights?

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NOBEL Prize-winning economist Milton Friedman, in 1970 New York Times Magazine article, presented possibly the most famous definition of corporate social responsibility . According to Friedman, the responsibility of a corporation is "to conduct the business in accordance with (owners' or shareholders) desires, which generally will be to make as much money as possible while conforming to the basic rules of society, both those embodied in law and those embodied in ethical custom."

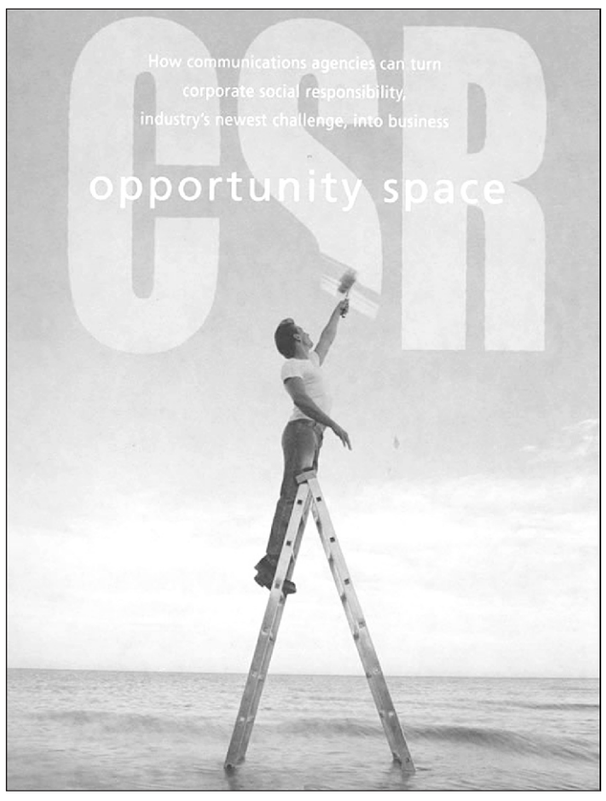
Corporate social responsibility (CSR) is not a new issue. The social responsibility of business was not widely considered to be a significant problem from Adam Smith's time to the Great Depression. But since the 1930s, and increasingly since the 1960s, social responsibility has become an important issue not only for business but in the theory and practice of law, politics and economics .The concept that corporations bear certain obligations to serve the public interest dates back to the late 19th century, when early industrial enterprises in the United States were kept under state control through the use of corporate charters (Richter, 2001, 6). Since the early 1990s, dozens of Transnational Corporations (TNCs) have been exposed to legal disputes in the United States. For example, Texaco has been sued for alleged violations of human rights in Ecuador. Coca-Cola has been sued for alleged human rights violations in Colombia, Royal Dutch Shell in Nigeria and Unocal has been sued for alleged violations of human rights in Burma.

In all of these cases, TNCs have been sued for alleged violations of human rights taking place in conjunction with their operations in developing countries or in places governed by repressive regimes. In these cases, plaintiffs have tried to focus TNCs to the jurisdiction of American courts in order to overcome their failure to enjoy the protection of the local jurisdictions where the alleged violations occurred. In some of these cases, the allegations concerned "hard-core" infringements on human rights, such as mass murder, rape, and torture. In other cases, the alleged violations concerned issues such as freedom of speech and association. In Kasky v. Nike, Nike was sued under Californian State Law for false advertising. Kasky claimed that information on Nike's social performance was false and did not reflect the poor working conditions in its foreign factories. Nike defended itself based on the First amendment of the US Constitution on freedom of speech, but the Court ruled, in the first instance, against Nike to find that the company statements should be classified as "commercial speech" (and not political). The case was subsequently settled with Nike paying $1.5 million as a donation to the Fair Labour Association in Washington, D.C.

An attempt was made to bring under the umbrella of human rights issues such as ethnic discrimination, environmental damages, and unfair labour practices in some cases. In yet other cases, the alleged violations were based on arguments of "cultural genocide" caused by forced relocation, destruction of a natural habitat, or the spread of health hazards. In other cases, the alleged violations occurred as a result of the corporation benefiting from oppressive practices of military or paramilitary groups or as a direct result of the corporation's business practices.

States are bound by international treaties which they have ratified, and by rules of customary international law. Do international human rights obligations apply also to Transnational Corporations (TNCs)? Some TNCs argue that human rights treaties are signed by states, and as such, obligations to respect, protect and fulfill human rights fall on the state. As non-state actors, TNCs argue, that they have no international legal obligations towards the protection of human rights. They may choose to protect human rights voluntarily, but they have no obligations under international law.

The Universal Declaration of Human Rights (UDHR), however, expands



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responsibilities to "every individual and every organ of society". "Every organ of society", includes non-state actors, such as companies, public and private. Although the phrase "every organ of society" has not been included in either of the human rights Covenants. The UN Norms on the Responsibilities of TNCs and Other Business Enterprises with Regard to Human Rights are the most recent step in a development towards ensuring corporate accountability for human rights, approved by the Sub-Commission on the Promotion and Protection of Human Rights, under the UN Economic and Social Council (ECOSOC) in its fifty-fifth session. The Norms are based on the principle that although states have the primary responsibility of the protection of human rights, multinational corporations and other business enterprises, as organs of society, including officers and persons working for them are also responsible for promoting and protecting human rights as lay down in the Universal Declaration of Human Rights. The Norms acknowledge various multilateral sets of principles, guidelines, standards and recommendations, such as the UN Global Compact, the OECD Guidelines for TNCs, the ILO Tripartite Declaration of Principles Concerning TNCs as well as the ILO Labour Conventions and Recommendations.

Transnational corporations and other businesses have a responsibility to respect human rights in their own operations. Their employees and other people with whom they work are entitled to rights such as freedom from discrimination, the right to life and security, freedom from slavery, freedom of association (including the right to form trade unions) and fair working conditions.In the context of civil and political rights, for example, companies recognize that their legal responsibilities include proper training of their security staff, and that they must not violate international and national labour laws, regarding the use of forced labour and exploitative child labour. The Tripartite Declaration of the International Labour Organisation also applies to companies. Similarly, companies are covered by sector-specific enforcement mechanisms, such as Responsible Care for the chemical industry, Forest Stewardship Programme in forest management, and the Kimberley Process Certification Scheme to regulate the trade in rough diamonds.

Scrutiny of the activities of corporations led many companies to adopt codes of conduct during the 1980s and 1990s. According to Amnesty International, fewer than 50 companies refer unambiguously to human rights in their codes. Whether unique to the company or adopted sector-wide, voluntary codes too often lack international legitimacy.

Human rights groups such as Amnesty International and Human Rights Watch are sometimes aligned closely with labour groups because a number of human rights principles concern to labour relations and working conditions, demonstrated by some of the recent high-profile cases involving forced labour, child labour, restrictions to freedom of association and the right to collective bargaining, as well as abusive "sweatshop" working conditions. Other human rights issues extend to cases involving political oppression, where the relationship to TNC operations may be indirect rather than causal.

According to some analysts debates relating human rights standards and TNC's social responsibility usually revolve around two fundamental issues. The first concern is who should decide whether and when significant human rights violations are occurring in a specific country. The second issue is determining the appropriate relationship between human rights obligations and the actions that business entities (particularly foreign-based TNCs) might take to influence a host country's domestic political affairs.

Therefore, any negotiation at the international level has to be supervised cautiously with the benefits and costs for both industrialized and developing countries. And the question of whether the agreement should be voluntary or regulatory need further discussion. It is worth mentioning that, since its establishment in 1919, the International Labour Organization (ILO) has not achieved the enactment of any of its Conventions or Recommendations on labour standards into any form of international law. Nevertheless, there is no international obligation on countries to do so.

In its keynote publication of 2001, Beyond Voluntarism, the International Council on Human Rights Policy (ICHRP) argues that: 'If self-regulation and market forces were the best way to ensure respect for human rights, one might expect, since this has been the dominant paradigm, the number of abuses attributable to companies to have diminished. In fact, in many parts of the world, the experience of workers and communities is precisely the opposite.' However, people are becoming more cognizant of human rights. There has been, predominantly over the recent years, a rising appreciation of the need to regulate corporate activity from the human rights perspective. There is a significant need to build up tools to support businesses in implementing their responsibilities for undertaking human rights. Therefore, the fundamental requirement for future corporations will be to demonstrate how to build a better world: not just for shareholders, but also for customers, consumers, employees and communities.

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FACT *file*

Bangladesh: Impunity encouraging killings of human rights defenders

The failure of successive governments in Bangladesh to stop the assassination of people promoting human rights in the country has encouraged such killings to increase in a climate of total impunity, states a report of Amnesty International published on August 23, 2005.

The report, Bangladesh: Human rights defenders under attack, highlights arbitrary arrest, torture and filing of unfounded criminal charges by government agents against those who dare to speak out on human rights abuses in the country. Such people are routinely subjected to death threats, physical attacks and sometimes assassination. Perpetrators are individuals or groups usually linked to armed criminal gangs, political parties or mercenary gangs thought to be linked to local politicians.

"The government's inaction has led to a climate of impunity in which physical harassment, torture and assassination go unnoticed and unquestioned," said Madhu Malhotra, Deputy Programme Director for Amnesty International. "Only the authorities can rein in abuses committed by their agents and under their supervision, and curb those committed by armed gangs."

AI is calling on the Bangladesh authorities to implement safeguards against arbitrary arrest and torture of human rights defenders and ensure rigorous investigation of reports of death threats and attacks against people who expose human rights abuses in the country.

Human rights defenders or people who criticise the authorities are often arrested, tortured or ill-treated in custody, and charged with a range of apparently unsubstantiated criminal offences. They include journalists, writers, academics, staff from non-governmental organisations and lawyers.

At least eight people who spoke out against human rights abuses in Bangladesh have been assassinated since 2000 by assailants believed to be linked to armed criminal gangs or armed factions of political parties. Scores of others have been seriously injured, some permanently, and require continued medical attention. Several journalists have had their fingers or hands deliberately damaged to prevent them from holding a pen.

The prevalence of armed criminal gangs has provided impetus to a culture of gun violence. These armed groups are either "student" groups affiliated to major political parties or gangs identifying themselves as Maoist parties and allegedly linked to certain individual politicians. Those speaking against political parties or certain politicians risk their lives at the hands of these gangs.

"The authorities must introduce specific measures aimed at protecting people who dare to speak out about human rights abuses in the country. It is their responsibility to bring all those responsible to justice, whether they are state agents or members of the armed gangs," said Madhu Malhotra.

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Source: Amnesty International.