"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

LAW ANALYSIS

THE NIKO ARBITRATION

Lessons for Bangladesh

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THE domestic trial of the Niko graft allegations has been continuing for quite some years, now reaching at the apex court in Bangladesh. This trial was triggered by the revelation of a web of bribery corruptions that Niko engaged in to win its natural gas contracts. In 2007, an international investigation conducted by ACC, Canadian Police, and FBI found that Niko hired middlemen to buy off corrupt key officials and politically influential persons to accomplish its goal. This trial is therefore in order and indeed imperative to bring those to justice who gave their personal greed precedence over the hardcore national interests. However, my purpose here is not to dwell on this domestic Niko graft case but to briefly highlight and comment upon what went on in the international arbitration between Niko and Bangladesh in London to sound a forewarning for Bangladesh to take its future state-investor dispute settlement (SIDS) seriously. Since these arbitrations are usually held in foreign jurisdictions, they often escape public scrutiny and concern with marginalising effect on the national interests, warranting an investigation not only to uncover nefarious deals, if any, but also to improve future performance in SIDS. The Niko arbitration appears to serve an example.

Niko Resources (Bangladesh) Ltd, a subsidiary of a Canadian corporation, entered into a joint venture agreement with BAPEX in 2003 to develop gas fields in Feni and Chattack. Petrobangla became the buyer of gas from the Feni field under a gas purchase and sales agreement (GPSA) with Niko. In drilling the Chattack gas field by Niko, two blowouts occurred on 7 January and 24 June 2005, which remained uncontrolled causing extensive damage to the gas wells, human lives, and the surrounding environment. The energy ministry's inquiry committee determined that the fire was the result of Niko's operational failure and inappropriate casing design. These blowouts gave rise to a dispute over the attribution of responsibility and compensation. Petrobangla sued Niko in a Bangladesh Court for damages in 2008. But Niko instead proceeded to an international arbitration under the International Centre for the Settlement of Investment Disputes (ICSID) in April 2010 requesting: (1) to exonerate itself from the liability for any damages caused by the blowouts, and (2) to realise its arrear gas bill from Petrobangla.

Niko avoided the Bangladesh court's jurisdiction pursuant to an arbitration clause in the joint venture agreement with BAPEX (Art. 18). In the two blowouts, Niko's negligence and lack of experience giving rise to responsibility were evident, which ICSID arbitrators ignored and concentrated solely on the failure of Petrobangla to make payment under the GPSA. ICSID award ordered Petrobangla to pay for Niko's invoices for gas delivered from November 2004 to April 2010 with interest compounded annually. On 6 August 2015, Bangladesh requested the ICSID tribunal to decide that 'the outstanding amounts under the Payment Claim Decision will be payable … only after all issues regarding Niko's liability are resolved', which was rejected (Cases No. ARB/10/11 &ARB/10/18, award of 14 September 2015, paras. 43, 167).

Petrobangla suspended its payment for the purchase of gas under an injunction issued on 5 May 2010 by the High Court Division (HCD) in response to a petition by the Bangladesh Environmental Lawyers Association. ICSID tribunal disregarded this injunction in assuming its jurisdiction over the dispute concerning the non-payment of gas invoices in violation of the ICSID Convention which states that, in arbitrations between foreign investor and host state agencies, 'consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required' (Art. 25(3)). No approval for Petrobangla's participation was sought or got from Bangladesh, nor did Bangladesh send any approval voluntarily to ICSID for Petrobangla to participate in the arbitration or notified ICSID that no such approval was required.

The history of FDI-led project operation is littered with instances, like the Bhopal disaster, of foreign investors' scanty regard for the environment, human rights, and sustainable development in host states. Foreign investors cannot operate their projects in a foreign jurisdiction in defiance of local laws, national interests, and public policies. Disregard by ICSID tribunal for Niko's negligence in two major gas field blasts in Bangladesh demonstrates its insensitivity to the vital interest of the host state and overly sensitive to protect corporate interests of Niko.

The dispute settlement procedure under the Niko-BAPEX joint venture agreement does not require the exhaustion of domestic remedies as a requirement for resorting to international remedies but specifies that disputes would be resolved through ICSID arbitration. Moreover, some pleadings contained in the BAPEX rejoinder favoured Niko more than Bangladesh. The following two examples extracted from the ICSID official's record are illustrative of the gaps and inadequacies in the representation of Bangladesh's competing interest:

1.BAPEX did not contest Niko's factual account of the blowouts and merely stated that it 'has never invoked Niko's liability for the two blowouts' and that 'it has little or nothing to add in response to Niko's description of the facts' (BAPEX Rejoinder filed with ICSID tribunal on 25 September 2014, paras. 2, 21); and

2.BAPEX never contested in any substantive manner 'the question whether Niko breached any obligation or law and whether Niko has any liability with respect to the blowouts' (*ICSID, Niko* v *BAPEX and Petrobangla* (Case No. ARB/10/11 and ARB/10/18, decision on jurisdiction, Procedural Order No. 7 of 17 October 2014).

Admittedly, there is a perennial issue of highly incentivised foreign direct investment (FDI) regime skewing disproportionately in favour the foreign investors. Nonetheless, the proceedings of the Niko arbitration clearly show the lacklustre representation of the competing interest of Bangladesh before the arbitral tribunal. As a result, Bangladesh lost in a distinctly winnable arbitration. Bangladesh as a host state accept FDI not for fun but for its economic development. FDIs are not the end but a means towards the end of development. Bangladesh must be prepared and positioned itself to withstand and face the challenge of international arbitration actions initiated by foreign investors such as Niko to protect its national interests.

Most arbitration clauses in bilateral investment treaties (BIT) of Bangladesh tilt to protect corporate interests more than its national interests (subject of a forthcoming piece). Bangladesh needs to be more careful and measured in offering various incentives in negotiating its future BITs and natural resources exploration contracts to minimise their use in arbitration. Legal representation before international arbitral tribunals calls for greater attention and articulation. Given the orientation of international arbitration leaving the host states subservient to the profit driven agenda of foreign investors, Bangladesh must be cautious in approving such arbitration as the last resort in order to limit its exposure to exorbitant damage claims. Adequate and effective representation in the realms of international arbitration would require an unequivocal standard of efficiency and skill in drafting and preparing pleadings, responses, and rejoinders to circumvent safeguard measures, the usual legal shelters of the foreign investors, to avoid their corporate responsibility for wrongdoings and consequential compensatory liability. Bangladesh has been creating multiple free trading FDI zones, which would inevitably attract and bring more FDIs as a catalyst for its ongoing economic progression. Bangladesh must learn lessons from its Niko arbitration by conducting a searching reappraisal of its performance for its own self-sufficient capacity building to face international arbitrations in the future.

PHOTO: STAR

TENGRATILA DISASTER: Niko managed to win the deal for cheap by showing the new gas field in Tengratila of Chattack as a used one in 2003. Two huge blowouts in January and May of 2005 took place due to "faulty and negligent operation of Niko." The gas field burnt for years and eventually turned the 260 billion cubic feet gas reserve into a vast wasteland. Bapex estimated the loss to be $1.05b.

Bangladesh must learn lessons from its Niko arbitration by conducting a searching reappraisal of its performance for its own self-sufficient capacity building to face international arbitrations in the future.

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RIGHTS WATCH

User's privacy in using Apps

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WHEN a smartphone user wants to install the Flashlight App, the app may ask to access the call logs and the contacts. Again that same user might want to launch a newly installed Calendar App that wants access to the user's camera or asks to read the messages. This kind of permission is very familiar to the smartphone or tab users. According to Singapore's 1st Privacy Survey on Mobile Apps which is done by 'Straits Interactive', 7% apps want access to users' call log, 10% apps want to see what the users' mobile cameras see. An interesting fact is that 9% apps want to see the contacts saved by the user and 4% wants to see the messages send and received by the user.

Personal information is as valuable as property and in order to get the same, one should ask for permission through cumbersome legal process.

Application permission is that which a user agrees to, in order to use a mobile application or to enable a mobile application to perform its task. Each permission sets out the conditions that the application may affect during the installation or use of the application. But when an app wants such permission that is not needed to perform any task, then how is the developer going to explain that? If the developer asks permission which is not fundamental to the user's safe and adequate use of the app, then what can be a possible explanation for keeping it? According to the Global Privacy Enforcement Network survey, of the 1211 apps surveyed, almost one third lacked a credible justification.

Our country has entered into the digital era and many web developers and companies are creating their own apps. This is one of the latest techniques of business but when any company or developer asks permission for accessing personal things like contacts or messages (without a justifiable reason underlying it) through the app, it is completely illegal. This is true that they are asking permission and it is up to the users whether they want to give it or not but what will happen if the user gives that permission accidently? As a developer or company, nobody can hold access to the personal information because the same can prove to be harmful for that user. Personal information is as valuable as property and in order to get the same, one should ask for permission through cumbersome legal process.

In recent times, we got the newly enacted Digital Security Act 2018 and through this Act, we may get remedy if any developer collects our information which is not necessary or unrelated to the performance of the supposed task of the app. According to section 26(1) of the Act, 'if a person collects, sells, possesses, supplies or uses the identity of another person without legal authority, then act of such person shall be an offence.' The illustration of this section mentions about the things which are not allowed to be used by the developers through the app. If the offence is committed by a company, the company's owner, chief executive, director, manager, secretary will be deemed to have committed this crime, unless he can prove that, this information has been stolen stealthily or he tried his best to prevent it (section 36).

We have laws but as users, we need to be more careful regarding the installation of an app. Users should be aware of their rights given by the Digital Security Act and use this when they noticed their personal information has been collected through a mobile application.

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FACT FILE

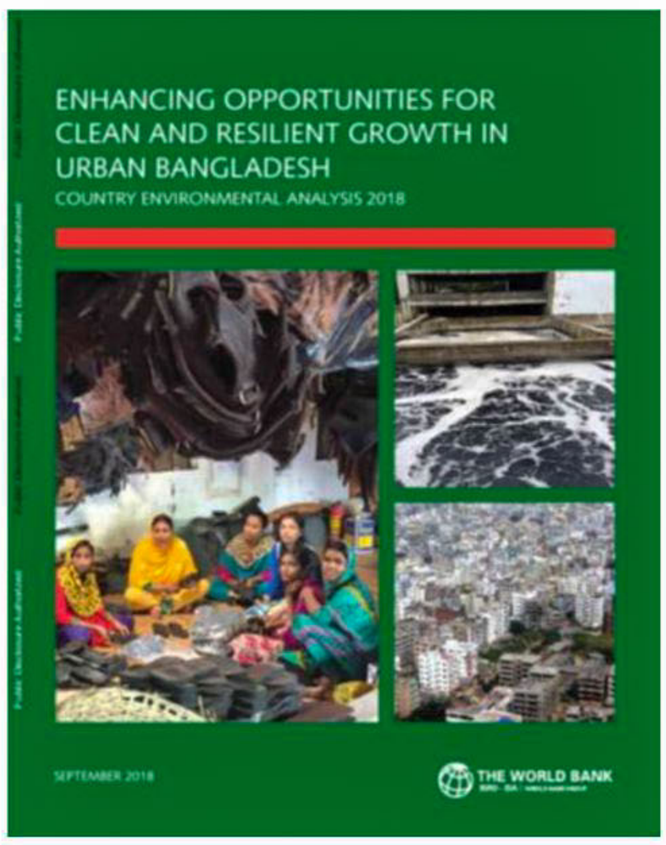
Balancing economic growth and clean environment

BANGLADESH has sustained vigorous economic growth, 6.7 percent of GDP per year on average, by massive industrial development and urbanisation. The country aspires to become an upper-middle income country by raising its gross domestic product (GDP) at 7 to 8 percent per year in the next decade. As recognition to its relentless journey towards being a developed country, in July 2015, Bangladesh officially graduated to the level of lower-middle income country with a gross national income (GNI) per capita of over US$1,046.

In parallel with its economic prosperity, the entire country has been increasingly urbanising — led by the enormous growth of Dhaka. The national urban population grew at an average annual rate of 3.5 percent, and according to the World Bank Report of 2015, is expected to increase from 28 percent of Bangladesh's total population today to 40 percent by 2025. However, at the sametime, the population living in slums within the urban areas is growing at double the average urban rate — around 7 percent annually.

As a result of massive urbanisation and industrial growth, we have to accept environmental costs as well. The increasing environmental costs associated with the enormous development are increasingly harming Bangladesh's prospects for continued strong economic progress. Unfortunately, the economic growth has showed uncontrolled urbanisation and industrialisation in a context of insufficient pollution control and poor management of natural resources that provide critical ecosystem services. The urban environmental pollution is already imposing a significant cost on Bangladesh's economy. In 2015, the total annual number of deaths and disability adjusted life years (DALYs) attributable to airpollution, inadequate water, sanitation, and hygiene (WASH), arsenic in drinking water, and occupationalpollutants in urban areas is estimated at some 80,000 and 2.6 million, respectively in 2015.

Over the last decade, Bangladesh has improved its policy regime and systems for environmental and pollution management. Since 2006, when the World Bank's first Country Environmental Analysis (CEA) for Bangladesh was published, the country has made tangible progress in further developing environmental policies, guidelines, and legislation. This progress toward mainstreaming the environmental agenda across government is especially apparent in the country's national development, environment, and climate change strategies, as well as in specific enhancements to the legal framework for pollution control, management, and accountability. Some industry-specific initiatives for scaling up cleaner production practices have also gained momentum.



However, we have so much to do to arrest the blatant effects of pollution and environmental degradationon people's health and economic productivity. Achieving Bangladesh's objective to reach uppermiddle-income status through cleaner and more resilient growth will depend on further developing and strengthening a range of complementary policies and systems for environmental protection, urban development, and industrial management. This is even more critical and urgent for Bangladesh than for most other countries at a similar income level due to its uniquely high population density and vulnerability to climate risks. Moreover, institutional reforms and capacity building will be key in all areas to ensure effective implementation of adopted strategies andpolicies. Based on the analysis in this CEA, priorities for reform and investment should include the following: enhancing environmental policy and institutions at the national level, enhancing environmental management at the local/city level, strengthen the enforcement and accountability regime, leveraging market-based instruments to protect the environment and unlock green financing, promoting resource-efficient and cleaner production (RECP) as a tool for reconciling environmental performance with competitiveness and lastly harness the power of public pressure.

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