"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

REVIEWING THE VIEWS

International arbitration of FDI disputes

Benign or malign for Bangladesh?

PROFESSOR M RAFIQUL ISLAM

FACING FDI nationalisation in the 1960s-1970s, foreign investors were reluctant to invest without strict protection. Many Third World states felt the stultifying economic effect of reduced FDI and accepted investor-state dispute settlement (ISDS) under private international law as the binding FDI protection. Developing host states adopted their incentivised policies to attract FDI and abandoned regulation for fear of FDI flight. Amid such lacklustre domestic policing of FDI, foreign investors favoured international arbitration to circumvent host states' law and judiciary to maximise their corporate interest, which has also happened in Bangladesh.

International arbitrations of FDI disputes are quasi-judicial in nature and operate under BITs. FDI operations in host states cause wide-ranging socio-economic impacts generating national public interests. The resolution of exclusive national issues beyond national judiciary in privatised and confidential international arbitration gives rise to jurisdictional conflict. Different arbitrations by different arbitrators result in conflicts of the same law, contrasting interpretations, and dissimilar decisions. The UNCTAD International Investment Arbitration Issues Note, 'Reform of ISDS: In Search of a Roadmap' criticises these arbitrations (a) that 'have exposed recurring episodes of inconsistent findings', including 'divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts', resulting in 'uncertainty about the meaning of key treaty obligations and lack of predictability of how they will be applied in future cases', and 'erroneous decisions' (No. 2, 26 June 2013, 3-4). There is no appeal to remedy these conflicts. Consequently, these arbitrations have become the embellisher of legal contradictions.

The seeds of jurisdictional conflict and interpretive inconsistency lie in the very act of arbitrating internationally FDI disputes that are essentially domestic in nature, falling squarely under the domestic law and judiciary of host states. The peripheral policy of such FDI-arbitration fails to address the perennial problem of skewed protection for corporate interests in total disregard for the competing interest of host states. National economic sovereignty, socio-economic goals, and the public interests of developing host states are the ultimate victims. Even developed host states now take a very cautious approach to international arbitration. The Australian Productivity Commission Research Report 2010 on the necessity of international arbitration clause in BITs found 'few benefits and considerable risks', which is an imminent challenge for the economic sovereignty of Australia (pp 265-74). In response in April 2011, Australia announced a policy not to accept any BIT arbitration that limits its ability to make laws to protect national interest and social, environmental and economic policies.

International arbitration of FDI disputes can have chilling effect on the freedom of domestic regulatory authority of Bangladesh. There may well be situations where Bangladesh may be reluctant, hesitant, and unwilling to enact legislation genuinely required by its national interest and citizens' welfare for fear of breaching BIT commitments and exposure to international arbitration incurring exorbitant compensation liability. The broad scopes going beyond investment-specific claims, inconsistent interpretations, and unpredictable outcomes of BIT-arbitrations make it very difficult for host states to understand the international legal implications of regulating and opt for the safest option of no regulation. This is how BIT arbitrations shift the investment risk from foreign investors to host states. This risk-shifting and regulatory chill can be triggered by only foreign investors by virtue of their minimum standard of treatment under BITs. This risk-shifting and minimum treatment standard are not extended to domestic investors, who are under strict domestic regulation, thus discriminated against.

Foreign investors regard the judiciary of developing host states corrupt, dilatory, and incapable of protecting investors by upholding the rule of law. There may well be sometruth in such claim, but what is at stake – inefficient judiciary or ruthless corporate interest? Australia enacted the Tobacco Plain Packaging Act 2011 to limit the branding freedom of tobacco companies to reduce smoking. Philip Morris Ltd (PM) found this Act a threat to its profit and sued Australia in the High Court of Australia arguing that the Act expropriated its intellectual property but lost(2012 HCA 43, 181). PM is a US company but restructured itself aHong Kong based Asian company. Australia and Hong Kong BIT 1993 had an international arbitration clause. PM mounted an arbitration action under this BIT on the identical ground that the Australian highest court rejected. The Permanent Court of Arbitration in Singapore held that PM was not a Hong Kong company and dismissed the action (PCA Case No 2012-12 award of 17 December 2015).

The international arbitration of FDI disputes can hamstring the jurisdiction of host states' courts. Such usurpation of judicial authority by BIT arbitrations against Bangladesh is evident. Saipem ignored the interim injunction order of HCD in 1999 and the Dhaka Sub-Judge court decision. Petrobangla had to withdraw its case for a stay of arbitration from a Bangladesh court for want of cooperation from Chevron. Petrobangla sued Niko in a Bangladesh Court for damages in 2008. Niko avoided this suit in favour of international arbitration, which disregarded the HCD injunction of 5 May 2010. The policymakers of Bangladesh must consider the effects of these arbitrations in which (a) foreign investors challenged the law of Bangladesh enacted by elected parliaments pursuant to its national policies and requirements; (b) foreign arbitrators showed no regard for the public interests and nefariously relied on BITs ostensibly to challenge the authority and legitimacy of the highest court whose decisions are binding under its constitution; (c) unfavourable decisions by the Bangladesh court have been ignored and overruled by foreign arbitrators; (d) arbitral awards were binding for Bangladesh, which had no right to challenge/appeal against unfavourable/inconsistent awards by foreign arbitrators; and (e) foreign arbitrators did not care to consider the previous interpretation and decision of the Bangladesh court as binding or at least a persuasive judicial precedent.

Mounting evidence of the exploitation of international arbitration of FDI disputes has resulted in a public backlash against it. Bolivia, Ecuador, and Venezuela have abandoned these arbitrations and adopted a policy of resolving FDI disputes under their domestic laws and courts. The EC is to establish an International Investment Court to replace ISDS and included in its free trade agreements with Canada and Vietnam. For ISDS, Bangladesh must choose its own judiciary first and international arbitration as the last resort. External arbitration should be excluded if it is inimical to the public interests in health, occupational safety, human rights, industrial relations, and the environment; and sensitive areas of national significance including fiscal interests, over-exploitation of natural resources, and land acquisition and resettlement.

Achieving these policy options requires measures to make domestic judiciary time-efficient, cost-effective, and corruption-free. Specialised courts with judicial capacity, like Bahrain and Myanmar, can be considered for speedy FDI dispute settlement. The functional capacity of the Bangladesh International Arbitration Centre, established in April 2011, may be increased to be a reliable non-governmental FDI arbitration forum. The establishment of the proposed SAARC Arbitration Council under the SAARC Agreement of November 2005 as a permanent neutral centre for arbitration in a SAARC country may also be a viable option worth pursuing. Other conciliatory and/or mediatory ADR by neutral good offices, such as UN Secretary-General or WTO Director-General, may be explored before embarking on international arbitration. Foreign arbitral FDI dispute settlement has compromised and will continue to compromise the sovereign regulatory and judicial authority of Bangladesh. It is in the best interest to reclaim its sovereign right to regulate and adjudicate, which should be prioritised over BIT arbitration.

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GLOBAL LAW UPDATES

UN COP 24 Climate Summit

THIS year's UN climate talks produced important steps forward in putting the landmark accord into practice. At the inauguration of the summit, UN chief warned that failure to agree would be 'suicidal' after 'rogue nations' block major scientific report.

After last-minute wrangling over wording, it has ultimately succeeded in its crucial primary task of agreeing the so-called rulebook for the Paris agreement. It is a significant achievement as it will enable all countries to implement all the different elements of the Paris Agreement in a manner that can be measured, reported and verified in a uniform manner. The Paris rulebook will spell out how countries can track and report on their efforts to tackle climate change, how they can communicate their plans, how progress can be assessed and how they can strengthen their efforts over time. It should serve to galvanise action and make sure countries are not slacking. Though it will apply to all countries, the rulebook will also need to allow some flexibility so that developing countries can keep up.

However, COP24 also represents a major failure to rise towards collective action to face the global challenge which has been highlighted by the scientific community in the IPCC'S special report on 1.5 degrees Celsius. Even though the summit a step forward, but fails to address climate urgency. The U.S., Russia and Saudi Arabia tried to undermine the gravity of the IPCC science report. Brazil successfully scuttled plans for an international carbon market. And COP24 failed to address the bioenergy carbon counting loophole, which incentivises the harvesting and burning of trees to make energy by calling the process carbon neutral.

One important issue that could not be resolved was over carbon markets, and how countries can gain credits for their efforts to cut emissions and their carbon sinks, such as forests, which absorb carbon dioxide. Even after failing to resolve this, it would, however, be a mistake not to recognise what was achieved.

FROM LAW DESK.

YOUR ADVOCATE

*This week Your Advocate is **Barrister Omar Khan Joy**, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies.*

Query

Dear Sir, I am a voter and this general election will be my first opportunity to cast vote. However, I would like to know whether it is obligatory to cast vote for every citizen in Bangladesh. I also want to know whether it is an offence for a voter if he/she decides not to cast his/her votes as I may be travelling out of the country during that time.

Anika
Dhaka

Response

Thank you for your query. I am glad to know that you will have your first opportunity to cast vote in the upcoming general election. According to Art. 122(2) of the Constitution of People's Republic of Bangladesh, a person shall be entitled to be enrolled on the electoral roll for a constituency delimited for the purpose of election to the Parliament, if he is a citizen of Bangladesh, is not less than eighteen years of age, is a person of sound mind and has not been convicted of any offence under Bangladesh Collaborators (Special Tribunals) Order, 1972. Article 122(2) qualifies a citizen to be entitled to cast vote as a voter in the National Election. This is a right of every citizen. However, it is the individual voter's discretion as to whether he wants to exercise this right or not. Nevertheless, it is important to bear in mind that casting vote constitutes a central part of a citizen's civic responsibility. Democracy in its applied form mostly means indirect democracy, i.e. the voters will elect their representatives and the representatives so elected will decide on the important issues of the country. Accordingly, participation in the election through casting vote constitutes participation in the democratic process and hence is crucially important.

For your other query, there is no legal obligation nor does it become an offence for a voter, if he does not participate in casting of vote, though it is a citizen's civic responsibility to participate in voting as stated above. However, according to section 77 of The Representation of the People's Order 1972, a person is guilty of undue influence, if he induces or compels any person to vote or refrain from voting. In addition to that, if anyone impedes or prevents the free exercise of the voting right, or compels, or refrain in from voting, will be guilty of undue influence as well. Therefore, if a citizen chooses not to vote on his free will, then he will not be liable for an offence. On the other hand, if he is obstructed from exercising his right then it will be treated as an offence for the person who obstructs through such act.

I hope that the above shall clarify your queries and you shall decide to participate the democratic process by casting vote in the general election, which is your important democratic right and civic responsibility.

FOR DETAILED QUERY CONTACT: OMAR@LEGALCOUNSELBD.COM.

LAW WATCH

Death of Meme Culture in EU

ARAFAT IBNUL BASHAR

THE European Parliament recently approved the Directive on Copyright in the Digital Single Market, popularly referred to as EU Copyright Directive. The article 13 of the proposed directive is a potential nightmare for the Youtube and Facebook content creators. The article states that online content sharing service providers and right holders are to cooperate in good faith in order to stop availability of unauthorised protected contents. The implementation of this provision will essentially be through upload filters, that will scan every content that users share and verify whether they are copyrighted material or not. The problem arises in the implementation mechanism. The upload filters dedicated to this, will sweepingly filter contents without distinguishing context of the contents. For example contents like memes, commentary, satire, parodies, fan videos, cover videos, product review videos etc. will be facing aggressive censor.

The Internet is particularly filled with contents that use copyrighted materials in order to create a simply unique content. Such use of copyrighted materials doesn't mandate acquiring permission of the copyright holder. Such use of creative works for transformative purpose is known as working in furtherance of the doctrine of fair use. U.S. Court of Appeals for the Ninth Circuit has stated in the *Lenz v. Universal Music Corp*. (2015) that fair use is not just a defense to infringement claims but an expressly authorised right and this right is protected in EU countries like France, Poland, United Kingdom etc.

Article 13 will violently disregard fair usage circumstances. As a result, memes and various other forms of creativity that uses copyrighted material under doctrine of fair use are at the threat of being extinguished from internet, resulting in the violation of right to hold opinion and freedom of expression guaranteed under Article 19 of International Covenant on Civil and Political Rights and Article 10 of European Convention on Human Rights. Although these rights may be subject to restrictions in public interest, contravening the doctrine of fair use is contrary to public interest. The doctrine of Fair Use ensures that copyright is not absolute and not used as a weapon to thwart creativity and public interest. Curtailing such right cannot have any good consequences to any stakeholder including the copyright holders.

The readers may wonder as to why an European directive have to do anything with an avid user of Youtube, Facebook or other social site in Bangladesh, which is geographically far away from the clutches of European laws and regulations. The implementation of article 13 will have a global impact as although the laws would only apply to the EU countries, the upload filters might be implemented around the world, having impact on the content creators and users even outside Europe.

The amendments approved in the directive are undergoing formal trilogue discussions and will go through a vote again in January, 2019, before being finalised. If finalised, EU countries will enact laws to implement the directive. Let's just hope European Union is not responsible for the death of memes!

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