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LAW IN-DEPTH

ICSID

How impartial is the main BIT arbitration forum of Bangladesh?

PROFESSOR M RAFIQUL ISLAM

Unwitting preference to ICSID is likely to expose Bangladesh to international arbitrations having marginalising effect on its national interest as has precisely happened in the Saipem and Niko arbitrations by ICSID.

MOST BITs and the model BIT (Art 13) of Bangladesh have preferred the Centre for the Settlement of Investment Disputes (ICSID) as its arbitration forum, which warrants a contextual and purposive understanding of ICSID. The wave of FDI nationalisation in the 1960s and 1970s scared investors to invest, which reduced economic growth and World Bank (WB)/IMF debt-servicing capacity of many developing states. To resuscitate foreign investors' confidence and get its loaned funds back, the WB took steps to protect FDIin host states and developed

its own FDI dispute resolution mechanism, a private law pathway that avoids international law and national law mechanisms. The WB created ICSID a self-contained arbitration forum to settle FDI disputes between host states and private foreign investors, who can take their disputes directly to ICSID by-passing the domestic judiciary of host states. Hence ICSID was engineered to serve a pressing necessity of the time to protect the debt-servicing interest of the World Bank and its creditors' FDIs by circumventing potential nationalisation. ICSID acted as a carrot for investors by incentivising with a foreign yet private outlet for FDI-dispute resolution as a reliable protection. It also served as a stick for debtor host states which were threatened not to expropriate FDIs to spoil their future prospect of WB/IMF loans.

ICSID arbitration allows foreign investors to sue host states' alleged violation of contractual obligations, a right that affords disproportionate protections to FDIs and makes host states vulnerable. There is no appeal process to challenge any contradictory facts and/or erroneous interpretation of arbitration clauses. Its award has no precedential effect on any future disputes with similar circumstantial fact, which erodes the possibility of developing ICSID arbitral jurisprudence and consistent commercial treaty interpretations. It is far from being impartial, apolitical, and objective. ICSID arbitrators are qualified commercial litigators, who are in most cases nominated from a pre-determined list of panellists and predominantly, indeed 95% are male from Europe and North America. According to the Corporate Europe Observatory, about 15 male elitist western arbitrators having close ties with the corporate world and sharing the view that the protection of FDI profits is non-negotiable are in charge of deciding FDI disputes. This homogeneity of ICSID arbitrators reveals a lack of plurality in understanding the legal and cultural diversities of developing host states. The very operational narratives of ICSID arbitrators inculcate an inherent bias towards foreign investors, who are overwhelmingly from European and North American.

Foreign investors religiously prefer ICSID arbitration. A UNCTAD report of December 2013 shows that ICSID arbitrated 407 FDI disputes compared to 158 by UNCTRAL (Research Report No. 13, Centre for Independent Studies, Sydney, April 2016, 6). The Harten Study 2012 into ICSID awards exposes its pro-investor tendencies in which arbitrators typically adopting an expansive claimant-friendly interpretation, an 'approach [that] would be accentuated where the claimant was a national of a major Western capital-exporting state'. Parties must pay for ICSID arbitration, which is very cost-intensive. According to OECD Working Paper on International Investment 2012, No.03, 19, the average cost of initiating arbitration is US$ 8 million, which is affordable for only rich foreign investors. Its compensatory awards for the winning party (usually foreign investors) are excessively exorbitant and the magnitude of awarded damages is on the rise. UNCTAD study suggests that the investors of developed states and investors, which initiated 35 out of 42 cases in 2014, substantially benefited from these damage awards (IIA Issues Note No 1, February 2015, 1, 6, 10). This ICSID arbitration outlet available to foreign investors is unavailable to their domestic counterparts, who are obliged to go to domestic courts - a discriminatory FDI protection.

ICSID arbitration is not open to the public unless both parties consent, which foreign investors are unlikely to consent in disputes involving host states' public interest and policy. It settles FDI disputes privately, many of which involve public issues and interests, such as the environment, human rights, public health, green technology transfer, corporate culture and social responsibility - all having grave economic, political, and socio-cultural ramifications. Confidential arbitral proceeding for binding compensatory awards prevents public scrutiny and criticism, ignition of public interest lobby, and potential barriers to enforcement of awards. Its policy of confidentiality is narrowly focused to avoid public reactions in favour social inclusion and distributive economic justice. It also keeps away from public domain the extent and conditions of natural resource exploitation in economically under-developed host states. Confidential dealings of some major financial institutions resulted in successive global financial crises. There has been widespread public cynicism about the credibility of these institutions making secret decisions. ICSID is one of such institutions making awards requiring many host states to pay millions in damages, pushing them to the brink of bankruptcy with no public scrutiny and sensitivity to the public interest. Its obsession with confidentiality undermines the value of open and public proceedings.

The above features of ICSID arbitration should be an important consideration for Bangladesh in negotiating essential safeguards in its BITs and FDI agreements carefully. It is better for Bangladesh to avoid secretive arbitration rules and tribunal in favour of an open arbitration forum. Such transparency would provide educational value in capacity-building for effective and informed participation in international arbitration proceedings. Bangladesh may negotiate a provision in its BIT by stating that the parties shall make arbitration materials available and hearings open to the public, which should not be difficult and costly in this age of advance information and communication technology. The International Chamber of Commerce (ICC) and UN Commission on International Trade Law (UNCITRAL) amended their arbitration rules in 2012 and 2014 respectively to improve transparency, disclosure obligations, speed, and cost-efficiency for greater accessibility to the public. ICSID is yet to undertake similar reforms and not bound by the ICC/UNCITRAL standard of transparency and case management.

UNCITRAL Rules make its award non-binding if it has 'been set aside or suspended by a court of the country [or] the recognition or enforcement of the award would be contrary to the public policy of this State' (Art 36(1v)). Such reservation based on court's authority and public policy is unavailable in ICSID, which unequivocally makes its awards conclusive: 'courts shall treat the award as if it were a final judgment of the courts of a constituent state' (Art 54). ICSID Convention states that the exhaustion of local remedies is not a condition for the admissibility of an arbitration claim by investors (Art 26). The ICSID Convention requires its arbitrators to 'exercise independent judgement' (Art 14). But in practice, ICSID does not disqualify those panellists who have acted as the legal counsel for foreign investors to be ICSID arbitrator in a subsequent dispute involving the same previous investor clients, an overt conflict of interest. In contrast, the impartiality of arbitrators is mandatory under the UNCITRAL Rules 2010 (Art 12) and the International Bar Association Guidelines on Conflict of Interest in International Arbitration 2014 strictly requires that the arbitrators must be free from conflict of interest.

The above ICSID arbitration features should serve a sufficient warning for Bangladesh to make a searching reappraisal of its choice of international arbitration forum and law based on comparative advantage. Among the main institutional arbitration forums and laws, ICSID is comparatively more rigid and pro-investor oriented. Exploring more palatable options, including UNCITRAL and ICC, may be rewarding for Bangladesh. Unwitting preference to ICSID is likely to expose Bangladesh to international arbitrations having marginalising effect on its national interest as has precisely happened in the Saipem and Niko arbitrations by ICSID.

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LAW TRIBUTE

Legal review of weapons and international law

Dr. William Boothby *is an Associate Fellow under the Global Fellowship Initiative (GFI) at the Geneva Centre for Security Policy (GCSP). He formerly held the position of Air Commodore in the Royal Air Force (RAF), UK. He retired as Deputy Director of Legal Services (RAF) in July 2011. In 2009, he took a Doctorate in International Law at the Europa Universität Viadrina, Frankfurt (Oder) in Germany and in the same year published 'Weapons and the Law of Armed Conflict' through Oxford University Press (OUP). He was a member of the Group of Experts convened by the ICRC to discuss Direct Participation in Hostilities and of the Group of Experts who produced the HPCR Manual on the Law of Air and Missile Warfare.* **Emraan Azad** *from Law Desk talks to him in Geneva on the following issues relating to the international legal regime governing the use of weapons during armed conflict.*

Law Desk (LD): Do ethics have a role to play in war?

William Boothby (WB): I think, there is an ethical dimension to what is acceptable as behaviour in war. Each society has its own interpretation of where the division lies between what is ethically acceptable and what is ethically unacceptable. It would be very difficult for me to chart exactly where that line between acceptable and unacceptable lies around the whole world. What I can say is that there is something that probably the people are universally going to regard as ethically unacceptable. Finally, I would throw in the thought that there is one established philosophy reflected in a piece of text, included in a 1907 treaty and repeated in different language in 1977, seventy years later, in Additional Protocol I to the Geneva Conventions. This text suggests that what is unacceptable in war may not necessarily be reflected in the legal rules that have been so far adopted. The customary principles based on the collective view of States and on what are called the dictates of the public conscience should nevertheless rule whether particular action should be undertaken, or particular technology should be employed. I think, that rule is to identify where the junction exists between the ideas of ethical acceptability and those of legal acceptability.

LD: How do you evaluate the idea of weapons law under the law of armed conflict?

WB: I see it as a part of public international law, as something that has always been there since the commencement of modern international law in the middle of the 19th century. One of the first treaties in modern humanitarian law times was the weapons law treaty dealing with exploding bullets that dated back to 1868. As you go through the decades from that time to the 21st century, you see from time to time weapons law provisions were being agreed upon by the States often in response to humanitarian concerns.

LD: Do you find any differences between weapons law and law of armed conflict?

WB: Well, I have already said that weapons law is part of the law of armed conflict. But the law of armed conflict is wider and deals with, for instance, provisions dealing with targeting by providing responses to questions such as, which objects and persons one can lawfully make the object of attack, or what the prohibition of indiscriminate attacks means, and so on. Equally, there is another part of the law of armed conflict that is specifically concerned with the protection of victims – victims consist, for instance, of wounded and sick on the battle field, or the wounded and shipwrecked at sea, prisoners of war, and civilians who find themselves in the hands of their enemies. What I would say is that you have a variety of elements of the law of armed conflict of which weapons law is only one.

LD: What is the status of treaty law and of customary law in the rubric of weapons law?

WB: The answer is simple. They have the same status as treaty law and customary law rules have in other areas of the law of armed conflict or IHL. In relation to the law relating to weaponry – you have two customary principles. One prohibits the use of weapons which are of the nature to cause superfluous injury or unnecessary suffering, and the other prohibits the use of weapons which are by nature indiscriminate. These are the customary principles in a sense that they bind all the States, and also in the sense that they reflect the general practice of the States accepted as law. Then, we have also a series of different treaties that have been adopted by States at different times during the last 160 years. They deal with certain particular technologies such as dum-dum bullets, asphyxiating gases, chemical and biological weapons each of which was the subject of humanitarian concern.

LD: Do you think the conventional international laws are being successful to deal with the use of new technology in wars?

WB: My view is that it is and ought to remain the way around that the technology needs to be adjusted to suit the law, rather than adjusting the law to suit the technology. The States have a duty to develop their systems in such a way that they become legally complaint. You may well have a new international rule dealing with a particular technology most certainly, and those are being discussed at the moment in Geneva on an annual basis in relation to what they call lethal autonomous weapon systems. That would be with a view to determining what additional law should be developed to deal with the challenges posed by that technology. However, that would be additional law over and above the existing legal rules that we already have, and the new technology would also need to comply with the existing rules.

LD: How do you see the future of weapons law?

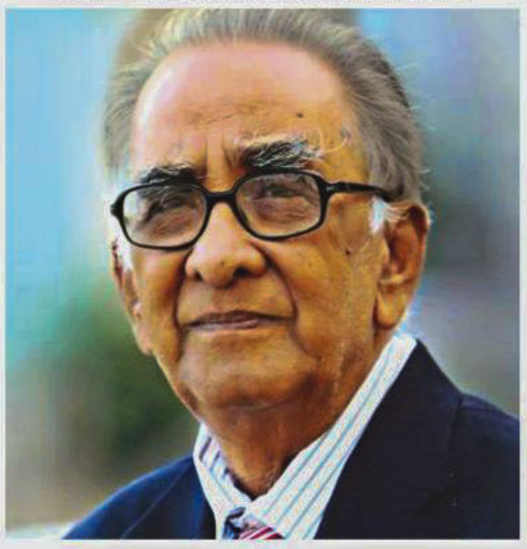
WB: I am personally committed to take the body of this law forward and try to teach the law to people who are possibly engaged with the legal review of weapons in different parts of the world. From that perspective, I see the future of weapons law, first of all, in trying to encourage the States legally to review their new weapon systems. Because that is something where many States are not known to have a systematic approach. Secondly, there must be attempts to look at whether the States need to discuss with one another the challenges posed by new technologies. I suppose they do, and I also think that there are all sorts of possible venues whether they can do that at the Conventional Weapons Convention meetings, in the United Nations or indeed at the Conference on Disarmament. What I would like to encourage the States to do is to engage in and to realise that they should be paying proper attention to their legal obligations.

LD: Thank you for your time.

WB: You are welcome.

LAW TRIBUTE

Remembering Justice MUHAMMAD HABIBUR RAHMAN



IT was on 11 January, 2014, when Justice Muhammad Habibur Rahman breathed his last and put an end to yet another era of excellence in the history of judiciary in Bangladesh. On the fifth death anniversary of the former Chief Justice of the Supreme Court of Bangladesh, Law Desk remembers his immense contribution to the realm of legal knowledge through his acumen and judicial activism.

"Under Article 102(1) of the Constitution, the High Court Division has been made the guardian for the enforcement of fundamental rights not only against the Executive but also against the Legislature. The judicial review with regard to the vires of a law passed by the Legislature flows from the court's constitutional duty to enforce a fundamental right." – *Asaduzzaman* v *Bangladesh* (1990) 42 DLR (AD) 144.

"The court is to hold the balance between the State's need to prevent prejudicial activities and citizen's right to enjoy his personal liberty.." - *Habiba Mahmud* v *Bangladesh* (1993) 45 DLR (AD) 89.

"Complete justice may not be perfect justice, and any endeavour to attain the latter will be an act of vanity. In the name of complete justice if a frequent recourse is made to Article 104 of the Constitution, then the Appellate Division will be exposed to the opprobrium of purveyor of "palm tree justice." - *AFM Nasiruddin* v *Mrs. Hameeda Banu* (1993) 45 DLR (AD) 38.

"The citizenship, though not mentioned as a fundamental right in our Constitution, is to be considered as the right of all rights as on it depends one's right to fundamental rights expressly provided for a citizenship in Part III of the Constitution and his right to seek court's protection of those rights." - *Bangladesh* v *Professor Golam Azam* (1994) 46 DLR (AD) 192.

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