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LAW IN-DEPTH

ICSID ARBITRATIONS

Circumventing the legitimate interest of Bangladesh

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The Saipem and Niko arbitrations are not isolated examples but the operational narratives of the ICSID awards expose their inherent bias in which arbitrators typically adopt an expansive investor-friendly interpretation

IN one of the previous write-ups published on 15 January 2019 in The Daily Star, I have discussed about the rigidity and partisanism in the arbitration law and panels of the Centre for the Settlement of Investment Disputes (ICSID). In this write-up, I intend to exemplify and demonstrate how this pro-investor biasness is blatantly pursued in actual arbitrations to protect corporate interest at the cost of Bangladesh's legitimate interest.

A dispute between an Italian company *Saipem* and *Petrobangla* arose from a pipeline construction contract, the completion of which was delayed. *Saipem* claimed compensation from *Petrobangla* for the additional time and works required for completion, which was rejected. *Saipem* resorted to the International Chamber of Commerce (ICC) arbitration, which the High Court Division (HCD) of the Supreme Court of Bangladesh declared void for the lack of jurisdiction and procedural irregularity. *Saipem* then submitted the dispute to the ICSID under BIT between Bangladesh and Italy 1990, claiming that the non-payment of compensation by *Petrobangla* constituted an act of indirect expropriation of its FDI under Article 5(2) of the BIT. The ICSID arbitrated on this *Saipem*'s claim. Article 5(2) states that 'Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalised, expropriated, requisitioned or *subjected to any measures having similar effects* in the territory of other Contracting Party'. The ICSID tribunal held that the HCD decision revoking the ICC tribunal's authority deprived *Saipem* of the financial benefit of the ICC award constituted 'measures having similar effects' of indirect expropriation under Article 5(2) [ICSID Case No. ARB/05/7, award on merit of 30 June 2009, paras. 122, 124, 153].

The ICSID tribunal never questioned at the jurisdictional hearing that the Bangladesh HCD lacked jurisdiction and competence to revoke the authority of the ICC tribunal. The HCD decision could at best arguably be regarded as a denial of natural justice. But the ICSID tribunal interpreted the HCD decision as indirect expropriation, not the denial of justice, which cast considerable doubts as to the merits and neutrality of the award. Challenging the jurisdiction of the host State's domestic court would have been outrageously untenable in law. Instead, the ICSID tribunal cunningly resorted to an expansive extrapolation of indirect expropriation, the dubious nature of which is evident from the following legal points.

The FDI law requires an expropriation to have some specific legal elements. The loss or deprivation of ownership, control, and management of a FDI is the central requirement for it to be considered expropriated. Even if it is conceded in fairness that the HCD order inflicted financial loss on *Saipem*, under no stretch of legal mind that such financial loss alone could have 'similar effects' of indirect expropriation without taking away the ownership, control, and management of the FDI, which remained fully with *Saipem*. The ICSID tribunal itself knew this indispensable legal requirement of expropriation. In *CMS Gas Transmission Co v Argentina*, the ICSID tribunal rejected the claim of the existence of expropriation, direct or indirect, because the investor had the full control and ownership of the investment. It held that expropriation could occur only when an investor lost control over the entire FDI and rejected the claim of partial or indirect expropriation [ICSID Case No. ARB/01/8, award of 12 May 2005, paras. 263-64].

Other FDI dispute settlement bodies also developed the identical legal requirements for expropriation. In *Tippets, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineering of Iran*, the Iran-US Claims Tribunal maintained that 'constructive expropriation' occurs when the owner is deprived of ownership right and that such deprivation is not merely ephemeral [(1985) 6 Iran-US Claims Tribunal Reports 219, 225]. The European Court of Human Rights found the existence of expropriation only where the investor suffered the substantial deprivation of the right of ownership and benefit of the investment [*Handyside v UK* (1976) 24 ECHR Ser A, 5; *Poiss v Austria* (1987) 117 ECHR Ser A, 86]. Since the legal effect of both direct and indirect expropriation is the same, the arbitral tribunal in *Biloune and Marine Drive Complex Ltd v Ghana Investment Centre and Government of Ghana* held that there should be no distinction drawn between direct and creeping expropriation in their constituent elements [(1993) 95 ILR para. 75]. This requirement has been a long held established legal position [OECD Working Paper on Indirect Expropriation of Investment 2004/04, September 2004)].

There is no clarification or rules of statutory interpretation of the term '*measures having similar effects*'. Nor is there any definition of measures equivalent to indirect expropriation and statutory clarification of its meaning or scope in the existing law to determine the inductive and deductive elements of indirect expropriation. Certain regulatory measures to protect national and public interests in host States may appear similar to expropriation, but these measures are not expropriation. The host States retain the full controlling authority over corporate taxation and can intervene on the ground of the environment, health, occupational safety, human rights, and industrial relations [High Court of Australia, *Murphyores Inc v Commonwealth* (1976) 136 CLR 1]. The above authoritative judicial interpretations including the ICSID arbitration itself show that there was no direct or indirect nationalisation, expropriation, or requisition of *Saipem*'s FDI by Bangladesh. The nexus between domestic judicial order and indirect expropriation established by the ICSID tribunal in *Saipem* case is a far-fetched inference and is contradictory to the established legal requirements of indirect expropriation, which is the finality in the absence of an appeal mechanism to correct or redress such an arbitrary construction of a BIT provision.

Some aspects of the Niko arbitration have already been covered in a piece in The Daily Star on 20 November 2018. The ICSID tribunal's pro-investor bias is highlighted here. Niko's flawed drilling the *Chattack* gas field caused two blowouts on 7 January and 24 June 2005 inflicting extensive damage to the gas wells, human lives, and the surrounding environment. There was ample tangible evidence of these damages resulting from Niko's operational failure and inappropriate casing design. Niko was responsible to compensate for the damages. But Niko ignored *Petrobangla*'s compensation claim in a Bangladesh Court in 2008 and requested the ICSID in 2010 to arbitrate its claims that Niko had no liability for any damages caused by the blowouts, and that *Petrobangla* pay its arrear gas bill. The ICSID arbitral award exonerated Niko of any responsibility for the blowouts and damages caused and ordered *Petrobangla* to pay its arrear gas bill with interest compounded annually. *Petrobangla* requested the ICSID tribunal in 2015 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 [ICSID Cases No. ARB/10/11 and No. ARB/10/18, award of 14 September 2015, paras. 43, 167. The ICSID arbitrators totally avoided the evidence presented of Niko's negligence and flawed drilling resulting in two major uncontrollable gas field blasts and damages. Instead, they concentrated solely on the failure of *Petrobangla* to pay its outstanding gas bills to Niko.

These two ICSID arbitral awards demonstrate that its arbitrators are overly committed to protect corporate interest, which is paramount, regardless of the deprivation of the competing interest of host states, which is peripheral. The ICSID tribunal's interpretation of 'indirect expropriation' in *Saipem* is legally untenable by its own standard. It covered up Niko's liability of damages for its negligent act in absolute insensitivity to the legitimate interests of Bangladesh and its laws, jurisdiction, environment, and public welfare in the *Niko* arbitration. The sole objective was to maximise corporate profits. The *Saipem* and *Niko* arbitrations are not isolated examples but the operational narratives of the ICSID awards expose their inherent bias in which arbitrators typically adopt an expansive investor-friendly interpretation (Harten Study 2012). It is this relentless pursuit of dogmatic neo-liberalism that lies at the root of worldwide backlash against the ICSID arbitration, falling prey on its own sword.

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LAW WATCH

Restraining Coaching business or teachers?

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PHOTO: UCANEWS.COM

ON 7 February 2019, the High Court Division (HCD) delivered a judgment on the legality of a policy promulgated by the Ministry of Education (MOE) in 2012 on limiting the involvement of teachers in the coaching business. Since the writer has not got hold of the full-text of the judgment, this write-up would not dwell primarily on the judgment; rather this write-up would instead concentrate on the recklessness of the policy and the way it has been sought to be enforced by the MOE and Anti-Corruption Commission (ACC). Indeed, it argues that this policy is an indication of the lack of a considered approach to education and a lack of respect and empathy towards teachers in this country.

First and foremost, the MOE has formulated this policy in response to a rule issued by the HCD in 2011, not a binding judgment. On a matter so fundamental as this, the MOE formulated a policy, which is, in effect applied like a law. It should ideally have been based on either a law passed by the Parliament or at least a delegated law on which there could have been a far greater scope of accommodating the inputs of various stakeholders. This is not to comment on the legality of the policy, but rather the wisdom of the way MOE has sought to enforce. It is also quite odd that on a policy like this, the assigned authorities did not appear to have consulted the educationalists. Oddly, the policy, in essence, is against teachers being engaged in coaching centres, not coaching centres operating their business.

If teachers of government educational institutes are restricted from teaching in formal coaching centres, they would still manage to teach in-house which would be next to impossible to stop. During our SSC and HSC days many of us were aware that while some of our teachers were involved in private tuition of students in batches, a few privileged students were receiving in-house private tuition for a whopping sum of money beyond the means of most. This kind of private tuition would remain untouched by the policy. And thus, it would only likely limit the choice of the students with modest financial means. Even in economically advanced countries (from personal experience, I can speak of Australia and Singapore), coaching is widespread.

The policy would do nothing to restrict coaching by teachers in private schools and many others such as students of universities and medical colleges. No one would morally support teachers being engaged in coaching ignoring their routine classes and other commitments in their respective educational institutions. However, when non-teacher government employees including civil servants are involved in teaching (of course, generally, after complying with their administrative formalities), it is grossly discriminatory that teachers in government educational institutions would be restricted from coaching.

It is hard to believe that coaching which is nothing, but a form of teaching for money beyond formal educational institutions is acceptable when it is done by non-teachers, and unacceptable when done by teachers. If coaching by teachers is a 'business', it is the same when it is done by other professionals. If the other professionals whose job description has nothing whatsoever to do with teaching can be involved in teaching without anybody questioning their professional integrity, by the same token, the career teachers, be in government or private educational institutions, should have every right to be engaged in teaching in whatever name it is labelled. If the comparatively far better-paid professionals have the financial need to earn extra bucks, the economic need of teachers cannot be doubted.

Again, as reported by media, the HCD has very rightly commented that the focus of the ACC on the low-profile violation of policy or law by teachers is rather curious. This is particularly so when we consider that ACC officials often lament the lack of resources at their disposal. The ACC would serve this country better if they focus their energy on other public sectors where the public perception is that they are rife in corruption and petty violation of law or policy by teachers should better be a lower level agenda for the ACC.

The effort to curb teachers teaching in coaching centres without enhancing the public expenditure on education and paying the teachers enough for a dignified life is not only misplaced but also immoral and would possibly be counter-productive. Already the lack of incentive of teachers is so low that often meritorious students are hard-pressed to enter teaching in schools and even colleges. It is a sad reality that many teachers at school level (and at times at college level too) are already virtually relegated to the near bottom of the social strata. And to push them further by restraining their option to be engaged in teaching beyond their educational institutions would be awful and would contribute little to suppress the 'business of coaching'.

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GLOBAL LAW UPDATES

Indian SC answers a pertinent property question

THE Supreme Court of India (SCI) granted relief to a party, who was misled to purchase a property by erroneous representation of title by the vendor. The appellant purchased the property on January 6, 1990, without noticing that it was declared as ceiling surplus land by the government two years ago. However, on September 14, 1990, the land was declared free of ceiling limit. Later, he effected mutation of the property in 1991. Four years later, the vendor trespassed into the property and took over its possession. This led to the institution of the title suit.

Although the trial court decreed the suit, the first appellate court reversed it, holding that the vendor had no marketable title on the day of conveyance. The first appellate court also came to the conclusion that the defendants' rights over the suit land also could not be established under Section 53A of the Transfer of Property Act. The judgment of first appellate court was confirmed by High Court in second appeal.

In the further appeal by the plaintiff, the SCI accepted his claim. Explaining the import of the Section 43 of the Transfer of Property Act 1882 (TP Act), the judgment authored by Justice Shah held: "If at the time of transfer, the vendor/transferor might have a defective title or have no title and/or no right or interest, however subsequently the transferor acquires the right, title or interest and the contract of transfer subsists, in that case at the option of the transferee, such a transfer is valid. In such a situation, the transferor cannot be permitted to challenge the transfer and/or the transferor has no option to raise the dispute in making the transfer".

The purpose of section 43 of the TP Act is that nobody can be permitted to take the benefits of his own wrong. The Court held that to apply section 43 TP Act, it was immaterial whether the transferor acted bona fide or fraudulently in making the representation. It is only material to find out whether the transferee has been misled because, section 43 uses the words ""where a person fraudulently or erroneously represents". Applying the principle in the case, the Court found that the vendor had acquired title over the property, when it was declared ceiling free after the sale. Therefore, the appeal was allowed, declaring the rights of the plaintiff.

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