LAW OPINION

The curious case of S Alam and our investment treaty regime

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The S Alam group has recently lodged an arbitration claim against Bangladesh at the International Centre for Settlement of Investment Disputes (ICSID). This event is significant for our investment law regime. The claim was made under one of our older Bilateral Investment Treaties (BITs) with Singapore from 2004.

On the merits, Bangladesh may argue that its actions, whether in the form of bank supervision, asset recovery, or anti-money-laundering enforcement, were legitimate sovereign measures taken in the public interest. The claimant, for its part, will possibly assert that these steps were arbitrary, discriminatory, or procedurally unfair, thereby breaching FET and amounting to indirect expropriation. Whether such arguments succeed will depend heavily on evidence of proportionality and due process, as well as the tribunal's interpretive approach to the FET standard.

It needs to be mentioned here that our older-generation BITs used too much 'investor protective language'. This is because at that time we had less experience in negotiation to protect our own interests. Hence, it is no surprise that the present claim could in fact be lodged.

The Bangladesh Singapore BIT defines an "investor" as any natural person who is a national of either contracting party, without requiring a genuine or effective link to nationality. Such an expansive definition allows for what is known as *treaty-shopping*, where individuals or companies restructure their nationality or corporate ownership to gain treaty protection.

Moreover, Article 3 of the treaty guarantees "fair and equitable treatment" (FET) and "full protection and security" provisions that have been interpreted liberally by arbitral tribunals to limit a state's regulatory discretion. The absence of qualifying texts around these terms has the effect of interpreting almost any administrative action as a potential treaty breach if considered adverse to investor expectations.

Perhaps most significantly, Article 7 permits investors to file an ICSID claim after only six months of failed negotiations, without any requirement first to exhaust local legal remedies. This is rather a "blank cheque" approach in the light of modern standards. Many countries have adopted more balanced approaches. India's 2016 Model BIT, for instance, introduced an 18-month "Exhaustion of Local Remedies" requirement before arbitration. Brazil abandoned investor–state arbitration altogether, preferring a system of *Cooperation and Facilitation Investment Agreements* built on preventive diplomacy. South Africa, after terminating its earlier BITs, enacted the *Promotion and Protection of Investment Act 2015*, which grants protection under domestic law rather than international arbitration. Bangladesh's treaties, by contrast, still retain the 1990s model of one-sided investor protection.

A number of jurisdictional and substantive questions will shape the S Alam dispute. The first concerns nationality and admissibility: can the claimant truly qualify as a "Singaporean investor"? If the investments were made before the claimant secured Singaporean citizenship, Bangladesh might argue that this effectively constitutes *treaty-shopping*. Notably, this BIT does not contain an explicit, specific clause that broadly bars treaty shopping. However, the treaty does include provisions that require investments to be made in accordance with the host state's laws and regulations, which can serve as a *de facto* mechanism against abusive routing of investments. Also, the prospective tribunal could apply an "effective nationality" test to determine whether the investor's connection to Singapore is genuine or merely formal.

The second question flags the definition of "investment." Article 1(a) limits coverage to investments made "in accordance with the laws" of Bangladesh. If the investments in question were not compliant with domestic law, or if accusations of financial misconduct are proven, Bangladesh could invoke the *clean hands* doctrine. This principle, increasingly recognised in arbitral jurisprudence, denies treaty protection to investors who have engaged in fraud, corruption, or other illegal acts in making or managing their investments. This invocation would challenge the tribunal's jurisdiction and strengthen Bangladesh's claim to sovereign regulatory authority.

On the merits, Bangladesh may argue that its actions, whether in the form of bank supervision, asset recovery, or anti-money-laundering enforcement, were legitimate sovereign measures taken in the public interest. The claimant, for its part, will possibly assert that these steps were arbitrary, discriminatory, or procedurally unfair, thereby breaching FET and amounting to indirect expropriation. Whether such arguments succeed will depend heavily on evidence of proportionality and due process, as well as the tribunal's interpretive approach to the FET standard.

Reportedly, the S Alam Group served its legal notice on the Government of Bangladesh on 18 December 2024, that is more than six months before the present arbitration, hence satisfying the consultation period requirement under Article 7 of the BIT. This timeline means the matter has now formally moved into the arbitration phase. Bangladesh must therefore respond promptly and accordingly nominate an arbitrator. Beyond the requirement of nominating an arbitrator, Bangladesh must also ensure legal representation before the tribunal. Under ICSID practice, the State is typically represented by the Office of the Attorney General or a designated international law firm instructed by the government. A delayed approach could severely undermine Bangladesh's position at the jurisdictional and merits stages. Since, under the ICSID Convention, proceedings may continue even if the respondent fails to appear, as the Secretary-General can appoint arbitrators on its behalf.

It is worth recalling that Bangladesh has faced ICSID arbitration before. In *Saipem SpA* v *People's Republic of Bangladesh* (ICSID Case No ARB/05/7), the tribunal ruled against Bangladesh and awarded millions in damages. That case, like the present one, revealed how loosely drafted BITs can restrict a state's rather lawful prerogative to regulate and expose it to costly claims.

The S Alam arbitration should therefore be seen not simply as a legal challenge but as a policy signal. Bangladesh must urgently modernise its investment-treaty architecture by adopting a comprehensive Model BIT that balances investor protection with the state's prerogative to regulate. Such a model should clarify definitions, include exhaustion of local remedies and mediation provisions, and recognise exceptions for legitimate public-interest regulation.

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LAW AND SOCIETY

Progressive evolution of guardianship laws in Bangladesh

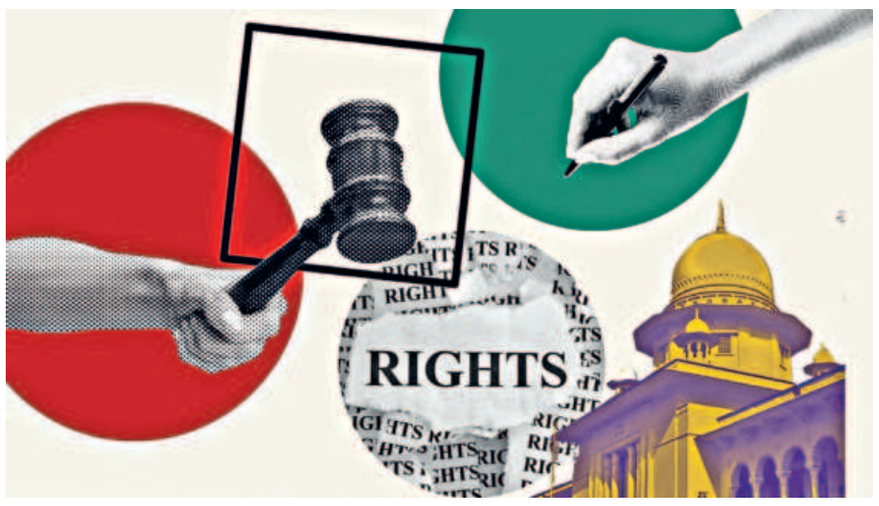
JEBA MOBASHWIRA

A "guardian" is someone who takes care of a child, looks after the child's property, or both, according to Section 4(2) of the Guardians and Wards Act, 1890. However, under Muslim law, guardianship is divided into two types based on function: *Waliyat alal Nafs* and *Waliyat alal Mal*.

Waliyat alal Nafs refers to the guardianship of a minor's person, which includes all aspects of personal care and supervision, such as education, marriage, and other personal matters. The father is regarded as the natural guardian of his minor child, and this right is considered absolute. His authority as guardian continues irrespective of who has the actual custody of the child. Even if the mother or another person has physical care of the child, the father remains the legal guardian of both the person and the property of the minor. It is worth noting that, along with this right of guardianship, the father bears the primary duty of maintaining his child. In the absence of the father, the right of guardianship passes to the male agnates according to a specific order. After the father, the paternal grandfather becomes the guardian, and upon his death, the responsibility may pass to the adult brother, then to the adult sons of the brother, and finally to the paternal uncle (Haque 2015).

Waliyat alal Mal on the other hand, concerns the management and protection of a minor's property. The father is also the legal guardian of the child's property. If the father dies, the paternal grandfather assumes the same authority. After the death of both the father and the paternal grandfather, the guardianship may be exercised by a person appointed through a will (wasiyat) made by either of them. In absence of such an appointment, the court may designate a guardian known as a statutory guardian, whose appointment is guided by the best interest and welfare of the child.

Consequently, under classical Sharia law, the mother does not have the right of guardianship over her child, even in the absence of the father. This position is supported by Section 19(b) of the Guardians and Wards Act, 1890, which states that the court cannot appoint another person as a child's guardian if the father is alive and considered fit to take that responsibility. However, this provision has recently been challenged in Bangladesh on the grounds of equality and gender-based discrimination. In a landmark judgment, the High Court Division in the Azmeri Haque Badhon case declared Section 19(b) unconstitutional for being inconsistent with Articles 26, 27, and 28 of the Constitution. As a result, Azmeri Haque Badhon became the first mother in Bangladesh to be recognised as the full legal guardian of her daughter despite the father being alive. Previously, in 2009, a collective initiative by three human rights organisations- Bangladesh Legal Aid and Services Trust (BLAST), Bangladesh Mahila Parishad, and Naripokkho led to a writ petition demanding that mothers be recognised as the legal guardians of their children for school registration and admission. In this case, the court also responded progressively, stating that even a single mother alone would suffice as the legal guardian. These rulings represent a significant step toward gender equality in family law and have broadened the scope for equal rights of guardianship for both father and mother.



Although the mother holds the first right to *hidanat* or custody, this right is limited to physical care and upbringing and does not extend to making legal or financial decisions for the child. For a son, this right continues until he reaches the age of seven, and for a daughter, until she attains puberty. When a child reaches the age of discretion, usually around seven years or upon attaining maturity, the court may take the child's preference into account regarding which parent they wish to live with. However, the final decision ultimately rests with the court, guided by the best interest of the child.

Section 17 of the Guardians and Wards Act, 1890, provides that in appointing or declaring a guardian, the court must always consider what would best serve the interest of the minor. Factors such as the age, sex, and religion of the minor, the character and capacity of the proposed guardian, and the child's own preference, if mature enough, must all be taken into account. The Md. Abu Bakar Siddique v. S.M.A. Bakar (1986) case established an important precedent in this regard, holding that the welfare of the minor can override traditional age- and sex-based rules of custody under Muslim law.

Thus, the laws of guardianship and custody under Muslim family law in Bangladesh reflects a gradual evolution from classical interpretations to modern, welfare-oriented approaches. Traditionally, the father's authority was regarded as paramount, but recent judicial developments, which maintain a harmonious balance between Islamic jurisprudence and the constitutional principles of equality and justice, have initiated a progressive shift toward recognising the mother's equal capacity as guardian.

The writer is official contributor to Law & Our Rights, The Daily Star.