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OVER A DECADE AGO, BANGLADESH PAINFULLY LOST ITS ONE AND ONLY ICSID ARBITRATION.

WHAT CAN BE DONE TO AVOID SIMILAR LOSSES IN THE FUTURE?

In 2009, Bangladesh lost its first and so far only international investment arbitration[1] against an Italian specialized construction company for the energy sector. It was a painful experience for Bangladesh whose counsel team had mounted a valiant and intelligent defense. But the facts of the case had already happened and these facts severely limited what the defense team was able to put forward.

So, in this contribution, we will not decide who is wrong or who is right, or re-litigate the legal arguments that were put forward by the parties and the Tribunal. And we will not discuss whether the decision was correct under international law[2]. Instead, we will look into what the Bangladesh Government could or maybe should have done differently in relation to the treatment of this investor to avoid the perception that has arisen. Which facts, which measures or steps by the Government on the ground have cost

Highlights of this note

- How did the dispute get started?
- The ICC Arbitration faces many problems
- The ICSID Arbitration
- What were the circumstances that made ICSID decide against Bangladesh?
- What lessons can be drawn from this case for arbitrations with seat in Bangladesh?

1 *An international investment arbitration is a proceeding between an investor and the host state of that investment for a breach of international law before an international tribunal such as ICSID. These need to be distinguished from international commercial or private arbitration between two enterprises before an arbitration tribunal that primarily settles international commercial disputes arising out of some kind of a contract. The difference is sometimes harder to see when the counterparty of the investment contract is actually a state-owned enterprise such as in this case the SOE. Nevertheless, the difference is clear in terms of the basis of the claim.*

2 *Some criticism has been formulated by local authors, raising questions on the bias of the ICSID Tribunal. Other international authors raised that the decision is perhaps not incorrect but at least is unlikely to be repeated https://www.cpradr.org/news-publications/articles/2011-05-05-comments-on-the-icsid-award-saipem-v-bangladesh-would-its-rationale-be-applicable-in-future-cases-2011-writing-contest-winner*

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Bangladesh this case? And how can this be avoided in the future?

How did the dispute get started?

The background of the case involves the construction of an onshore gas pipeline under a contract that was signed in 1990 for US$34 million between the Investor and the principal, which was a State-Owned Enterprise (the SOE). The project was supposed to have been completed in 1991, but several months before the deadline, the Investor had to ask for an extension. The main problem, apparently, was the resistance to the project by the local population of several areas where the pipeline had to be constructed, but that is just the contention of the Investor.

The SOE ended up accepting the extension with 1 year, but claimed compensation for the lost time. The agreement on the extension was made without finalizing the amount of the compensation, so negotiations on that continued. At the same time, the Investor claimed various price increases based on a range of costs and circumstances in their view in accordance with the contract, in excess of US$10 million.

In 1992, the pipeline was finally completed, but the matters of the price increase and the compensation for the extension had yet to be settled, and a part of the original price had been withheld pending final settlement.

Litigation started when the SOE wanted to cash in the warranty bond that the Investor had to put up, which the Investor had an Italian court block with an injunction to the Italian subsidiary of the international bank that had facilitated the bond. That same bank's Pakistan subsidiary then sues in Dhaka to obtain confirmation from a Bangladesh court that the bond cannot be cashed in by the SOE. That proceeding went nowhere.

In 1994, the Investor then commences an ICC arbitration, which the construction contract said should have its seat in Dhaka, Bangladesh.

The ICC Arbitration faces many problems

The relationship between the parties got a lot worse, apparently, when the Investor kicks off the ICC arbitration. A key problem is that the seat of that arbitration and the hearings is supposed to be in Dhaka. Indeed, a first meeting is held in Dhaka, but not without incident, at least according to the Investor side. Returning to Dhaka later on is then a real challenge for the witnesses and the management of the Investor, who claim, rightly or wrongly, that they have safety concerns if they return to Dhaka to attend the proceedings.

The ICC Tribunal rejects a number of applications by the SOE, including an application to have witnesses attend the procedure in Dhaka, and the ICC accepts a witness written submission instead.

The SOE then turns to the domestic courts in Bangladesh for a series of proceedings directed against the ICC arbitration, claiming ICC has no jurisdiction, and that the ICC Tribunal misconducted itself. It prevails in lower courts and the Investor loses appeals. Finally, the Supreme Court declares a stay against the Investor against proceeding with the ICC, and later revokes the authority of the ICC arbitrators:

> *"In view of the submission of the lawyers for the parties and perusal of the documents filed by both sides I hold that the Arbitral Tribunal has conducted the arbitration proceedings improperly by refusing to determine the question of the admissibility of evidence and the exclusion of certain documents from the record as well as by its failure to direct that information regarding insurance be provided. Moreover, the Tribunal has manifestly been in disregard of the law and as such the Tribunal committed misconduct. Therefore, in the above circumstances, it appears to me that there is a likelihood of miscarriage of justice".*

The ICC proceedings continue nevertheless and result in a Final Award in 2003 ordering the SOE to pay the Investor US$11M.

Soon afterwards, the whole proceeding and Award is declared illegal and legally non-existent by the Bangladesh Supreme Court:

> *It is, thus, clear and obvious that the Award dated 9.5.2003 passed by the Arbitral Tribunal in Arbitration Case No. 7934/CK/AER/ACS/MS is a nullity in the eye of law and this Award can not be treated as an Award in the eye of law as it is clearly illegal and without jurisdiction inasmuch as the authority of the Tribunal was revoked as back as on 5.4.2000 by a competent Court of Bangladesh. […]*

The ICSID Arbitration

Seeing that enforcing the ICC award in Bangladesh will have a lot of difficulties going forward, the Investor changes its strategy. Instead of suing the SOE

based on the gas construction contract, in 2004 it starts a procedure against the People's Republic of Bangladesh for violations of international law, notably referring to domestic courts frustrating the ICC proceeding.

The main claim of the Investor is that these domestic court decisions violated international law in this case and that Bangladesh has international responsibility for the actions of the courts of Bangladesh. According to the Investor, the actions of the courts were such that they effectively cancelled the right that the Investor had to get back its US$11M from the SOE, which the Investor says qualifies as an expropriation under the Bangladesh-Italian Bilateral Investment Treaty ("the BIT").

Going from a domestic court interfering with a foreign arbitration to an expropriation is not common in international investment law. Normally, as pointed out by the SOE's team of counsel and even agreed by the Investor, such interference is regarded as a "denial of justice", which is according to long standing jurisprudence part and parcel of the standard of Fair and Equitable Treatment as codified in BITs, or, similarly, to the minimum standard of treatment of aliens in customary international law[3]. But the reason the Investor had to go for this expropriation route is simple. The applicable BIT does not allow Italian investors to start an international arbitration against Bangladesh for anything else except expropriation. Not for violation of fair and equitable treatment (which, as mentioned is often interpreted to include denial of justice or lack of due process), not for violation of national treatment, only an expropriation:

> *"Any disputes arising between a Contracting Party and the investors of the other, relating to compensation for expropriation, nationalization, requisition or similar measures including disputes relating to the amount of the relevant payments shall be settled amicably, as far as possible. […] In the event that a such dispute cannot be settled amicably […] the investor in question may submit the dispute, at his discretion for settlement to: […] the "International Centre for the Settlement of Investment Disputes" (Article 9 Italy-Bangladesh BIT of 1990)*

The SOE counters that as the seat of the ICC arbitration is in Dhaka, the Bangladesh courts have jurisdiction to oversee that arbitration and they did so in accordance with local law. It also very reasonably points out that an unpaid invoice for US$11M is not an "investment" in the sense of the BIT, and is thus not protected.

But the ICSID Tribunal does not follow the SOE's arguments. Instead, in 2009, the Tribunal decides that there was indeed an expropriation of the Investor's US$10M unpaid invoice, and orders Bangladesh, after rejecting some parts of the monetary claim, to pay US$7M.

What were the circumstances that made ICSID decide against Bangladesh?

The ICSID Tribunal quickly agrees with the SOE that Bangladesh courts have legal jurisdiction over the arbitration, because the contract specified that the seat would have to be in Dhaka, even though it is an ICC arbitration. Nevertheless, a number of actions by the Bangladesh courts weighed heavily on the mind of the ICSID tribunal, and made them decide that Bangladesh abused its right of jurisdiction.

1. There was no misconduct at all by the ICC Tribunal on those 4 procedure applications

Most of the domestic courts' decision that there was misconduct at the ICC

3 *Harvard Research Draft on International Law: "Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgement. An error of a national court which does not produce manifest injustice is not a denial of justice", n. 32 at 506. In Azinian v. theUnited Mexican States the Tribunal held that: "A denial of justice could be pleaded if the relevant courts refuse to entertain such a suit, if they subject it to undue delay, or if they administer justice in a serious inadequate way….There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mark a violation of international law", ICSID case No ARB(AF)/97/2 paragraphs 102-103; US and Mexico General Claims Commission, Janes Claim, United Nations, Reports of International Arbitral Awards, 1926, IV, p.82; See Alwyn V. Freeman "Steady international practice ….as well as the overwhelming preponderance of legal authority, recognises that not only flagrant procedural irregularities and deficiencies may justify diplomatic complaint, but also gross defects in the substance of the judgement itself" in "The International Responsibility of States for Denial of Justice"309 (Kraus Reprint Co. 1970) (1938).*

and that, because of it, the whole proceeding was to be stayed and then voided, was based on the ICC Tribunal's decision on 4 procedural applications the SOE had made, and which were all more or less rejected by the Tribunal. Among those 4 rejected applications was an application to have the testimony of a witness stricken from the record because the Tribunal accepted the testimony that was not given by the witness while being in Dhaka.

The ICSID Tribunal sees nothing wrong with the ICC"s rejections, and furthermore cannot find any reasons or arguments in the domestic court decisions as to why the ICC rejections were so wrong that they resulted in the court just cancelling the entire ICC proceedings.

> *"Having carefully reviewed the procedural orders referred to in the Revocation Decision as the cause of the ICC Tribunal's misconduct, the Tribunal did not find the slightest trace of error or wrongdoing. Under these circumstances, the finding of the [Bangladesh] Court that the arbitrators "committed misconduct" lacks any justification. As emphasized by the Investor at the Hearing, if one carefully studies the Revocation Decision of 2 April 2000, one fails to see any reference whatsoever to the law that was allegedly "manifest[ly] disregard[ed]". By way of consequence, it is unfounded to then infer from such an illfounded finding of misconduct that there is a likelihood of miscarriage of justice. Equally unfounded is the consequence drawn by the Court when declaring the revocation of the authority of the ICC Tribunal. This declaration an only be viewed as a grossly unfair ruling"*[4].

Furthermore, at the ICSID proceeding, Bangladesh did not attempt to demonstrate that the ICC indeed made grave mistakes of any kind [5], and this must have meant to the ICSID Tribunal that there simply was no misconduct to point out.

2. The domestic court decisions just copied what the SOE said

The ICSID Tribunal found it difficult to understand why the domestic court decisions apparently did not scrutinize what the SOE claimed, and did not entertain any of its own submissions of facts [6].

3. The domestic court did not consult with the ICC Tribunal

The ICSID Tribunal found it strange that the domestic court did not seek to consult at all with the Tribunal, or allowed them to be heard[7].

4 *Saipem v. Bangladesh, l.c., (par. 155).*

5 *"In none of its submissions in the present arbitration did Bangladesh even attempt to show that the ICC Tribunal committed misconduct and that such alleged misconduct could reasonably justify the revocation of the arbitrators" Saipem v. Bangladesh, l.c., (par. 156)*

6 *Saipem v. Bangladesh, l.c., (par. 157).*

7 *Saipem v. Bangladesh, l.c., (par. 158).*

What lessons can be drawn from this case for arbitrations with seat in Bangladesh?

A lot has happened in Bangladesh in the nearly 20 years since the dispute in this case got started. For one, Bangladesh has revamped its local arbitration legislation in 2001 with the Arbitration Act, in following of the UNCITRAL Model law. The Arbitration Act 2001 was amended since in 2004[8].

Now as before, commercial arbitration with a seat in Bangladesh will be supervised by the Bangladesh courts, and as such be vulnerable to judicial intervention, as is the case in many countries. But the Arbitration Act limits the authority of the courts in that regard to a number of matters which are in line with the UNCITRAL Model Law, much better than was the case in the nineties.

The domestic court interventions that happened in this case, cannot legally happen at the present time, given the 2001 Arbitration Act. So, the risk for foreign investors is lower, but some slightly vague areas persist:

- In the above case, the domestic courts revoked the authority of the ICC arbitrators based on misconduct, even before any final award was made. Under the Arbitration Act 2001, domestic

8 *https://www.vdb-loi.com/bd_publications/the-good-news-is-you-can-now-get-interim-measures-in-bangladesh-for-a-foreign-arbitration-that-is-also-the-bad-news/*

courts only play a role in appointing arbitrators failing any agreement, not in directly in revoking them. The rules on terminating a duly appointed arbitrator are strict and leave very little room for the domestic court to intervene (s. 15 Arbitration Act).

- Challenges to appointments of arbitrators are first decided by the Tribunal itself, with the High Court serving as an appellate jurisdiction only (s. 14(4) Arbitration Act).
- In the above case, the Supreme Court had already decided that the ICC proceeding was illegal and void, and resulted thus in a legally non-existent award. Under the Arbitration Act 2001, the domestic courts can be asked to set aside an award of an arbitration with seat in Bangladesh afterwards for a number of limited reasons (including being prima facie opposed to laws or public policy of Bangladesh), but not, in effect, by anticipation (s. 20 Arbitration Act).
- However, domestic courts do have the power to make interim orders and injunctions with respect to arbitrations (s. 7A 2004).

With reference to the case above, if Bangladesh domestic courts need to exercise their jurisdiction over arbitrations with seat in Dhaka, or over foreign awards seeking recognition and enforcement, it would be important they would state in detail where errors are made in those arbitrations, why these are wrong and what laws they violate. It is not sufficient, according to the discussed ICSID decision, to simply assert the proceedings are flawed and thus rejected. If no valid reasons can be explained, such court actions might pull Bangladesh into a violation of its investment treaties.

Authorities should also bear in mind that most Bangladesh BIT's do include a rule on Fair and Equitable Treatment (which includes denial of justice) and give investors the right to commence an international arbitration against the state, without having to prove expropriation[9].

9 *Notably, Bangladesh's BITs with Turkey, USA, UK, UAE, Philippines, Netherlands, Thailand, Iran, Austria, Vietnam, India, North Korea, Singapore, Malaysia, Italy, Belgium, Poland, Uzbekistan, Switzerland, and Indonesia.*

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